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

NEW JERSEY
SCHOOL LAW DECISIONS
Indexed

January 1, 1977 to December 31, 1977

vol. 2

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Department of Education
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FRED G. BURKE
COMMISSIONER OF EDUCATION

In the Matter of the Tenure Hearing of Carmine Stephen Raciti, School District of the Township of Brick, Ocean County.

COMMISSIONER OF EDUCATION

ORDER

This matter is before the Commissioner of Education as a result of the determination of *James McCabe v. Board of Education of the Township of Brick, Ocean County,* 1974 *S.L.D.* 299, affirmed State Board of Education 315, affirmed Docket No. A-3192-73, New Jersey Superior Court, Appellate Division, April 2, 1975 (1975 *S.L.D.* 1073), wherein the Commissioner ordered the Board of Education of the Township of Brick, hereinafter "Board," to certify certain tenure charges against Carmine Stephen Raciti, Superintendent of Schools, within forty-five days; and

The Commissioner's decision in *McCabe, supra,* having been affirmed by the State Board of Education and the New Jersey Superior Court, Appellate Division, respectively; and

The Commissioner having received and reviewed the minutes of the regular meeting of the Board held May 14, 1975, which disclose that a resolution to certify the aforementioned tenure charges against the Superintendent was defeated from passage by a vote of one aye and three nays, with two members abstaining; and

The Commissioner being aware of his duty to implement the affirmance of *McCabe, supra,* by the State Board and the Court; therefore

IT IS ORDERED that the tenure charges filed with the Board against Carmine Stephen Raciti are hereby certified; and

IT IS FURTHER ORDERED that Respondent Raciti be notified by the Division of Controversies and Disputes, Department of Education, that he may file an Answer to such charges and may defend against such charges, in accordance with the provisions of the Tenure Employees Hearing Law, *N.J.S.A.* 18A:6-10 *et seq.*, and the appropriate rules of procedure, *N.J.A.C.* Title 6, Education.

Entered this 8th day of August 1975.

COMMISSIONER OF EDUCATION

STATE BOARD OF EDUCATION

DECISION

Order of the Commissioner of Education, August 8, 1975

For the Board of Education, Anton and Ward (Donald H. Ward, Esq., of Counsel)

For James McCabe, Joseph N. Dempsey, Esq.

The Application for Stay of the proceedings before the Commissioner of Education is granted, until such time as the Appellate Division makes a determination on the Motion pending before it, or until the disposition of this appeal before the State Board of Education.

Mrs. E. Constance Montgomery abstained.
September 10, 1975

STATE BOARD OF EDUCATION

DECISION

Order of the Commissioner of Education, August 8, 1975

Application for Stay Granted by the State Board of Education, September 10, 1975

For the Board of Education, Anton and Ward (Donald H. Ward, Esq., of Counsel)

For James McCabe, Joseph N. Dempsey, Esq.

The State Board of Education grants the Motion to Dismiss the Stay which was granted by this Board on September 10, 1975 and, further, grants the Motion to Dismiss the Appeal from the Order of the Commissioner of Education dated August 8, 1975.

October 1, 1975

COMMISSIONER OF EDUCATION

ORDER

For the Petitioner, Anton and Ward (Donald H. Ward, Esq., of Counsel)

For the Respondent, Joseph N. Dempsey, Esq.

This matter is before the Commissioner of Education as a result of the determination of *James McCabe v. Board of Education of the Township of Brick, Ocean County,* 1974 *S.L.D.* 299, affirmed State Board of Education 315, affirmed Docket No. A-3192-73, New Jersey Superior Court, Appellate Division, April 2, 1975 (1975 *S.L.D.* 1073), wherein the Commissioner ordered the Board of Education of the Township of Brick, hereinafter "Board," to certify certain tenure charges against Carmine Stephen Raciti, Superintendent of Schools, within forty-five days; and

The Commissioner having certified such charges himself by Order dated August 8, 1975, as a result of the Board's failure to make such certification as of that date; and

Petitioner, in *McCabe, supra,* having brought an action for contempt citing those members of the Board who voted against the judgment of the New Jersey Superior Court, Appellate Division, or who were present and abstained from voting on said tenure charges; and

The contempt proceeding having been held and an Order having been issued by the Honorable Henry H. Wiley, J.S.C., on December 17, 1975, holding five members of the Board in contempt and, *inter alia,* directing said five members to properly certify the tenure charges against Carmine Stephen Raciti; and

The Board having properly certified said tenure charges by a vote of seven ayes and no nays at a public meeting held February 11, 1976; and

The Board having filed two Motions concerning the instant matter, the Commissioner makes the following determination:

In regard to Section A of the first Motion, the Petition and Answer filed subsequent to the determination of *McCabe, supra,* by the Commissioner, aff'd State Board of Education, aff'd Superior Court, Appellate Division, are moot.

Sections B, C and D of the first Motion are rendered *stare decisis* by the Order of the Honorable Henry H. Wiley, J.S.C., *ante,* and the subsequent action of the Board certifying the aforementioned tenure charges.

In regard to Section E of the first Motion, the Board shall employ independent counsel for the purpose of prosecuting the tenure charges, in view of the fact that the Board's regular counsel has been engaged in a continuous

defense of the Board's previous failure to certify the charges as directed by the Commissioner. This holding is consistent with the traditional and consistent practice of local boards of education prosecuting tenure charges since the enactment of the tenure statutes for teaching staff members in this State.

Section F of the Board's first Motion questions whether the Board must indemnify the Superintendent of Schools in accord with *N.J.S.A.* 18A:12-20 or *N.J.S.A.* 18A:17-20, either as a member of the Board or as an employee of the Board, and whether the Board must defend the Superintendent at Board expense. In each instance the Commissioner's determination is negative. The Superintendent is a teaching staff member and as such is entitled to acquire a tenure status, and, having acquired such status, may be dismissed or reduced in salary only in accordance with the Tenure Employees Hearing Act, *N.J.S.A.* 18A:6-10 *et seq.*, which requires, *inter alia,* the certification of charges and a hearing before the Commissioner.

The Board's second Motion argues that the amendment of *N.J.S.A.* 18A:6-11, effective February 7, 1976, should be considered retrospective and applied to the instant matter. Such argument is rejected by the Commissioner. The Board may seek relief from the Appellate Division, New Jersey Superior Court, which is the appropriate forum, in view of the Court's affirmance of *McCabe, supra.*

Finally, prior requests by the New Jersey School Boards Association and the New Jersey Association of School Administrators to intervene and file *amicus curiae* Briefs in regard to the issues raised in the Board's first Motion are hereby denied by virtue of the fact that the issues raised by such Motion have been disposed of herewith.

Counsel for petitioner in *McCabe, supra,* is permitted to participate in the tenure hearing proceedings at the discretion of the hearing officer.

The Commissioner hereby orders this 12th day of November 1976, that this matter proceed to plenary hearing as expeditiously as possible.

COMMISSIONER OF EDUCATION

STATE BOARD OF EDUCATION

DECISION

Order of the Commissioner of Education, November 12, 1976

For the Petitioner-Appellant, Anton and Ward (Donald H. Ward, Esq., of Counsel)

For the Respondent-Appellee, Joseph N. Dempsey, Esq.

The appeal from the Commissioner's interlocutory order of November 12, 1976, is denied. The State Board of Education directs that the plenary hearing on the tenure charges proceed as expeditiously as possible.

January 5, 1977

COMMISSIONER OF EDUCATION

ORDER

For the Petitioner, Gregory H. Janes, Esq.

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

For the Intervenor, Joseph N. Dempsey, Esq.

This matter having been opened before the Commissioner of Education as a result of the determination of *James McCabe v. Board of Education of the Township of Brick, Ocean County,* 1974 *S.L.D.* 299, affirmed State Board of Education, 1974 *S.L.D.* 315, affirmed Docket No. A-3192-73, New Jersey Superior Court, Appellate Division, April 2, 1975 (1975 *S.L.D.* 1073), wherein the Commissioner ordered the Board of Education of the Township of Brick, hereinafter "Board," to certify certain tenure charges against Carmine Stephen Raciti, Superintendent of Schools, within forty-five days; and

The Commissioner having certified such charges himself by Order dated August 8, 1975, as a result of the Board's failure to make such certification as of that date; and

The Board, subsequent to the issuance of an Order issued by the Honorable Henry H. Wiley, J.S.C. on December 17, 1975, having properly certified said tenure charges at a public meeting held February 11, 1976; and

The Commissioner having on November 12, 1976, issued an interlocutory Order in response to two additional Motions by the Board; and

That Order, herein incorporated by reference, having directed, *inter alia,* that the Board retain independent counsel, that application to intervene by the New Jersey School Boards Association and the New Jersey Association of School Administrators be denied, that counsel for the petitioner in *McCabe, supra,* be permitted to participate in the tenure hearing proceedings at the discretion of the hearing examiner, and that the matter proceed expeditiously to a plenary hearing; and

The New Jersey Superior Court, Appellate Division, Docket No. A-1870-76, having granted a Motion to Dismiss Appeal of the Commissioner's Order of November 12, 1976; and

A conference of counsel having been held on April 14, 1977 wherein dates for a plenary hearing were set down beginning May 23, 1977 to conclude June 14, 1977; and

Respondent Raciti having moved, *inter alia,* on May 13, 1977 to dismiss the matter for mootness in view of his resignation effective June 30, 1977 and the Board's acceptance thereof on March 2, 1977 (Affidavit of Carmine Stephen Raciti, May 20, 1977 (R-3); Board Resolutions and Minutes of March 2, 1977 (J-1(a-c), J-2)); and

Oral argument having been conducted at the Monmouth County Court House by the Commissioner's representative on May 23, 1977; and

The Commissioner having considered, *inter alia,* the arguments of law set forth in respondent's Brief and the transcript of oral argument whereby it is contended that the matter is rendered moot for the reason that there remains prior to June 30 hearing insufficient time to conduct a plenary hearing and issue both a hearing examiner report pursuant to *N.J.A.C.* 6:24-1.17(a), (b) and a determination of the Commissioner; and

The Commissioner having considered the further argument of respondent that after respondent's resignation and retirement effective June 30, 1977 the Commissioner will in any event be without authority to order that respondent be dismissed or to order that a financial penalty be assessed against respondent (*Oxfeld et al. v. New Jersey State Board of Education et al.,* 68 *N.J.* 301 (1975)); Brief of Respondent, at pp. 5-7; Tr. 13-17, 25-30); and

There having also been considered the further argument that upon respondent's retirement the Commissioner has no authority to exact or order a financial penalty on respondent's retirement benefits which are authorized by the Teachers' Pension and Annuity Fund under the aegis of the Department of Treasury pursuant to *N.J.S.A.* 18A:66-1 *et seq.*; and

The Commissioner having also considered those arguments in opposition

to the Motion set forth in the transcript by the Board's counsel and counsel for McCabe wherein it was contended, *inter alia,* that respondent continues to earn and receive salary and will receive a retirement allowance based at least in part upon his rate of pay as Superintendent (Tr. 18-24); and

There having also been considered the further argument that prospective mootness is a nonentity and that respondent's resignation which is not effective until June 30, 1977 cannot prospectively render the matter moot (Intervenor's Brief in Opposition to Motion, at pp. 1-5; Tr. 23-24, 30-32); and

The arguments of respective counsel regarding whether in the interest of the public weal the matter should be dismissed having also been considered; and

The Commissioner having carefully balanced the respective arguments of counsel in the light of the factual context of respondent's resignation and having concluded that, indeed, a determination cannot be rendered prior to June 30, 1977; and

The Commissioner having also concluded that he will be without authority after June 30, 1977 to order the statutory penalties of dismissal or reduction of salary even should the charges be found to be true in fact; and

The Commissioner having determined that the instant matter in litigation before him, wherein he will be without authority in law after June 30 to order appropriate relief, is effectively rendered moot (*N.J.S.A.* 18A:6-16); and

The Commissioner having concluded on numerous occasions, in his quasi-judicial capacity as a determiner of disputes arising under education law, that he does not determine moot issues (*Oxfeld, supra; Sharon A. Pinkham v. Board of Education of South River et al.,* 1974 *S.L.D.* 1103; *Carolyn Henry v. Board of Education of the City of Wildwood,* 1975 *S.L.D.* 1); now therefore

IT IS ORDERED that respondent's Motion to Dismiss be and is granted by reason of mootness and that the tenure charges against Carmine Stephen Raciti be and are dismissed.

Entered this 31st day of May 1977.

COMMISSIONER OF EDUCATION

Michael J. Watsula,

Petitioner,

v.

Board of Education of the Township of Plumsted, Ocean County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Starkey, White & Kelly (James M. Blaney, Esq., of Counsel)

For the Respondent, Kessler, Tutek & Gottlieb (Henry G. Tutek, Esq., of Counsel)

Petitioner, a member of the United States Air Force for twenty-one years, was employed subsequent to his discharge by the Board of Education of the Township of Plumsted, hereinafter "Board," for the 1973-74 school year at the first level of the salary guide for those possessing a bachelor's degree. For the 1974-75 school year petitioner was placed on the second step of the bachelor's degree salary guide. He now claims recognition for his years of military experience and compensation totaling $3,392, plus interest, attorney fees and costs. The Board denies this claim and grounds such denial on the defense that petitioner entered into a contract of employment voluntarily and knowingly waived any claim for additional compensation for military service.

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

The relevant facts are not in dispute and are recited as follows:

Petitioner was employed as a teacher by the Board for the school years 1973-74 and 1974-75. Previous to his employment, he had received his bachelor's degree and had served twenty-one years' active duty in the United States Air Force.

Petitioner was placed at the time of his initial employment by the Board at the first level of the salary scale applicable to teaching staff members in possession of a bachelor's degree. Thus he was not compensated for any of the years of his military service at the time of initial employment and no recognition of such service was afforded him in the subsequent 1974-75 academic year. In December 1974 he became aware of the possibility that he might be entitled to salary credit for his military service and he filed a claim with the Board. (P-1) Such claim was denied by the Board. The amounts in dispute are as follows:

September 1973 – June 1974		
Step 1, Bachelor's Degree Salary Guide	$8,200	
Step 5, Bachelor's Degree Salary Guide	9,954	
Difference		$1,754
September 1974 – June 1975		
Step 2, Bachelor's Degree Salary Guide	$ 9,197	
Step 6, Bachelor's Degree Salary Guide	10,835	
Difference		$1,638
Total Amount Claimed		$3,392

The Board denies the claim and maintains that petitioner voluntarily waived his entitlement for military service credit at the time of his initial employment. The Board avers that it properly placed petitioner at the first step of its salary guide for 1973-74 pursuant to its policy negotiated by the Plumsted Township Education Association and the Board for the period of July 1, 1973 to June 30, 1975, which states, *inter alia,* as follows:

> "ARTICLE VII
>
> "*TEACHER EMPLOYMENT*
>
> ***
>
> "D. The Association recognizes the right of a starting teacher to negotiate his or her initial placement on the district's salary schedule and that such initial placement shall be considered by all parties involved to be that teacher's proper step on said salary schedule. The starting salary negotiated will not be lower than the lowest step on the salary schedule."
>
> (R-1, at p. 9)

The Board further argues that the provisions of *N.J.S.A.* 18A:29-11 are part of a statutory scheme including *N.J.S.A.* 18A:29-6, 9 and 10, and that when these statutory provisions are construed together, it will show that the Legislature intended that the beneficiary of a military service credit entitlement may waive such entitlement if he and the employing Board so agree. (Respondent's Brief, at pp. 14-15)

Petitioner asserts that the language of *N.J.S.A.* 18A:29-11 is explicitly clear and unambiguous and must be construed in accordance with the express intentions of the Legislature. (Petitioner's Brief, at p. 4) This statute recited in pertinent part provides that:

> "Every member who, after July 1, 1940, has served or hereafter shall serve, in the active military or naval service of the United States *** shall be entitled to receive equivalent years of employment credit for such service as if he had been employed for the same period of time in some publicly owned and operated college, school or institution of learning in this or any other state or territory of the United States, except that the period of such service shall not be credited toward more than four employment or adjustment increments.***"

Subsequent to the submission of Briefs in the instant matter, the Commissioner observes that the Court adjudicated a similar matter in *Howard J. Whidden, Jr. v. Board of Education of the City of Paterson, Passaic County,* 1976 *S.L.D.* 356, modified Docket No. A-3305-75 New Jersey Superior Court, Appellate Division, January 28, 1977, wherein it held that:

> "***In construing a statute, full force and effect must be given, if possible, to every word, clause and sentence. *State v. Canola,* 135 *N.J. Super.* 224, 235 (App. Div. 1975), certif. den. 69 *N.J.* 22 (1975). A construction that will render any part of a statute inoperative, superfluous or meaningless is to be avoided. *State v. Sperry & Hutchinson Co.,* 23 *N.J.* 38, 46 (1956); *Hoffman v. Hock,* 8 *N.J.* 397, 406-407 (1952).***"
>
> (Slip opinion, at p. 3)

The Court determined that full force and effect must be accorded to all relevant sections of the statute *N.J.S.A.* 18A:29-1 *et seq.* and in particular the operative language of *N.J.S.A.* 18A:29-11 which states, *inter alia*:

> "****shall* be entitled to receive equivalent years of employment credit for such service as if he had been employed for the same period of time***."
>
> (*Emphasis supplied.*)

The legislative use of the word "shall," continued the Court, ordinarily indicates that the statute is intended to have an imperative rather than a permissive effect.

The Court further observed that:

> "****N.J.S.A.* 18A:29-9 authorizes a school district to place a newly employed teacher at an initial place on the salary schedule as may be agreed upon between the member and the employing board of education. Nothing in the language of that section, however, suggests that the legislature intended to authorize a waiver of or a departure from the requirement of *N.J.S.A.* 18A:29-11 that credit be given for military service. See *Bd. of Ed. Englewood v. Englewood Teachers,* 64 *N.J.* 1, 7 (1973).***"
>
> (Slip opinion, at p. 4)

In the context of *Whidden, supra,* the Commissioner determines that petitioner in the instant matter is similarly situated. The words of the Court are clear and the Commissioner holds that all teaching staff members who have served in the armed forces are entitled to count the years of such service to a maximum of four years for employment increments within the scope of the Board's adopted salary schedule.

Accordingly, the Commissioner directs the Board to compensate petitioner in the amount of $1,754 for the 1973-74 school year and an amount of $1,638 for the 1974-75 school year, so that the total amount of adjustment and compensation shall be $3,392. The Commissioner further directs the Board to place petitioner on the appropriate step of its current salary guide, based upon

petitioner's beginning service for the 1973-74 academic year on the fifth step of the then in force salary guide.

Finally, the Commissioner knows of no statutory or other authority that would empower him to grant petitioner's request for counsel fees and costs. *Fred Bartlett, Jr. v. Board of Education of the Township of Wall, Monmouth County,* 1971 *S.L.D.* 163, aff'd State Board of Education 166; *Celina G. David v. Board of Education of the Borough of Cliffside Park, Bergen County,* 1967 *S.L.D.* 192 Accordingly, this prayer of petitioner is denied.

COMMISSIONER OF EDUCATION

June 1, 1977

In the Matter of the Annual School Election Held in the School District of the Borough of Helmetta, Middlesex County.

COMMISSIONER OF EDUCATION

DECISION

The announced results of the balloting for two members of the Board of Education for full terms of three years each at the annual school election held in the School District of the Borough of Helmetta, Middlesex County, on March 29, 1977, were as follows:

	At Polls	Absentee	Total
Lawrence F. Space, Jr.	56	–0–	56
Mona Richards	34	–0–	34
Barbara Young	33	–0–	33
Eva Dicks	30	–0–	30
Pat Young	2	–0–	2
Joan Allen	1	–0–	1
Doris Ayers	1	–0–	1

Pursuant to a letter request from Candidate Barbara Young, hereinafter "petitioner," dated April 1, 1977, a recount of the votes cast and an inquiry into alleged irregularities in the voting procedure were conducted by an authorized representative of the Commissioner of Education at the voting machine warehouse of the Middlesex County Board of Elections, Edison, on April 20, 1977.

The representative observes that Candidate Space was the only formally announced candidate for election to Board membership. Consequently, his name appeared alone on the printed ballot.

The recount of the ballots cast confirms the announced results set forth above with the single exception that Candidate Dicks received thirty-one votes instead of her announced total of thirty votes.

Petitioner argues that the two ballots cast for Pat Young must be counted for petitioner because the voters really intended to vote for her. Petitioner reaches this conclusion by asserting that no one by the name of Pat Young lives in the Borough of Helmetta. The representative finds this argument without merit. When write-in candidates possess identical surnames, voters must use the given name of the candidate to show their respective choices. In this instance the voters selected Pat Young. Petitioner failed to establish that the voters intended to choose her instead of Pat Young.

Petitioner also complains that the election workers were improperly instructing the voters with respect to registering a write-in vote for Board membership. Petitioner also asserts that the Board Secretary provided similar erroneous information at a public meeting of the Board several days prior to the election. Petitioner contends that the Board Secretary also improperly counted the ballots at the conclusion of the election instead of the election officials.

The representative observes that the Board Secretary did not appear at the inquiry and an attempt to contact him was unsuccessful. The representative finds that the Board Secretary did articulate improper instructions at the public meeting conducted prior to the election with respect to voters properly selecting write-in candidates. It is also found that the election officials provided improper instructions to the electorate during the conduct of the election.

The representative notices that Candidate Mona Richards, who along with Candidate Space is a declared winner of the election, advised the Board by letter dated April 4, 1977, that she declines to take the oath of office. Consequently, even if the Commissioner affirms the election of Candidate Richards, her declination of Board membership creates a vacancy on the Board.

The representative finds with respect to Candidate Space that no real dispute exists with respect to his election. A significant dispute does exist, however, with respect to each of the write-in candidates in that a total of one hundred ten voters exercised their voting privileges. The improper instructions provided by the Board Secretary and by the election officials with respect to the selection of write-in candidates has caused, in the judgment of the representative, the will of the people to be thwarted in regard to which of the write-in candidates was the true choice of the electorate.

The representative recommends that the Commissioner confirms the election of Candidate Lawrence F. Space, Jr., to a full three-year term to Board membership, and that he declare a failure to elect with respect to the other three-year term. The representative also recommends that the Middlesex County Superintendent of Schools closely supervise the Board Secretary with respect to future elections.

This concludes the report of the representative.

* * * *

The Commissioner has reviewed the report of his representative and adopts as his own the findings of fact and recommendations therein.

The Commissioner finds and determines that Lawrence F. Space, Jr. was elected to a full three-year term on the Board of Education of the Borough of Helmetta. The Commissioner also finds that because of improper instructions given by the election officials to voters during the election and given by the Board Secretary at a public meeting conducted on a day preceding the election, attended by members of the electorate, the will of the people cannot be discerned with respect to their choice of write-in candidates. Accordingly, a failure to elect a member to the second full three-year term is declared. The Commissioner, consistent with *N.J.S.A.* 18A:12-15, hereby directs the Middlesex County Superintendent of Schools to appoint a qualified person to that vacancy from among the residents of the Borough of Helmetta. The person so selected shall serve until the organization meeting of the Board following the next annual school election.

Finally, the Commissioner directs the Middlesex County Superintendent of Schools to supervise the Board Secretary in his preparation for the next annual school election.

COMMISSIONER OF EDUCATION

June 10, 1977

"S.W." and "D.W.,"

Petitioners,

v.

Board of Education of the Town of Westfield, Union County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Schechner and Targan (David Schechner, Esq., of Counsel)

For the Respondent, Nicholas, Thomas & Peek (William D. Peek, Esq., of Counsel)

Petitioners, residents of Westfield, aver that their son, D.W., a pupil now enrolled in the private Midland School, was improperly classified in 1972 by the Westfield Board of Education, hereinafter "Board," and that his private school tuition costs for the years 1972-73 through 1975-76 at the Midland School should be borne by the Board. They request the Commissioner of Education to alter the classification, to correct the records of D.W. and to continue him in the private school at public expense or, in the alternative, to place him in an appropriate program in Westfield. The Board denies that its classification or placement of D.W. was in error and it moves for dismissal of the Petition.

A hearing was conducted on July 8, 1976 at the office of the Union County Superintendent of Schools, Westfield, by a hearing examiner appointed by the Commissioner. The submission of Briefs by the parties was completed on February 1, 1977. The report of the hearing examiner is as follows:

D.W. was born in February 1963, and in 1968 was placed by the Board as a communication disabled-perceptually impaired pupil in the private Midland School. Tuition costs in that year and to June 1972 were paid for by the Board.

In 1972 D.W. was retested by the Board and reclassified as mentally retarded-educable and assigned by the Board to an appropriate class in the Westfield School System for pupils with such classification during the 1972-73 academic year. Petitioners thereupon informed the Board that they would not accept the proposed placement but would continue D.W. as a pupil in the Midland School.

D.W. continued as a pupil in the Midland School during the school years 1972-73 through 1974-75 but in 1975 he was again enrolled by petitioners in the Westfield Schools and was again assigned to an educable class. Petitioners again refused his placement in such class and D.W. has been continued as a pupil in the Midland School. At this juncture they formally protest the classification of D.W. as mentally retarded and aver that his classification and school

placement should be altered retroactively to a classification and placement appropriate to a pupil who is neurologically impaired. Their Petition of Appeal also requests the Commissioner to "***adequately reimburse them for the tuition and cost of transportation paid for their child during the period from 1972 to date ***" when D.W. was educated at their expense. (Petition of Appeal, at p. 5)

Thus, the Petition of Appeal is principally premised on an argument that the Board erred in 1972 when its child study team reclassified D.W. and that the ensuing tuition costs paid by petitioners were and are payable by the Board. The hearing was primarily concerned with testimony pertinent to the controverted classification of D.W. A total of nine exhibits were stipulated in evidence. The hearing examiner proposes to excerpt or cite such exhibits at the outset since they served as the foundation upon which the testimony at the hearing was founded.

Exhibit P-1 – This Exhibit is a letter from Dr. Avrum Katcher, Director, Child Evaluation Center, Hunterdon Medical Center, to petitioners on November 24, 1975. The letter summarizes the findings of prior examinations of D.W. by the other physicians and sets forth Dr. Katcher's own test results and conclusions. Of importance to the instant adjudication Dr. Katcher states:

> "***I feel that [D.W.] is a physically normally developed and nourished boy of 11 years and 9 months. He has a static encephalopathy secondary to gestational factors related to prematurity. This includes what amounts almost to an atonic diplegia, multiple severe cognitive difficulties, an expressive and possible receptive language disorder. He probably has dull or very low average intellectual potential. I suspect he is not really retarded.***" (P-1, at p. 3)

Exhibit P-2 – This Exhibit is a complete compilation of the records of D.W. in the Midland School. The cover document of the report dated August 15, 1974, and written by a learning disabilities teacher-consultant states that:

> "***Throughout his stay at Midland, [D.W.] has made slow but steady progress.***"

Such statement is subsequent to a quotation from a report of the Westfield Child Study Team which indicated that D.W. had "***few areas of strength***" to compensate for "limitations" attributable to "organic involvement." Although this letter of the learning disabilities teacher acknowledges that D.W. may be "***functionally retarded as far as his ability to perform***" on a test, such ability "***may very well be influenced by his perceptual and neurological impairment and his delayed language development.***" (P-2, at page 4)

Exhibit P-3 – This Exhibit is a compendium of reports of medical personnel who performed a variety of examinations of D.W. in the years 1968-1974, and of teaching staff members of the Westfield Schools employed as members of the Board's Child Study Team. Included are the results of several Wechsler Intelligence Scale (WISC) and other examinations: i.e., in 1972:

Verbal Scale I.Q.	76
Performance Scale I.Q.	55
Full Scale I.Q.	63

Against such test results, which the Westfield Child Study Team interpreted to mean that D.W. was functioning in the "***mental defective (educable) range***" there is the report of Dr. Gail Solomon which states:

> "***I feel strongly that this boy has normal or borderline normal intelligence and should be given every benefit or special education in small classes for brain injured children and not be placed with retarded children since he is not retarded.***" (Letter of Dr. Gail E. Solomon, at p. 3)

Exhibit P-4 is a chronicle of the efforts of the Westfield School System to classify and place D.W. The document itemizes the "conflicting opinions" with respect to the primary classification.

Exhibits R-1, 2, 3 – These Exhibits attest to the specificity of D.W.'s classification by the Westfield Child Study Team as:

	Multiply Handicapped
Primary:	Mentally Retarded – Educable
Secondary:	Neurologically Impaired

Such excerpts from the extensive documentation serve to emphasize the dichotomy of views concerned with the classification of D.W. On the one hand there are opinions that there is clear evidence of neurological impairment of D.W. and that such evidence should constitute the principal basis for classification and placement. On the other hand there are opinions that there is no evidence of neurological impairment, or only slight evidence, as the primary cause of learning difficulty and that the difficulty, per se, as evidenced particularly by objective tests, must stand as the single most important factor in the classification equation.

These views received amplification at the hearing from Dr. Katcher and from the Director of the Board's Child Study Team.

Dr. Katcher testified that he believed D.W. had a "diffuse brain abnormality" as the result of brain damage and that such belief was primarily based on abnormalities in the retina of the eye. (Tr. 17-18) He said that these abnormalities had:

> "***not produced mental retardation but that his [D.W.] intelligence testing may, to some extent, mimic mental retardation because of the neurologic abnormalities which he has, and I believe, therefore, that, to be responsible for a classification on him, if I were to be charged with that responsibility, I would have said the appropriate classification would be neurologically impaired first and communicationally handicapped second.***" (Tr. 19)

Dr. Katcher did admit, on cross-examination that the specific delineation of disability or handicap was often difficult and that a categorization might, without error, involve more than one disability. (Tr. 35)

The Director of the Board's Child Study Team testified that the team considered the WISC tests as more authoritative than those administered elsewhere in terms of mental capacity (Tr. 54) and said the team was of the opinion that such data and other reports indicated that most of the problems of D.W. "***[were] in the area of educability.***" (Tr. 52) He said:

> "***We thought that the neurological involvement may be a cause for this educability.***"

He also testified that the team had concluded the "***educable mental retardation of this youngster was the primary concern.***" (Tr. 56)

The principal issue of this matter is indeed just this categorization of the "primary concern" since even petitioners' expert witness is in agreement on the Board's first classification of D.W. as "multiply handicapped." (R-3) As Dr. Katcher testified:

> "***I'm willing to agree that this child could be classified as multiply handicapped, but not with these primary and secondary classifications***." (Tr. 44)

(Such "primary" and "secondary" classifications as noted *ante* were "mentally retarded -- educable" and "neurologically impaired.") (R-3)

Petitioners aver that such testimony and the total record of great proportions sustain their claim that D.W. has during all of the period 1972-77 been incorrectly classified by the Board and that the placements the Board proposed for him were inappropriate.

The Board avers it has conscientiously reviewed the total record of D.W. and that its classification of him was correctly founded in all the available data. It cites decisions of the Commissioner to support an avowal that in such circumstances there is no authority for intervention by the Commissioner and no liability imposed on the Board as the result of petitioners' withdrawal of D.W. from the Westfield public schools. *Malcolm and Ina Woodstein v. Board of Education of the Township of Clark, Union County,* 1970 *S.L.D.* 220, aff'd State Board of Education 1971 *S.L.D.* 662; *"K.K." v. Board of Education of the Town of Westfield, Union County,* 1971 *S.L.D.* 234, rem. State Board of Education 240, decision on remand 1973 *S.L.D.* 30, aff'd State Board of Education 34, aff'd Docket No. A-1125-73 New Jersey Superior Court, Appellate Division, February 13, 1975 (1975 *S.L.D.* 1086)

The hearing examiner has reviewed all such arguments in the context of the factual record stipulated by the parties and the testimony of the hearing and finds no clearly discernible proof that the classification and recommended placement of D.W. has ever been or is now in classifiable error. The proof is, in

fact, to the contrary and in favor of the Board's Child Study Team which carefully and in great detail over a long period of time weighed conflicting medical advice and balanced such advice with its own professional component opinion in the mandated classification procedure. The team was a complete one, consisting of the school psychologist, social worker, supervisor of nurses, school physician and the learning disabilities-teacher consultant. (Tr. 62) The judgments it made with respect to classification were reasoned ones based on data which was contradictory in part and which could not be held to support one conclusion alone to the exclusion of all others but, on the other hand, deserve support in the absence of evidence that discretion was abused. Reasonable, professional persons may differ over the conclusions they reach, as indeed they do herein in part, but such differences cannot logically be held to constitute error when there is significant reason or justification in support of such conclusions. There is ample reason in support of the controverted classification of D.W. and the hearing examiner recommends that it be determined valid.

In the context of such determination there can be no finding that petitioners are entitled to the tuition costs or other expenses that they seek. D.W. was voluntarily withdrawn in 1972 from the Westfield School System and entered in a private school. While petitioners were free to make such placement, there is no obligation on the Board for an expenditure of public funds. As the Commissioner said in *Woodstein, supra*:

> "***While parents have a right to make a choice between private and public school placement, they do not have a right to require that public school districts pay tuition costs to private schools in the event that this is the parental choice.***"

The hearing examiner recommends, therefore, that the Petition be dismissed.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and concurs with the findings and recommendations contained therein. No exceptions to the report have been filed.

The question for determination is one that has often been raised in matters which involve the classification and placement of handicapped pupils; namely, whether the collective judgment of a child study team, duly constituted pursuant to law (*N.J.S.A.* 18A:46), may be sustained as a valid, reasonable exercise of discretion in the context of other opinions at variance with it. The question was similarly considered by the Superior Court of New Jersey in *"R.D.H."* and *"J.D.H." v. Board of Education of Flemington-Raritan Regional School District,* 1975 *S.L.D.* 103, aff'd State Board of Education 111, aff'd Docket No. A-3815-74, New Jersey Superior Court, Appellate Division, November 8, 1976 (1976 *S.L.D.* 1161). The Court found

> "***there was sufficient credible evidence in the record as a whole to support the conclusion that the initial classification was not so unreasonable as to constitute an abuse of discretion. In this setting, the classification issue separating the parents, on the one hand, and the district on the other, was a debatable one with respect to which the district acted reasonably***." (1976 *S.L.D.* 1162)

The finding of the hearing examiner herein was also that the classification issue was "debatable" but that a properly constituted Child Study Team had over a long period of time carefully weighed conflicting medical advice and balanced such advice with its own professional opinion in the mandated classification procedure. The hearing examiner then found that the total record supported the Child Study Team's classification of D.W. as a reasonable one and recommended that it be determined valid.

The Commissioner's concurrence is specifically grounded in such findings and recommendation.

Accordingly, the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

June 10, 1977

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, June 10, 1977

For the Petitioners-Appellants, Schechner & Targan (David Schechner, Esq., of Counsel)

For the Respondent-Appellee, Nichols, Thomson & Peek (William D. Peek, Esq., of Counsel)

The State Board of Education denies the request for Oral Argument and affirms the decision of the Commissioner of Education.

September 7, 1977

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

ORDER

Argued December 19, 1977–Decided December 22, 1977

Before Judges Conford, Michels and Pressler

On appeal from decision of New Jersey State Board of Education.

This matter having been duly presented to the court, it is hereby ordered as follows: Motion for Remand to State Board granted.

The appeal is remanded to the State Board of Education for reconsideration in the light of its decision in *Diaz v. Board of Education of Roxbury*.

In the event of a redetermination by the State Board of Education in favor of appellants this appeal will be dismissed. In the event of any other determination by the State Board of Education this court retains jurisdiction.

Pending State Board of Education

In the Matter of the Request of the Board of Education of the Township of Brick, Ocean County, for a Declaratory Judgment Concerning the Payment of Salaries.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Anton & Ward (Donald H. Ward, Esq., of Counsel)

This matter has been opened before the Commissioner of Education by the filing of a Petition of Appeal on February 17, 1977, by the Board of Education of the Township of Brick, hereinafter "Board." The Board seeks a declaratory judgment respecting the payment of salaries pursuant to the provisions of *N.J.S.A.* 18A:27-6(3) which directs that each contract of a teaching staff member shall specify, *inter alia,* the following:

> "The salary at which he is employed, *which shall be payable in equal semimonthly or monthly installments,* as the board shall determine, not

> later than five days after the first and fifteenth day of each month in case of semimonthly installments ***, *a month being construed, unless otherwise specified in the contract, to be 20 school days or four weeks of five school days each****." (*Emphasis supplied.*)

Specifically, the Board seeks direction as to whether its negotiated agreement provision as found in Article 23B.1 that "all teachers shall be paid every two weeks" is legal. The Board also seeks a determination of the legality of its present mode of payment whereby its teachers are currently being paid biweekly in twenty-two installments beginning September 3, 1976 and ending June 24, 1977. (Exhibit D(A).)

The Commissioner is constrained to reiterate that which was stated in *Joseph McKay v. Board of Education of the Borough of Red Bank, Monmouth County,* 1972 *S.L.D.* 606, as follows:

> "*** Petitioner is not entitled to reimbursement of salary *** by virtue of the fact that he was not suspended, but voluntarily refrained from rendering any service during the course of this litigation. (*N.J.S.A.* 18A:6-30). *Any such payment would constitute a gift of public funds for services not rendered, which is clearly prohibited by the law of this State. New Jersey Constitution, Art.* VIII, *Sec.* III, *Pars.* 2, 3." (*Emphasis supplied.*) (at 611)

Grounded on this constitutional principle, it must be held in the instant matter that the payment of salary beginning on September 3 for the majority or total of a pay period in which teachers have not yet rendered a proportionate number of days of teaching services is illegal. The Commissioner so holds. Should a teacher fail to report for duty for all or part of that period for which he was paid in advance, the Board could be faced with costly litigation to recover those public funds improperly paid. Such eventuality, or that of total inability to recover those funds, is not in the public interest. Such determination is likewise applicable to the Board's hypothetical biweekly payment plan beginning on September 10. (Exhibit D(B))

Accordingly, it is directed that the Board proceed forthwith to revise its payment plan to avoid any prepayment of salaries.

The Commissioner determines that the Board's hypothetical payment plan for semimonthly payments on the fifteenth and thirtieth of each month is legal. (Exhibit D(D)) It remains to determine whether the Board's biweekly plan of twenty-one payments beginning on September 17 and ending on June 24 is appropriate. The Commissioner determines that it is legal. The wording of *N.J.S.A.* 18A:27-6(3) recognizes a month for purposes of the statute as "***20 school days or four weeks of five school days each***." Inasmuch as some calendar months have fewer than and others have more than twenty school days throughout the academic year, the Commissioner perceives that the Legislature, in its wisdom, avoided the more constrictive definition of a teacher's pay period as a calendar month and thus allowed a desirable flexibility.

Within the above parameters, the Board may choose to pay its teachers twice each calendar month or it may opt to pay them on a biweekly basis every two weeks as long as it does not pay them at any time for services not yet rendered. *McKay, supra* Such biweekly payment plans are easily keyed to computer payroll operations and, at the option of boards, are appropriate to the fiscal operation of school districts.

It should, of course, be understood that within the above contextual pattern a board of education, pursuant to *N.J.S.A.* 18A:29-4 and *N.J.A.C.* 6:20-2.11, may deduct an amount equal to ten percent from the payments of salaries made to employees who choose to participate in a summer payment plan. The Board may, thereafter, in a lump sum at the end of the academic year or in installments prior to September 1 pay out the amount of those deductions to the rightful recipients. Such summer payments, however, must originate from funds deducted during the preceding fiscal year.

COMMISSIONER OF EDUCATION

June 10, 1977

Ann Camp, Gail Peterman and the Glen Rock Education Association,

Petitioners,

v.

Board of Education of the Borough of Glen Rock, Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Goldberg, Simon & Selikoff (Theodore M. Simon, Esq., of Counsel)

For the Respondent, Parisi, Evers & Greenfield (Irving C. Evers, Esq., of Counsel)

The Glen Rock Education Association, hereinafter "Association," joins with members Ann Camp and Gail Peterman, hereinafter "petitioners," in challenging the legality of a curricular change authorized by the Glen Rock Board of Education, hereinafter "Board," which resulted in the termination of petitioners' employment as tenured physical education teachers at the end of the 1975-76 school year.

The Board asserts that its actions constituted a legal reduction in force which was effectuated in good faith and for valid reasons.

The matter is before the Commissioner of Education in the form of the pleadings, Cross-Motions for Summary Judgment, affidavits, and Briefs. The contextual background of the dispute is as follows:

Petitioners were certified, tenured physical education teachers in the Board's employ when in April 1976 the Board determined to relegate the behind the wheel portion of its driver education program, previously assigned on a part-time basis to physical education teachers, to non-school hours of the afternoon, holidays, weekends and summer vacations of the ensuing year. This action coupled with a two year decline of 155 enrolled pupils since 1974 resulted in a corollary reduction in the Board's need for physical education teachers. Petitioners, who had the least seniority of the Board's physical education teachers, were terminated.

The Board during 1976-77 has contracted behind the wheel instruction to persons who are paid $6.40 per hour at an estimated cost of $8,832. This, when compared with an equivalent school day contracted salary of $26,903 for the previously employed equivalent of 1.3 driver education teachers, reveals an estimated saving of $18,071 attributable solely to the revised basis for behind the wheel instruction. (Board Secretary's Affidavit)

The Board in its Brief in Support of Motion relies upon the judgment rendered in *Passaic Valley Education Association, Inc. v. Board of Education of the Passaic County Regional High School District No. 1,* Docket No. C-3084-73, Superior Court of New Jersey, Chancery Division, Passaic County (June 12, 1974). (Unpub.) Therein, the Court denied, *inter alia,* an appeal which sought to compel the Passaic County Regional Board to negotiate terms and conditions of employment and to post driver education positions which had been similarly relegated to non-school hours.

The Board, contending that it had the statutory, discretionary right to eliminate petitioners' positions and to fill or not fill positions, cites, *inter alia,* in this regard *Board of Education of the Township of Madison, Middlesex County v. Madison Township Education Association et al.,* 1974 *S.L.D.* 488; *Board of Education of the Scotch Plains-Fanwood Regional School District v. Mayor and Council of the Township of Scotch Plains et al., Union County,* 1974 *S.L.D.* 1216; *George Marotta v. Board of Education of the Borough of Sayreville, Middlesex County,* 1976 *S.L.D.* 768; and *Mary Ann Popovich v. Board of Education of the Borough of Wharton, Morris County,* 1975 *S.L.D.* 737. (BB, at pp. 3-4)

The Board argues that petitioners were hired, not as driver education teachers but as physical education teachers, and that the elimination of behind the wheel instruction from its regular daytime offering has violated no right of petitioners. The Board contends that the Commissioner should not in such a matter substitute his discretion for that of the Board's good faith determination which carries a presumption of validity that petitioners' positions are no longer necessary. *David Payne v. Board of Education of the Borough of Verona, Essex County,* 1976 *S.L.D.* 543, aff'd State Board of Education 554; *Donald Banchik*

v. Board of Education of the City of New Brunswick, Middlesex County, 1976 *S.L.D.* 78; *Green Village Road School Association et al. v. Board of Education of the Borough of Madison, Morris County,* 1976 *S.L.D.* 701 (BB, at pp. 5-7) In this regard the Board also cites *Cleveland Board of Education v. LaFleur,* 414 *U.S.* 632, 94 *S.Ct.* 791 (1974) wherein Mr. Justice Powell stated:

> "***School boards, confronted with sensitive and widely variable problems of public education, must be accorded latitude in the operation of school systems and in the adoption of rules and regulations of general application.***" (at p.____)

It is further argued in the Board's Brief in Opposition to Cross-Motion for Summary Judgment that the restructuring of its educational program achieved genuine economy and should not be set aside. The Board contends that its action was a managerial prerogative legally effected by official resolution as follows:

> "***RESOLVED, that certain tenured teaching staff members, whose names are on file with the Board Secretary listed on 'Addendum C,' will *not* be issued contracts for the 1976-77 school year because of *reduction in force****." (*Emphasis in text.*) (Excerpt from Board Minutes of April 26, 1976 as appended to the Board's Brief in Opposition to Cross Motion for Summary Judgment; see also "Addendum C" appended to Petitioners' Memorandum of Law.)

Petitioners contend, conversely, that the Board did not legally abolish their positions but merely transferred a substantial portion of their duties to other physical education teachers whose schedules were lightened by the removal of behind the wheel instruction from the school day curriculum. It is argued that when an alleged reduction in force does not, in fact, eliminate duties the need for which no longer exists then no true reduction in force can be said to have occurred. *Victor Catano v. Board of Education of the Township of Woodbridge, Middlesex County,* 1971 *S.L.D.* 448, aff'd State Board of Education 1972 *S.L.D.* 665 Petitioners aver that the contracting out of work of tenured employees has been held illegal and cite in this regard *Amos Smith v. Board of Education of the Township of Matawan, Monmouth County,* 1958 *S.L.D.* 58. Petitioners contend that:

> "***Tenured status under Title 18A is of little value if a board of education can merely contract away the daily duties of teachers to other individuals***despite the fact that the work performed by the dismissed individuals is still being performed to a substantial extent.***"
> (Petitioners' Memorandum, at p. 5)

Petitioners contend further that if the Board were allowed to contract this and other courses taught by tenured teachers in the daytime instruction program to nontenured teachers, to be taught during non-school hours, the result would reduce to a sham and pretext the protection of the tenure laws. (Petitioners' Memorandum, at pp. 4-7) Accordingly, petitioners pray for an order of the

Commissioner which would void the Board's action and restore petitioners to their tenured employment with lost salary and attendant emoluments.

The Commissioner, having carefully considered and balanced the respective arguments of law advanced by the litigants, addresses first the Board's contention that the Association is not a proper party to the dispute. The Association is the representative for nonsupervisory teaching staff employees who may feel threatened by the Board's action of contracting with persons not covered by the usual teacher contracts for certain instruction to be completed during non-school hours, which instruction was previously performed during the regular school day. This fact alone is sufficient to embrace the Association as an interested party to the dispute. The Commissioner so holds. *Marilyn Winston and the South Plainfield Education Association v. Board of Education of the Borough of South Plainfield et al.*, 64 *N.J.* 582 (1974)

Petitioners' argument that the Board's resolution of April 26, 1976, *ante,* did not constitute an abolishment of the teaching positions held by petitioners is without merit. The language of the resolution is sufficiently clear to convey the intention of the Board to abolish a number of positions. Therein it was stated:

> "***certain teaching staff members***will *not* be issued contracts for the 1976-77 school year because of *reduction in force****." (*Emphasis in text.*) (Excerpt from Board Minutes of April 26)

It was stated in *Robert T. Currie v. Board of Education of the School District of Keansburg, Monmouth County,* 1966 *S.L.D.* 193 that:

> "***The Commissioner looks rather to the clear intention of the Board than to the technical perfection of its language. Board of education members are laymen, and where their intention is clear, they should not be limited by the legal niceties of language.***" (at 195)

The Commissioner has in the past cautioned local boards of education that when effecting a reduction of force the preferred procedure is, by separate resolutions, to abolish an existing position and then to notify any tenured teaching staff member who has no seniority rights to another position that employment will terminate as of a given date. Such procedure avoids unnecessary, costly litigation. Where such preferred procedure has not been followed, however, the Commissioner has on occasion upheld the clearly expressed intent of a board to effect a reduction in force. *Popovich, supra; John Hyun v. Board of Education of the Borough of Wharton, Morris County,* 1976 *S.L.D.* 764; *Mildred Wexler v. Board of Education of the Borough of Hawthorne, Passaic County,* 1976 *S.L.D.* 309, aff'd State Board of Education 314

It remains to address the principal issue of whether the Board could legally relegate to non-school hours and contract on an hourly basis with persons to teach behind the wheel driver education classes which were previously taught by salaried teaching staff members during the regular school day.

Boards of education in New Jersey are vested with broad powers and authority to accomplish that which has been delegated to them by the Legislature. *N.J.S.A.* 18A:11-1 Among those powers is that of adopting and changing curricular offerings and employing and discharging teaching staff members. *N.J.S.A.* 18A:27-4 provides that:

> "Each board of education may make rules, not inconsistent with the provisions of this title, governing the employment, terms and tenure of employment, promotion and dismissal, and salaries and time and mode of payment thereof of teaching staff members for the district, and may from time to time change, amend or repeal the same, and the employment of any person in any such capacity and his rights and duties with respect to such employment shall be dependent upon and governed by the rules in force with reference thereto."

It is clear that the Board's employment practices must harmonize with those other provisions of Title 18A, Education, among which are the teacher tenure laws, *N.J.S.A.* 18A:28-1 *et seq.* Accordingly, the instant issue must be determined as the result of a harmonious interpretation of the statutes and applicable case law.

N.J.S.A. 18A:28-9 provides as follows:

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

The Board has determined, because of reduced need for teachers of physical education classes and because of a desire to economize by administratively relegating its behind the wheel driver education to non-school hours, to terminate two tenured teachers, one of whom had taught driver education one period per day and one of whom had not taught driver education in 1975-76. A continuation of driver training instruction was effectuated by contracting with persons other than the tenured teachers who previously taught it at an hourly rate of pay. Savings resulted in the amount of $18,071 for the 1976-77 school year which conclusively shows that this restructuring resulted in a substantial reduction in costs for driver education.

The Commissioner, without commenting upon the advisability of such a restructuring, determines that it is within the prerogative of the Board to do so. Boards of education, while not compelled by law to offer behind the wheel driver training, have been encouraged by the State Department of Education, the law enforcement agencies and by local citizens to do so in the interests of practicality and individual and public safety. The Board in this instance has

elected to relegate its behind the wheel driver training to hours other than the regular school day. This it may legally do assuming proper supervision and the use of certified teachers.

Petitioners express apprehension that, if behind the wheel training is so relegated, other subjects taught by tenured teachers may be similarly transferred to non-school hours to be taught by others at an hourly contracted rate. The Commissioner does not share this view. Behind the wheel instruction is unique in that it is usually completed in as few as six hours of individual instruction and not commonly assigned credit. This contrasts sharply with conventional academic studies in which credits are awarded for successful completion of study in larger classes over several weeks or months. Nor are tenured teachers without a measure of protection of their rights respecting courses offered outside the regular school day or at alternate locations. *Arthur Jones et al. v. Board of Education of the Borough of Leonia et al., Bergen County,* 1976 *S.L.D.* 495 Petitioners, herein seek no relief in the form of assignment to driver education classes during weekends, vacations, summer or after school hours. Accordingly, no useful purpose would be served by addressing the matter of entitlement to such assignment.

The Commissioner finds *Smith, supra,* wherein a tenured janitor was found to have been illegally discharged, to be importantly distinguishable from the instant matter. Therein, it was determined that a janitor's position was abolished but not for economy or reduction in force, both of which elements are present herein. *Catano, supra,* upon which petitioners further rely, is likewise inapplicable for the reason that although economy resulted therein, a board of education illegally transferred duties of a tenured foreman of janitors to another position of different title without a genuine reduction in force. The matter herein controverted differs in that there was in fact a reduction in force which resulted from both a decline in pupil enrollment and a reorganization under which behind the wheel driver training continued to be offered but at a reduced cost.

The Commissioner is constrained to reiterate that which was said by the Court in *Viemeister v. Board of Education of Prospect Park,* 5 *N.J. Super.* 215 (*App. Div.* 1949) as follows:

> "***Some provisions of our school laws were designed to aid in the establishment of a competent and efficient system by affording to principals and teachers a measure of security in the rank they hold after years of service. They represent important expressions of legislative policy which should be given liberal support, consistent, however, with legitimate demands for governmental economy.***" (at 218)

Boards, however, are not completely without flexibility in organizing the times and places of their curricular offerings nor should they be so stringently fettered that they may not effect economies.

In the matter herein controverted the Commissioner determines that the Board's reduction in force resulting in part from reduced pupil enrollment and in

part from curricular reorganization was a reasonable exercise of its statutory discretionary authority pursuant to *N.J.S.A.* 18A:28-9. The Commissioner views the Board's action as similar to that of *Mary Ann Popovich v. Board of Education of the Borough of Wharton, Morris County,* 1977 *S.L.D.*____ (decided April 14, 1977) wherein the Commissioner upheld the legality of an economy move by a board relegating to before and after school and summer hours the instrumental instruction previously provided during the regular school day.

Although such economy measures are frequently regrettable for their inconvenience to pupils, boards must be upheld when their actions do not clash with the essential elements of a thorough and efficient education and when there is no showing of bad faith, arbitrariness, capriciousness, or statutory or constitutional violation. It has been said by the Court that:

> "***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.***" (*Thomas v. Board of Education of the Township of Morris,* 89 *N.J. Super.* 327, 332 (*App. Div.* 1965); aff'd 46 *N.J.* 581 (1966))

The Commissioner perceives no such violation herein. Accordingly, the Board's Motion for Summary Judgment is granted and petitioners' Cross-Motion is denied. The Petition of Appeal is dismissed. *Passaic, supra; Popovich, supra; Hyun, supra; Cleveland, supra; Wexler, supra; Viemeister, supra*

The Commissioner emphasizes, however, that this determination has application only to the facts which pertain to this controversy rather than to any factual context which differs markedly therefrom.

COMMISSIONER OF EDUCATION

June 10, 1977

Robert Elms, Mary Brentnell, and Raymond Wasilewski,

Petitioners,

v.

Mount Olive Township Board of Education, Morris County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Stover, Stover and Broscious (James W. Broscious, Esq., of Counsel)

For the Respondent, Arnold H. Chait, Esq.

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

Petitioners, three residents of Mount Olive Township, charge that the Board of Education of the Township of Mount Olive, hereinafter "Board," was in conflict of interest and request the Commissioner of Education to render a judgment that the contracts entered into between the Board and its various employee representatives be declared void due to a conflict of interest as follows:

1. The 1974-76 Teachers' Contract;
2. The 1975-76 School Bus Contract;
3. The 1975-76 Teachers' Aides Contract.

Further, petitioners request that the Commissioner render a judgment for the removal from Board membership of Curtis Winston, Bernice Kern, Barbara McGoldrick, Arthur Magalio, Walter Lata, James DiRenzo and Harry Israel, and that the Commissioner render a judgment for the removal from the Board's employment of Dolores Digney, Carol Winston, Barbara Dudrow, Annette Sinato and Lucille Magalio due to a conflict of interest.

This matter is submitted on pleadings, exhibits and Briefs of counsel. Twenty-five stipulations were submitted by the respective parties. The following relevant facts are not disputed:

1. Dolores Digney has been employed by the Board since December 8, 1969, as a bus driver. She is the wife of Charles Digney, a member of the Board since February 1969 and currently President of the Board.

2. Carol Winston is a full-time tenured teacher whose employment with the Board commenced on June 29, 1971. Her husband, Curtis Winston, was elected a member of the Board on February 13, 1974, and he presently serves as Vice-President of the Board.

3. Barbara Dudrow is a full-time tenured teacher whose employment with the Board commenced on July 13, 1970. Her sister, Bernice Kern, is presently a member of the Board, having been elected to that position on February 8, 1972.

4. Annette Sinato, Board Member McGoldrick's sister, is a paid full-time teachers' aide whose employment with the Board commenced on September 3, 1974, although the Board did not ratify her employment until the meeting of October 21, 1974. At the October 21 meeting, subsequent to action on appointment of teachers' aides, the Board appointed Barbara McGoldrick to fill a vacancy in the membership of the Board. Mrs. McGoldrick did not participate in the October 21 meeting and was not sworn into office until November 18, 1974.

5. Lucille Magalio is presently a paid teachers' aide whose employment with the Board commenced on September 3, 1974. Her husband, Arthur Magalio, was elected to the Board prior to September 3, 1974, and is currently a member.

6. Walter Lata was elected a member of the Board on February 13, 1974. His grandson was employed by the Office of Economic Opportunity, Dover, New Jersey, pursuant to a federal program, to do custodial work for the Board during July and August 1974. Mr. Lata's grandson worked as a part-time custodian for the Board from January 1975 until May 1975, at which time his employment terminated. The District's guidance advisor supplied the Office of Economic Opportunity with a list of pupils interested in participating in the federal employment program. The custodial services rendered by the grandson of Walter Lata were not the subject of any resolution of the Board.

7. Harry Israel, an elected member of the Board, is employed as a teacher in the Morris School District.

8. James DiRenzo, an elected member of the Board, is employed as a principal in the Byram Township School.

9. Two sons of Charles Digney were employed during the summer of 1975 by the Office of Economic Opportunity, Dover, New Jersey, under a federal program, to do custodial work for the Board. The District's guidance advisor supplied the Office of Economic Opportunity with a list of pupils interested in participating in the federal employment program. The custodial services rendered by the sons of Charles Digney were not the subject of any resolution of the Board.

10. During the 1974-75 school year, the Board purchased by two purchase orders supplies from Sportsmen's Corner in the total amount of $337.22. Edward Lata, son of Board member Walter Lata, is the proprietor of Sportsmen's Corner. During the same period, similar supplies were purchased from a number of other vendors.

11. Walter Lata did vote affirmatively to approve a lengthy bill list which

included one of the two vouchers submitted by Sportsmen's Corner, and in the subsequent month abstained from voting on the bills listed which included a second voucher of Sportsmen's Corner.

12. During his successive terms of office, Charles Digney either abstained or did not vote on resolutions where his wife's name was included on a list of persons to whom a contract of employment was to be offered or renewed.

13. Arthur Magalio abstained from voting on a resolution on October 21, 1974 in which his wife's name was included on a list of teachers' aides to be employed by the Board.

14. Curtis Winston abstained from voting on a motion to extend contracts for the 1974-75 school year on a lengthy list of teachers which included his wife.

15. On April 21, 1975, the Board at a public meeting voted on item #6 on the agenda, a motion to extend contracts of teachers for the 1975-76 school year. The motion was made by Harry Israel, with all members voting in the affirmative. Included in the list of teachers were the names of Barbara Dudrow, sister of Board member Bernice Kern, and Carol Winston, wife of Board member Curtis Winston. After the conduct of additional business, Mr. Israel made another motion, this time to set aside his original motion with respect to item #6. This time Mr. Winston abstained.

16. Since her election to the Board, Bernice Kern has voted affirmatively on the annual motion to reemploy teachers of the school district, which list included her sister, Barbara Dudrow, except in the instance of the motion on the 1974-75 teachers' contracts, in which instance Bernice Kern was absent and did not vote.

17. Contracts for teachers have been and are negotiated collectively by the Education Association of Mt. Olive, and the compensation, benefits and other terms and conditions of employment of all teachers are fixed and determined collectively. Said negotiations for 1974-75 were carried out by a committee consisting of Messrs. Israel and DiRenzo and Mrs. Kern.

18. Contracts for the bus drivers of the Mt. Olive Township School District have been and are negotiated collectively by the Mt. Olive Township Board of Education Bus Drivers Association and the compensation, benefits and other terms and conditions of employment of all bus drivers are fixed and determined collectively. The negotiations on behalf of the Board are conducted through a committee of District administrators.

19. The population of Mt. Olive Township is 15,000. The number of Mt. Olive Township School District employees is 421, of whom 56 percent, or 236, reside in the Township.

20. All petitioners were unsuccessful candidates for election as members of the Mt. Olive Board of Education in the 1975 annual election.

21. The charges of nepotism and conflict of interest asserted in the Petition before the Commissioner were also asserted and raised as issues by petitioners during their campaign for election to the Board.

22. In the course of their respective campaigns for election and re-election to the Board, Curtis Winston and Charles Digney made known to the voters the employment of their spouses by the Board.

23. Petitioner Raymond Wasilewski is the holder of a New Jersey teacher's certificate and has applied to the Board for employment.

24. Petitioner Robert Elms solicited contracts to sell and supply to the Mt. Olive Township School District and to the Township radio equipment for school district and Township vehicles. Elms was a candidate for election to the Mt. Olive Township Board of Education in 1976.

25. Petitioner Mary Brentnell is employed by a neighboring school district as a bus driver and her husband's aunt is transportation coordinator in that school district.

In its Brief the Board moved to amend the facts as set forth in the Stipulation, particularly the third paragraph, *ante,* due to the resignation of Bernice Kern as a member of the Board on March 15, 1976.

The Board, therefore, filed a Motion to Dismiss claims against Barbara Dudrow and Bernice Kern as moot. *Carolyn T. Henry v. Board of Education of the City of Wildwood, Cape May County,* 1975 *S.L.D.* 1 (Board's Brief, at p. 3)

The Commissioner hereby dismisses that portion of petitioners' allegation which claims that Bernice Kern was in conflict of interest.

Additionally, the Board moved to dismiss petitioners' claims for relief against individuals or associations who have not been made parties to this action. To the extent that petitioners seek removal of tenured employees, the Board asserts that the Commissioner is without jurisdiction or authority to grant such relief in the absence of the implementation of the statutory procedure mandated for dismissal of tenured employees. *N.J.S.A.* 18A:6-10 The Board asserts that no written charges setting forth statutory grounds for dismissal have been filed against the tenured employees as provided in *N.J.S.A.* 18A:6-11.

In the context of the stipulated facts, *ante,* the issues herein may be succinctly stated as follows:

1. Does a conflict of interest exist when there is a husband-wife relationship as employer-employee?

2. Does the employment by a board of education of a close relative of a member of the same board constitute a conflict of interest?

3. Does a business transaction entered into with a relative of a board

member constitute a conflict of interest?

4. Does membership on a board by teachers employed in an adjoining school district, wherein those teacher-board members ratify a negotiated agreement, constitute a conflict of interest?

Petitioners aver that the statute of primary reference herein is *N.J.S.A.* 18A:12-2 which provides in its entirety that:

> "No member of any board of education shall be interested directly or indirectly in any contract with or claim against the board."

In petitioners' view, this statute specifically bars respondents from service on the Board since they had a direct and continuing interest, as well as an indirect interest, in the award of employment contracts, business transactions with a relative on the Board and the ratification of negotiated agreements by teacher-board members. Petitioners assert that the lack of interest in a contract or claim against the Board is a qualification for the very office of Board member and, in support of this avowal, cite *Visotcky v. City Council of Garfield,* 113 *N.J. Super.* 263 (*App. Div.* 1971). Further, petitioners argue that it is axiomatic that a member of a local board of education holds office as a public trust in the public interest and that the common law and the principal statute of reference, *N.J.S.A.* 18A:12-2, disqualify participation by a board member in the business of the board if he or she has a substantial financial interest in such business. In this regard petitioners cite *Joseph Engel v. Passaic Township Board of Education et al.,* 1938 *S.L.D.* 780 (1924) and in particular that section wherein the Commissioner said:

> "***In the case under consideration, therefore, Mrs. Swenson, a member of the Passaic Township Board of Education and the wife of the party with whom such Board of Education has contracted, must be presumed to have a financial interest in such contract and consequently an indirect interest in the agreement even though she be not actually one of the contracting parties.
>
> "Not only has it been decided in Equity cases that there cannot legally be a conflict between public duty and private interest in the case of a person occupying a position of public trust, but the section of the School Law above quoted explicitly prohibits a member of a board of education from being directly or indirectly interested in a contract with the Board of which he or she is a member.***" (at 781)

Petitioners assert that the rationale of the Commissioner in *Engel, supra,* controls in the instant matter and that there existed a violation of the predecessor to *N.J.S.A.* 18A:12-2.

Petitioners contend that the majority decision of the State Board of Education was in error *In the Matter of the Election of Dorothy Bayless to the Board of Education of the Lawrence Township School District, Mercer County,*

1974 *S.L.D.* 595, rev'd State Board of Education 603, and that the minority opinion was correct. In support of petitioners' contention they cite *Scott v. Bloomfield,* 94 *N.J. Super.* 592 (*Law Div.* 1967), aff'd 98 *N.J. Super.* 321 (*App. Div.* 1967), dismissed 52 *N.J.* 473 (1968) and argue that the minority opinion of the State Board in *Bayless* when viewed in the light of *Scott* represents the more well reasoned and legally justifiable position with regard to the issue of conflict of interest in the instant matter.

With respect to the issue of teachers who serve on boards of education, petitioners cite *Jones v. MacDonald,* 33 *N.J.* 132 (1960) and argue that it is not sufficient to indicate that a conflict can be cured by the abstention of the individuals involved as indicated in *Scott, supra,* and in *Jones* wherein the Court stated:

> "***It is no answer to say that the conflict in duties *** may never in fact arise. It is enough that it may in the regular operation of the statutory plan.***" (at 138)

Petitioners assert that when *Jones, supra,* is applied to the instant matter, it is manifest that a conflict of interest exists. *Griggs v. Princeton Borough,* 33 *N.J.* 207 (1960)

The Board declares that no assertion was made that any of its members had contracted or made a claim directly with the Board in violation of *N.J.S.A.* 18A:12-2. Thus, consideration must be given to the issue of whether a board member had sufficient interest in a contract or claim held by the employee's spouse to constitute a conflict of interest. In reversing the Commissioner in *Bayless, supra,* the majority of the State Board balanced the conflicting interests and rights and, asserts the Board, created a standard by which such matters should be measured. The Board asserts that, according to the State Board in *Bayless* in order to disqualify a board member from holding a seat on the board of education to which he or she was duly elected, it must first be determined that the "conflicting interest is substantial and materially sufficient" to warrant disqualification. The State Board acknowledged that in the alternative where the conflicting interest is not substantial and materially sufficient to warrant disqualification, the duly elected board member may continue to serve on the board by abstaining from participation in and voting on particular matters directly or indirectly affecting the employee's spouse. The majority opinion demonstrated the State Board's reluctance to infringe upon the right of citizens of New Jersey to hold public office which right is both constitutional (New Jersey Constitution, *Art.* I, *Par.* 2) and statutory as provided by *N.J.S.A.* 10:1-1. Contrary to petitioners' assertion, the Board declares that the majority of the State Board did not narrowly construe the term "marital status" to be limited to single vs. married individuals as found in *N.J.S.A.* 10:1-1, but rather the statute guarantees such rights independently to each spouse regardless of the marital relationship in the absence of a compelling State interest. The majority opinion in *Bayless* could not find such a compelling State interest, asserts the Board, and further it held that the remedy of the Doctrine of Abstention was adequate in those circumstances to satisfy any State interest.

The Board observes that the minority opinion of the State Board in *Bayless, supra,* cited only judicial authority for its position, *i.e.,* the letter opinion of Chief Justice Hughes, *New Jersey Law Journal,* January 17, 1974. That judicial authority, asserts the Board, has since evaporated with the Court's decision *In re Gaulkin,* 69 *N.J.* 185 (1976), a unanimous decision of the Supreme Court wherein Chief Justice Hughes reversed his previous position and acknowledged recent trends of the law which recognize society's modern understanding of the marital relationship and the ability of a viable and successful marriage to coexist with the individual identities of the marriage partners, the language of spousal autonomy discarding previous principles of conflict of interest which require forfeiture of identify and subordination to the oneness of wedlock is found in *Gaulkin* at 193. In support of its argument, the Board cites *Marguerite W. Decker et al. v. Board of Education of the Township of Berkeley,* 1959-60 *S.L.D.* 57; *O.B. Nichols et al. v. Board of Education of the Township of Pemberton,* 1938 *S.L.D.* 48 (1932), aff'd State Board of Education 50; *Donald P. Sweeney v. Henry Komorowski,* 1974 *S.L.D.* 740.

The Board admits to the allegation that it purchased goods from a vendor whose father sat on the Mount Olive Board during the 1974-75 school year. The Board describes the amount of $337.22 as two nominal purchases and avers that during the same period of time it purchased similar supplies from a number of other vendors. The Board asserts that the two purchases were a matter of convenience and that there was no proof to show that the Board dealt extensively or exclusively with the Board member's son. The Board argues that within a small community such situations are unavoidable, immaterial, and do not warrant the removal of a board member from the elected office.

With regard to the allegation that a conflict of interest existed because two members of the Mount Olive Board were employed as professional educators in adjoining school districts, the Board observes that petitioners failed to cite any authority under which the Commissioner could exclude the two members from their duly elected offices. To the contrary, the Board asserts that the issue, *sub judice,* is *stare decisis* in *Jones et al. v. Kolbeck et al.,* 119 *N.J. Super.* 299 (*App. Div.* 1972), wherein the Court found no constitutional, statutory or common law prohibition which would disqualify a member of a board of education in a public school district because he was a teacher in a neighboring school district. The Board notes that in *Jones*, the court specifically found no inherent incompatibility and no conflict or inconsistency in the performance of the two functions. The Board asserts that the language from *Jones* has general application to all of the claims of conflict of interest raised by petitioner as follows:

> "***While the law demands complete honesty and integrity in the exercise and performance of the duties of every public office, position or employment, that requisite does not necessitate or contemplate a severance of all ties and associations with persons and organizations that may espouse a particular philosophy or position on any one or more of the many facets of public affairs that the local agency of which the individual is a member is called upon to administer.***" (119 *N.J. Super.* at 301)

And,

> "***Although it may be that there is a possibility that conflicts of interest may arise from time to time, this is not unique to the present situation. In any event, the test is 'incompatibility in the *functions or duties* of office,' rather than a mere possibility of a conflict of interests. *Reilly v. Ozzard, supra,* 33 *N.J.* at 549. Compare, *Griggs v. Princeton Borough,* 33 *N.J.* 207 (1960).***" (*Emphasis in text.*) (*Id.*, at 300-301)

The Board avers that the possibility that an occasional conflict may arise is insufficient grounds to remove a member of a board of education from office.

A Memorandum of Law of Intervenors was filed on behalf of Respondents Carol Winston, Barbara Dudrow and the Mount Olive Education Association, hereinafter "Association." In its Brief, respondents concurred with the Board's Motion that the charges and claims against Respondents Dudrow and Kern be dismissed. The amended Stipulation as filed by the Board represented the fact that Barbara Dudrow's sister, Bernice Kern, resigned from the Board on March 15, 1976, and therefore rendered moot the allegation of conflict of interest.

Respondents assert that petitioners seek to destroy the statutory rights of tenure and collective negotiations by their allegations of conflicts of interest. Respondents contend that it is not within the power of the Commissioner to void agreements between the Board and the Association nor to dismiss tenured employees from their teaching positions due to alleged conflicts of interest.

With regard to tenure, respondents cite *N.J.S.A.* 18A:28-5 which provides, *inter alia,* that tenured teachers shall not be dismissed except for:

> "***inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title [*N.J.S.A.* 18A:6-9 *et seq.*] ***."

N.J.S.A. 18A:28-9 further permits the dismissal of tenured personnel when the position they occupy is abolished by the board of education. In the instant matter the positions occupied by respondents have not been abolished. Therefore, aver respondents, *N.J.S.A.* 18A:28-9 cannot be relied upon by petitioners. With respect to *N.J.S.A.* 18A:28-5, respondents argue that the procedures required by *N.J.S.A.* 18A:6-10 *et seq.* had not been complied with nor even initiated in this matter. Tenure is a legislatively created status which can only be abridged by statute. *Phelps v. State Board of Education,* 115 *N.J.L.* 310 (*Sup. Ct.* 1935), aff'd 116 *N.J.L.* 412 (*E.&A.* 1936), aff'd 300 *U.S.* 319 Thus, assert respondents, no dismissal under *N.J.S.A.* 18A:28-5 is possible.

With regard to the agreement between the Board and the Association, respondents declare that such an agreement is a unique contractual form. It is not a commercial contract that has been awarded to a relative of a board member which would bestow special economic advantage on that individual but rather, assert respondents, it affects all of the teaching staff as a direct

outgrowth of their collective statutory rights. Respondents argue that there has not been a single item of evidence to indicate any conflict of interest regarding the agreement.

The Commissioner has carefully considered the respective positions of the parties as set forth in the entire record of the instant matter. He will consider each of the four separately stated issues, *ante.*

The circumstances of the first issue are similar to those enunciated in the State Board of Education decision in *Bayless, supra.* Carol Winston was employed by the Board prior to her husband's election to that Board. The record reveals that Curtis Winston did, in fact, exercise the Doctrine of Abstention with respect to extending his wife's contract for the 1974-75 school year (Stipulation No. 14), and the extension of teacher contracts for the 1975-76 school year (Stipulation No. 15). The Commissioner finds that Curtis Winston has met the conditions as set forth by the State Board of Education in *Bayless* and therefore determines that the alleged conflict of interest is not substantially or materially sufficient to disqualify him from holding his seat on the Board and that he may continue to serve as a duly elected member of the Board, abstaining from participation in and voting on particular matters directly or indirectly affecting his wife. The Commissioner observes that the record is void with regard to the circumstances under which these spouses of Board Members were employed.

It is stipulated that Charles Digney either abstained or did not vote on resolutions where a contract of employment was offered or renewed for his wife's employment. (Stipulation No. 12) Similarly, Arthur Magalio abstained from voting on a resolution for his wife's employment by the Board. The circumstances with regard to the employment of the spouses of Digney and Magalio differ from those of Winston above and of *Bayless, supra,* since the wives of Digney and Magalio were employed subsequent to their husbands' election to the Board. Such employment raises the spectre of nepotism and this spectre has been a source of concern to many local boards of education. As a result some local boards have adopted regulations which prohibit the initial employment of a person in the immediate family of a board member. The Court has upheld the validity of such regulations. *Scott Whateley v. Leonia Board of Education,* 141 *N.J. Super.* 476 (*Chan. Div.* 1976) The Commissioner recommends the Mount Olive Board of Education consider a similar adoption. Such adoption would minimize the "irritant."

In the absence of any persuasive evidence that there was indeed a conflict of interest with respect to the employment of Dolores Digney and Lucille Magalio, the Commissioner holds that the allegation is without merit.

With regard to the second issue which alleges that the employment of close relatives of board members constitutes a conflict of interest, it is again necessary to review Stipulations Nos. 4, 6 and 9. Stipulation No. 4 states that a sister of a Board member was employed subsequent to the appointment of that individual to membership on the Board. Stipulations Nos. 6 and 9 state that the grandson and sons of two Board members respectively were employed by the Office of

Economic Opportunity to perform custodial services for the Board. It is further stipulated that the employment of the grandson and sons by the Office of Economic Opportunity was not the subject of any resolution by the Mount Olive Board of Education.

The Commissioner finds and determines that no conflict of interest existed with respect to the employment of the close relatives as alleged in Stipulations Nos. 4, 6 and 9.

Similarly, the third issue alleges that a conflict of interest existed when the Board entered into a business transaction with a close relative of a Board member as stated in Stipulation No. 10 and the Commissioner finds substance in such allegation. The purchase, although nominal, was in fact made and was improper in the context of law. *N.J.S.A.* 18A:12-2 Accordingly, the Commissioner does not condone but condemns the action and issues a caveat to all boards of education to refrain from the illegality of such practice. While there is, herein, no evidence of conspiracy, no proof of unfair gain, no showing of excessive cost, the practice cannot be sanctioned.

With regard to the fourth issue and petitioners' allegation that membership on a board of education by individuals who teach in an adjoining school district constitutes a conflict of interest when those teacher-board members ratify a collectively negotiated agreement with the Association, the Commissioner observes that the question of a board member who is also a teacher in an other district is *stare decisis* as stated in *Jones v. Kolbeck, supra,* as follows:

> "There is neither constitutional nor statutory prohibition against an individual at one and the same time holding and exercising the office of member of the board of education of one public school district, and holding and performing the duties of the position or employment of teacher in the schools of a different public school district. *** [T]he provisions of *N.J.S.A.* 18A:12-2 contain no such proscription, expressly or impliedly.***" (119 *N.J. Super.* at 300)

The Commissioner notices that *Jones, supra,* speaks directly regarding the individual's right to teach in one school district and serve on the board of education of another school district. Additionally, *Jones* is specific with respect to the teacher-board member's membership in a representative teacher's organization which negotiates salaries and other benefits and has access to the resources such as State and national data and information. With respect to such membership, the Court states:

> "***Nor does mere membership in the New Jersey Education Association disqualify a person from membership on a local board of education–any more than membership in any other professional or labor organization constitutes a disqualification.***" (*Id.*, at 301)

The Commissioner finds that while *Jones, supra,* speaks directly, *N.J.S.A.* 18A:6-8.4 is fully dispositive of the instant matter. It provides that:

> "No person employed by a public educational system or institution in a position which requires a certificate issued by the State Board of Examiners *** shall be disqualified by reason of such employment from holding any elective or appointive State, county or municipal office excepting as member of the board or body by which he is employed."

The Commissioner determines, therefore, that Messrs. Israel and DiRenzo were not in conflict of interest while serving on the Board's negotiations committee. To hold otherwise would be counter to statutory provision.

With regard to the instant matter, it was held by the State Board in *John Kenny et al. v. Board of Education of the Town of Montclair, Essex County,* 1938 *S.L.D.* 647 (1934), aff'd State Board of Education 649, that:

> "***The School Law vests the management of the public schools in each district in the local boards of education, and unless they violate the law, or act in bad faith, the exercise of their discretion in the performance of the duties imposed upon them is not subject to interference or reversal.***" (at 653)

Further, in the case of *Boult and Harris v. Board of Education of Passaic,* 1939-49 *S.L.D.* 7, aff'd State Board of Education 15, aff'd 135 *N.J.L.* 329 (*Sup. Ct.* 1947), aff'd 136 *N.J.L.* 521 (*E.&A.* 1948), the Commissioner stated:

> "***[I]t is not a proper exercise of a judicial function for the Commissioner to interfere with local boards in the management of their schools unless they violate the law, act in bad faith (meaning acting dishonestly), or abuse their discretion in a shocking manner. Furthermore, it is not the function of the Commissioner in a judicial decision to substitute his judgment for that of the board members on matters which are by statute delegated to the local boards. Finally, boards of education are responsible not to the Commissioner but to their constituents for the wisdom of their actions.***" (at 13)

There are allegations herein concerned with the conduct and discretion of respondents and the Mount Olive Board. Respondents and the Board are not responsible to the Commissioner for the wisdom of such conduct, but to the electorate they represent. On a previous occasion in *Angelina Koch Downs et al. v. Board of Education of the District of Hoboken,* 1938 *S.L.D.* 515 (1932), aff'd State Board of Education 519, aff'd 12 *N.J. Misc. R.* 345 (1938 *S.L.D.* 528), aff'd 113 *N.J.L.* 401 (*E.&A.* 1934) (1938 *S.L.D.* 531), the State Board of Education had reason to consider the matter of "motives" which actuated members of local boards of education. It said in this regard:

> "***Can we go behind the record of the proceeding and the action of the Board to question the motives which actuated its members? The general principle appears to be against such proposition.
>
> 'So long as a *** board of education *** acts within the authority

> conferred upon *** it by law, the courts are without power to interfere with, control or review *** its action and decisions in matters involving the exercise of discretion, in the absence of clear abuse thereof ***, nor is the wisdom or expediency of an act, or the motive with which it was done, open to judicial inquiry or consideration, where power to do it existed.' 56 C.J., page 342***."
> (1938 *S.L.D.* at 526)

Such principles are still valid today and are applicable to the instant matter.

In summation, the Commissioner has carefully considered the allegations of conflict of interest and has determined them to be valid in part. In these respects the Commissioner directs the Board to consider forthwith the adoption of a policy which will bar an initial employment of a member of the immediate family of a Board member. He further directs the Board to refrain in the future from purchasing materials or services for the schools from members of the immediate family of members of the Board. In all other respects there has been a determination that there has not been persuasive evidence of conflict of interest. Accordingly, the Petition is dismissed.

COMMISSIONER OF EDUCATION

June 10, 1977

Marjorie L. Silverman,

Petitioner,

v.

Fred G. Burke, Commissioner of Education,
New Jersey Department of Education, and
James Van Zoeren, Director of Secondary Education,
Division of Curriculum and Instruction,

Respondents.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Marjorie L. Silverman, *Pro Se*

For the Respondents, William F. Hyland, Attorney General (Mary Ann Burgess, Deputy Attorney General, of Counsel)

For *Amicus Curiae* Education Law Center, Stephen Eisdorfer, Esq.

Petitioner, a twelfth grade pupil enrolled in Tenafly High School in the 1975-76 academic year, alleged in a Petition of Appeal filed on February 10, 1976, that a policy of the State Department of Education, hereinafter "Department," barred her high school from acceptance of credit toward graduation for work done in an accredited college. She avers that such policy constitutes an unjust and arbitrary exercise of the regulatory powers of the Department and should be set aside in order that she may be permitted to substitute a college course for one she is required to complete for her high school diploma. The Department maintains there is flexibility in its rules for local school districts to provide the individual consideration of pupil requests which petitioner seeks.

A hearing was conducted on March 11, 1976 at the State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner of Education. The Education Law Center, Newark, as *amicus curiae,* has filed a Brief to which petitioner subscribes. Documents which set forth disparate views on the subject of this Petition are also made part of the total record. Such documents were received (or were previously documented) from the New Jersey Education Association, the New Jersey School Boards Association, and the New Jersey Association of Secondary School Principals. The report of the hearing examiner is as follows:

The hearing in this matter was conducted as one of inquiry and not as an adversary procedure although petitioner, acting *pro se,* and representatives of the Department were present and testified. The facts of the matter are not in basic dispute.

Petitioner was enrolled as a full-time pupil in Tenafly High School in the fall semester of 1975 and at the conclusion of that semester she lacked only one academic course for graduation. She could have fulfilled the requirement by taking any one of four courses, including a course entitled "Contemporary Social Change" in the high school, but was required by high school rules to be enrolled full time. She requested instead that she be allowed to substitute either a course entitled "Introductory Sociology I" or "Contemporary Society I" to be given by Fairleigh Dickinson University in the Spring of 1976 as an equivalent course to the "Contemporary Social Change" course. Such request was refused by high school administrators. The basis for the refusal was an earlier letter of June 6, 1974 from Dr. William Shine, Assistant Commissioner of Education, to the Tenafly Superintendent of Schools in response to a query similar to the instant matter. The letter is cited in its entirety as follows:

> "In response to your letter of June 3, please be advised that the following conditions must be met for students to be able to receive a high school diploma:
>
> "1. The minimum number of credits established by local board of education and approved by the State Board of Education must be achieved.

"2. A two year course of study in United States History must be successfully completed.

"3. A course in health, safety and physical education taught for a minimum of 150 minutes per week each year the student was in school must be successfully completed.

"4. Other requirements established by the local board of education and approved by the State Board of Education must have been satisfied.

"If the students in question have completed these requirements there is no necessity for them to have been physically present in Tenafly High School for four years. You may not grant credit toward graduation for work done in college because these courses were not part of the curriculum approved by the State Board of Education for your school and they may, or may not, have been taught by certified teachers.

"I trust these answers satisfy the concerns which you express in your letter, but if they should not, please do not hesitate to contact me. If you are unable to contact me directly, Dr. Donald Beineman, Director of Secondary Education, should be able to help." (P-3)

The letter (P-3) states without equivocation that "work done in college" *may not* be granted as credit toward high school graduation. It was this statement which caused the Tenafly Superintendent to reject petitioner's request for a transfer of college credit and caused petitioner to initiate her Petition against the State Department rather than against the Tenafly Board of Education.

Petitioner testified at the hearing that her high school program in September 1975 was one directed toward early graduation but was "***not well-balanced***" (Tr. 5) and that as a result she had been forced to drop a half year history course. This created the need for one additional course to complete graduation requirements and petitioner testified she proposed to meet such requirement by the transfer of credit from the one college course. She testified that the high school refused such transfer and indicated the only possibility of a transfer of credit for college work was one to satisfy requirements for an equivalency diploma. She testified that in her opinion this diploma does not have the recognition of a regular diploma from Tenafly High School and that therefore she was "***being forced to attend high school***" in Tenafly to secure the regular one. (Tr. 7) Further, she testified that in order to take the one course she needed she was required to take a full program which included physical education, typing, child development, English and the history course. (Tr. 6)

Petitioner testified that she wished to use the credit for the college course toward both the high school diploma and a college degree (Tr. 11) and that other high schools did permit such use. (Tr. ll-12) She testified she thought this use was part of an "independent study program."(Tr. 12)

Petitioner's father also testified at the hearing with respect to petitioner's efforts to transfer college credit. He testified she had first been approved by the guidance department of Tenafly High School to take the college course for high school credit but that this approval had then been rescinded by other school officials. (Tr. 14) As a result, he testified, petitioner had enrolled in the full high school program, as well as in the college course, in order to insure graduation "***pending the decision by the Department***." (Tr. 15) His testimony was in other respects principally an oral argument against the apparently unequivocal rejection of the possibility of a transfer of college credits toward a high school diploma. (Tr. 18 *et seq.*) He testified:

> "***It seems to most independent people in the field of education that it restricts the modern tendency towards encouraging high school youngsters to blend into college, to aid them in obtaining the college education that they're looking for and represents a hangover of the past days when a four-year high school diploma was considered the end rather than a preparatory for college work.***" (Tr. 19)

He further testified that he believed a transfer of college credit toward a high school diploma was little different than the transfer of high school credits through advance placement programs, etc., to college degree credit. He averred there has been no "outcry" or harmful result against this latter practice and that individual differences in pupils demand a liberal attitude and flexibility in meeting their needs. (Tr. 19-20) He said:

> "***The decision [on appropriate school programs] should be left to the individual Board and the Guidance Department of the school involved.***" (Tr. 20)

Two officials of the Department testified with respect to the controverted policy and indicated that it was not as inflexible as the letter of Dr. Shine appeared to say it was. (P-3)

The former Director of Secondary Education, Division of Curriculum and Instruction, testified that prior to 1972 it was the position of the Department that college courses were not approvable pursuant to the Administrative Code requirements (*N.J.A.C.* 6, Education) but that in 1973 there was a "restructuring" of the "credit arrangement." (Tr. 26) He testified that such restructuring made it possible for pupils to pursue programs "which were different" and he specifically cited a section of the Code known as "Plan B." (Tr. 26) He said Plan B "***called for the opportunity for students to pursue independent study under the tutelage of a certified teacher with the permission of the school and to receive credit for it.***" (Tr. 26) He testified further that the Department had been "underwhelmed" by the response although he also said "***I think pursuit of it would certainly have satisfied the current petition.***" (Tr. 26)

The cited sections of the Administrative Code, *N.J.A.C.* 6, are reproduced in pertinent part as follows:

N.J.A.C. 6:27-1.4 Graduation

"(a) Subject to approval of the State Board of Education:

"1. Each four-year high school shall establish graduation requirements on the basis of either course credits, program completion of course credits and program completion:

"i. Regarding course credits, the rules include:

"(1) Each four-year high school shall establish a minimum set number of credits to be required for graduation, to be not less than 92.

"(2) Each senior high school shall establish a minimum set number which shall be not less than 69 credits to be completed in grades ten to twelve inclusive.

"(3) Six-year schools may base their graduation requirements on formal completion of grades nine to twelve or ten to twelve within the credit limits established for four-year or senior high schools respectively.

"(4) Credits toward graduation shall be awarded by the following method:

"(A) Credit shall be assigned on the same basis to all high school courses offered by the local board of education.

"(B) Credit may be assigned by each board of education for *curricular activities as defined in N.J.A.C. 6:27-1.13*.

"(C) The exception is that approved cooperation education programs shall receive a maximum of 15 credits per year.

"ii. Program completion procedures include:

"(1) Local boards of education may determine and establish a set number of curricular activities or programs for promotion and graduation purposes.

"(2) Programs shall be planned for individuals and/or a group based on specific instructional objectives.

"(3) The principal shall certify completion of curricular activities or programs based upon specified instructional objectives.

"(4) Group programs based on specific instructional objectives shall be approved in the same manner as other approved courses. Individual programs shall be on file in the local district subject to review by the Commissioner or his representative.

"2. Each junior high school shall establish a statement of policy governing graduation.

"(b) Diplomas shall be granted only to pupils who have completed fully the requirements for graduation as established in the curriculum approved by the State Board of Education, except as provided for seniors entering military or naval service.

"(c) Statutory requirements for United States history and health, safety and physical education shall be fulfilled by the system adopted by the local board of education.

"(d) These requirements shall be effective for all grades nine through twelve on or before September, 1975***." (*Emphasis supplied.*)

N.J.A.C. 6:27-1.13 Definitions

"The following words and terms, when used in this Chapter, shall have the following meanings, unless the context clearly indicates otherwise.

" 'Class period' means an instructional unit of time adopted by the local board of education ranging between 40 and 60 minutes daily or a weekly or monthly equivalent.

" '*Curricular activity*' means a learning activity approved by the local board of education for *individuals* or groups of students and expressed in terms of specific instructional objectives or class periods. *Examples of curricular activities are independent study programs, field experiences,* community service programs and competency-based evaluation."
(*Emphasis supplied.*)

Note: The referenced "Plan B" thus embraces not only *N.J.A.C.* 6:27-1.4 but also the definitions pertinent thereto contained in 6:27-1.13.

The former Director was joined in his understanding of the Department's policy by the present acting Director. (Tr. 31) The acting Director testified that Plan B could serve as the vehicle for a transfer of college credits toward a high school diploma, but he also stated that he was not "aware" of any instance in the State wherein such transfer had actually occurred. (Tr. 38) Both officials expressed serious reservations about further liberalization of Plan B, or an alternative plan, which would, in effect, remove the authority of local boards of education to supervise in its entirety a pupil's educational program. (Tr. 30, 32-33)

At the conclusion of the hearing, the hearing examiner indicated he would write to Tenafly High School and convey the possibility that Plan B could serve as a solution to the instant problem and such a letter was forwarded on March 17, 1976. The letter said that "***[college] credits may be accepted as part of an approved independent study program***" and offered a suggestion that talks with petitioner might prove to be helpful in clarification of the school's policy. Thereafter, however, the Superintendent and high school principal both addressed letters to petitioner's father which indicated that there were unresolved issues which respect to adoption by the local board of an independent study program and that petitioner would be required to complete her full schedule at the high school in order to secure the diploma.

On May 12, 1976, petitioner advised the hearing examiner that the appeal remained viable. On June 7, 1976, petitioner's father addressed a letter to the hearing examiner which said, *inter alia,* that petitioner had completed her course at Fairleigh Dickinson University with a grade of "B." It is presumed that petitioner thereafter also completed her high school program and received her diploma.

Thus, in a factual sense the Petition is moot since credit for the college course is no longer required by petitioner as an integral part of the credit required for a Tenafly High School diploma. The issues raised herein are important ones, however, and the hearing examiner recommends consideration of them.

The principal issue, simply stated, is whether the policy position of the Department with respect to transfer of college credit toward a high school diploma is a proper one, founded on duly promulgated regulations of the State Board, or one which represents an inappropriate exercise of authority, and is illegal.

The Brief of *amicus* and petitioner, hereinafter "petitioner's Brief," cites five principal points in support of an argument that the Department's policies with respect to the acceptance of college credits toward a high school diploma as expressed in P-3, *ante,* are an improper interpretation of State Board regulations (*N.J.A.C.* 6) and inconsistent with statutory and constitutional mandates. Of principal importance is the contention that a literal interpretation of the regulations embodied in *N.J.A.C.* 6:27-1.4 *et seq.* clearly indicates that local school districts are already authorized to "***grant high school credit for college coursework in appropriate cases.***" (Petitioner's Brief, at p. 6) In this view the regulations as revised in 1973 must be interpreted in their broadest and most flexible terms as a reflection of an attempt at liberalization and "***to escape the inflexibility of the prior requirements.***" (Petitioner's Brief, at p. 7) Further, petitioner argues that the interpretation of the regulations by Dr. Shine (P-3) must be labeled as an "informal policy" which must "***give way before the authority of properly promulgated regulations, for such regulations have the force of law.***" (*Id.*, at p. 5)

Petitioner also avows that the New Jersey Constitution, and particularly

the Public School Education Act of 1975 (*N.J.S.A.* 18A:7A-1 *et seq.*), mandates a tailoring of educational programs to individual, specialized needs of pupils and that a rigid policy which limits opportunity negates such mandates. She then avers, *arguendo,* that even if this were not so, the reasons advanced by P-3 in support of the policy are an insufficient basis for its continuance. In particular she avers that the certification status of a college instructor is irrelevant and imposes a standard not found elsewhere in statute or regulation, with respect to pupils in cooperative education programs (*N.J.A.C.* 6:42-2.1), private music instruction (*N.J.A.C.* 6:27-1.5), and instruction by various branches of the armed forces. (*N.J.A.C.* 6:27-4.1)

Petitioner's Brief avers she does not suggest that high school doors must be "flung open" to all submissions of college courses for high school credit but that reasonable regulations should be substituted for what she regards as arbitrary and illegal ones. She suggests the following guidelines be established:

> "1. A student may receive credit toward high school graduation for college coursework only if:
>
> > "a. the college course is part of an educational plan based upon specific educational objectives formulated by the student in consultation with his or her guidance counselor and parents;
> >
> > "b. the granting of such credit is approved in advance by the principal of the high school or his delegee (which may be the student's guidance counselor);
> >
> > "c. the college course is a regular part of the curriculum of an accredited college, community college, junior college, or university;
> >
> > "d. the student achieves a satisfactory grade in the college course.
>
> "2. Except in extraordinary cases, only twelfth grade students may receive high school credit for college courses.
>
> "3. Except in extraordinary cases, college coursework may be substituted for no more than the equivalent of one semester of high school coursework.
>
> "4. The local board of education and the State Board of Education may specify high school courses or categories of courses for which college coursework may not be substituted.
>
> "5. The principal or delegee may, but need not, require that, in appropriate cases, a student taking a college course for high school credit do so under the general supervision of a member of the teaching staff, who may review papers, examinations, and projects done by the student in connection with the college course." (Petitioner's Brief, at pp. 19-20)

Petitioner's Brief also relies on an opinion of the Attorney General which

was advanced on September 5, 1973 in response to a request concerned with the application of college credit toward high school graduation. (R-1) Such opinion states that even under then existing regulations local high schools were empowered to recognize college courses as "elective subjects" and that earned credits from them "***may be given by a local secondary school as part of its curriculum which has been approved by the State Board of Education.***" (R-1, at p. 1) The opinion further states with respect to *N.J.A.C.* 6:27-1.4 and 1.13 as amended effective September 20, 1973:

> "***local boards of education may determine and establish graduation requirements on the basis of either course credits, program completion, or a combination of both. Pursuant to graduation requirements on the basis of program completion, local boards may determine and establish a set number of curricular activities *** or programs for promotion and graduation purposes planned for students on the basis of specific 'instructional objectives.' This system obviates the need to affix credit accumulation as a prerequisite to graduation and the contemplated college-level work would fit within this broad prescription. If the high school elects to establish graduation requirements on the basis of course credits under revised *N.J.A.C.* 6:27-1.4(a)(1), credit may still be awarded for college level courses.***"

On prior occasions organizations other than *amicus* have expressed interest in proposed changes in the regulations with respect to the requirements for a high school diploma, although such organizations were not part of the instant litigation. The occasions for a prior expression of interest were the introduction of Senate Bill 1110 in 1974 and of Assembly Bill 2064 in 1975 which were specifically concerned with a credit of college work toward a high school diploma. The organizations which expressed an interest on those occasions were the New Jersey School Boards Association, the New Jersey Association of Secondary School Principals and the New Jersey Education Association. All three groups, in letters to the Department or in position papers, appear to endorse the present regulations of the Department with respect to independent study programs and advanced placement or enrichment courses as sufficiently flexible provisions adequate to the needs of pupils. They oppose change in such regulations which might threaten the integrity of the high school diploma or cause the supervision of its award to pass out of the jurisdiction of the local board of education.

The hearing examiner has considered all such arguments and opinions, together with the regulation of the State Board, and observes that the focal point of the instant controversy is the letter P-3, *ante,* which, on its face, narrowly construed the regulations to bar all credit for college course work toward the high school diploma. When Tenafly High School officials were apprised by letter, however, that such approval was possible under an independent study program, the time limitation and complexity of approval were such that in practical terms the flexibility of the State regulation was of no benefit to petitioner. Approval for transfer of college credit to a high school diploma was not secured. She was required to complete the full high school semester.

Thus, as far as petitioner was concerned, there was no flexibility in the regulations sufficient to accommodate her minimal request, namely, the transfer of credits from one college course toward completion of the high school diploma. Nor are such regulations given a generally flexible practical interpretation by other local school officials since as the former Director of Secondary Education testified the Department has received few responses to Plan B. The testimony that there was no known instance wherein college credit had been used toward a regular high school diploma illustrates the point.

Accordingly, the hearing examiner recommends that the Commissioner direct a survey of local school districts to determine the reasons for the lack of interest in a flexible approach for high school curricular program approvals, which is clearly available in the rule provisions for Plan B. The Commissioner may determine that Plan B requires clarification in the regulations. The Plan has apparently been ineffective in its present form for a number of reasons not developed by the instant litigation. In any event, it did not serve to provide a flexible alternative for Tenafly school officials or petitioner with respect to her reasonable requests. A review of the whole of the rule provisions for Plan B is in order.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and the exceptions thereto filed by petitioner and *amicus* pursuant to *N.J.A.C.* 6:24-1.17(b). Such exceptions do not take issue with the basic findings or recommendations of the hearing examiner but urge the Commissioner "***to decide the specific issues raised by this case as mandated by N.J.S.A. 18A:6-9.***" (Exceptions of *Amicus,* at p. 3) Such issues are primarily concerned, as stated by the hearing examiner, with whether the policy of the Department with respect to transfer of college credits toward a high school diploma is a proper one legally founded in the regulations of the State Board of Education. Petitioner and *amicus* contend the policy is founded on an improper interpretation of such regulations.

The Commissioner does not agree. He determines, instead that the Department's policy with respect to the transfer of college credits toward a high school diploma is a flexible one in conformity with the rules of the State Board and that such policy best preserves the discretion of local boards of education with respect to graduation requirements. Within the parameters of the referenced "Plan B" local school districts may conduct approved independent study programs which may include college course credit. Such a program in Tenafly High School might well have made it possible to comply with petitioner's request.

The Commissioner further determines, however, that a decision with respect to the establishment of such a program in Tenafly High School or in other secondary schools of the state properly rests with local boards of education pursuant to law. *N.J.S.A.* 18A:11-1 The discretion of local boards in

such fundamental matters should not be overturned by the Commissioner absent evidence of gross abuse and there is no such evidence herein.

The Commissioner concurs with that recommendation of the report of the hearing examiner which is concerned with curricular program approvals and particularly with approvals pursuant to the referenced "Plan B." The flexibility of such plan should result in a broader utilization by local boards of education.

Accordingly, the Commissioner directs that a study of the rule provisions contained in *N.J.A.C.* 6:27-1.4 be conducted by the Division of School Programs to determine the efficacy of the provisions toward a maintenance of flexibility in the requirements for high school graduation.

The Petition is otherwise dismissed.

COMMISSIONER OF EDUCATION

June 16, 1977

Alfonse Rossi,

Petitioner,

v.

Board of Education of the City of Newark and Stanley Taylor, Acting Executive Superintendent, Essex County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Lipari & Ferrante (Joseph A. Ferrante, Esq., of Counsel)

For the Respondents, Pickett & Jennings (Robert T. Pickett, Esq., of Counsel)

Petitioner, a tenured teaching staff member in the employ of the Board of Education of the City of Newark, hereinafter "Board," alleges that he has acquired a tenure status as a school principal and that his transfer from such position to one of lesser rank was contrary to law. The Board denies that petitioner has acquired a tenure status as a principal and maintains its actions with respect to his transfer were legally correct.

A hearing was conducted on May 25, 1976 at the office of the Essex

County Superintendent of Schools, East Orange, by a hearing examiner appointed by the Commissioner of Education. Subsequently, Briefs were filed by the parties. The report of the hearing examiner is as follows:

Certain of the facts pertinent to the instant matter are not in dispute and may be recited succinctly. Petitioner was first employed by the Board in 1961 as a permanent substitute teacher and in 1964 he acquired a tenure status as a teacher. (Tr. 6-33) Such employment continued without change or interruption until September 1971 when he was assigned to duties as an acting vice-principal. (Tr. 9-34) He performed such duties until February 1, 1973, when he was appointed by the Board to the position of Acting Principal of East Side High School. (Tr. 9, 36) His service in this position continued thereafter for a period of two years, eight months to the date of October 2, 1975, when his assignment was changed by transfer at the direction of the Superintendent of Schools and/or Board to the performance of duties in the Board's central offices. It is this transfer which petitioner now disputes.

Petitioner's period of two years, eight months' service as Acting Principal was as a replacement for a former school principal, Mr. Goff, who was first granted a leave for reasons of physical health effective February 1, 1973. Such leave was initially granted by the Board to September 1, 1973, but was later extended to January 31, 1974. (Tr. 57, 59) Subsequent to that date the status of the former principal was evidently changed to that of an employee on sick leave although his exact status is not clearly delineated in the record. (See Tr. 63-68 and R-9.) In any event, the former principal either retired or indicated he would retire in May 1975, and such retirement was acknowledged by the personnel office of the Board in December 1975. (R-4) The precise date of retirement is not clearly set forth in the total record although both counsel stipulated at the hearing that it actually occurred on May 1, 1975. (Tr. 99) Counsel for the Board now avers that "***until his retirement in December 1975, Mr. Goff was the principal of East Side High School." (Board's Brief, at p. 3) (See also Tr. 69 *et seq.*)

Petitioner testified at the hearing that during all of the period from February 2, 1973 to October 2, 1975, he performed all the duties, and assumed all of the responsibilities, of principal of East Side High School. (Tr. 10, 36, 49) He testified that he was told on October 2, 1975 by the Superintendent that he would be continued as a "principal" but would thereafter be "***assigned to the central office." (Tr. 15, 48) (It is stipulated that his duties in the central office are not "comparable" to those of a principal.) (Tr. 15) Petitioner testified that he had not been assigned administrative duties of any kind in the central office and in fact that he had no definite meaningful, regular assignments. (See Tr. 22 *et seq.*) He further testified that he now reports to a director rather than to an Assistant Superintendent. (Tr. 26)

The Superintendent testified that petitioner's work as Acting Principal had been rated satisfactory (Tr. 75) except that on one recent occasion he had visited petitioner's school and had told petitioner that "***I was not happy with what I had seen.***" (Tr. 79) The Superintendent testified that in August 1975, he recommended petitioner's continuation as "Acting Principal" pending a

determination with respect to the status of the former principal (Mr. Goff) but that thereafter "***it was discovered he [Mr. Goff] would not be returning.***" (Tr. 78) The Superintendent testified that it was then decided to interview candidates for the position and finally determined to recommend a candidate other than petitioner for permanent appointment. (Tr. 79) It was this candidate who was then employed by the Board effective October 2, 1975, and petitioner was notified by the Superintendent that he was to be transferred. (Tr. 88) The Superintendent testified that petitioner was to be assigned to duties in the central office in order "***that a person with administrative background in a secondary school could lend [such background] to the curriculum area." (Tr. 90) He testified that it was his belief that petitioner was receiving a principal's salary and that his work hours were those of a principal. (Tr. 89) The Superintendent testified further that he thought he had authority to transfer or "assign personnel" (Tr. 86) and in a memorandum of October 23, 1975 to an Assistant Executive Superintendent he said that petitioner

> "***is to be administratively assigned to the Division of Curriculum and Instruction under the supervision of Mrs. Gladys Francis. No Board action is required for this assignment." (P-2)

It was originally stipulated at the conference of counsel that petitioner had tenure and it was agreed that the only issue which remained herein was one concerned with the legality of petitioner's transfer. The stipulation with respect to tenure was withdrawn at the hearing and is now an issue.

The Board now avers that petitioner's service as a principal was at all times that of a person in an acting capacity and that tenure does not accrue as the result of such service. It cites the statute *N.J.S.A.* 18A:16-1.1 in support of this avowal. The statute is recited in its entirety as follows:

> "In each district the board of education may designate some person to act in place of any officer or employee during the absence, disability or disqualification of any such officer or employee subject to the provisions of section 18A:17-13.
>
> "The act of any person so designated shall in all cases be legal and binding as if done and performed by the officer or employee for whom such designated person is acting but no person so acting shall acquire tenure in the office or employment in which he acts pursuant to this section when so acting."

Petitioner maintains that the legislative intent of the statute is to "***permit the Board of Education to appoint someone in an emergent situation to replace someone who is immediately ill or unable to perform the functions of a particular office.***" (Petitioner's Brief, at p. 9) He avers that the fact that Mr. Goff, former principal, never did return to his post of duty is sufficient proof that petitioner's service was not the "temporary" service meant to be excluded by the statute but the kind entitled to be counted toward a tenure accrual pursuant to *N.J.S.A.* 18A:28-5 and 6. These statutes are recited in pertinent part as follows:

N.J.S.A. 18A:28-5

"The services of all teaching staff members including all teachers, principals, assistant principals, vice principals, superintendents, assistant superintendent, and all school nurses *** and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect, shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title, after employment in

(a) three consecutive calendar years, or any shorter period which may be fixed by the employing board, for such purpose; or

(b) three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or

(c) the equivalent of more than three academic years within a period of any four consecutive academic years;

provided that the time in which such teaching staff member has been employed as such in the district in which he was employed at the end of the academic year immediately preceding July 1, 1962, shall be counted in determining such period or periods of employment in that district or under that board but no such teaching staff member shall obtain tenure prior to July 1, 1964 in any position in any district or under any board of education other than as a teacher, principal, assistant superintendent or superintendent, or as a school nurse***."

N.J.S.A. 18A:28-6

"Any such teaching staff member under tenure or eligible to obtain tenure under this chapter, who is transferred or promoted with his consent to another position covered by this chapter on or after July 1, 1962, shall not obtain tenure in the new position until after:

(a) the expiration of a period of employment of two consecutive calendar years in the new position unless a shorter period is fixed by the employing board for such purpose; or

(b) employment for two academic years in the new position together with employment in the new position at the beginning of the next succeeding academic year; or

(c) employment in the new position within a period of any three consecutive academic years, for the equivalent of more than two academic years;

provided that the period of employment in such new position shall be included in determining the tenure and seniority rights in the former position held by such teaching staff member, and in the event the employment in such new position is terminated before tenure is obtained therein, if he then has tenure in the district or under said board of education, such teaching staff member shall be returned to his former position at the salary which he would have received had the transfer or promotion not occurred together with any increase to which he would have been entitled during the period of such transfer or promotion."

Petitioner cites a number of decisions of the Commissioner in support of this view. *Robert F. X. Van Wagner v. Board of Education of the Borough of Roselle, Union County,* 1973 *S.L.D.* 488; *Arthur L. Page v. Board of Education of the City of Trenton, Mercer County,* 1975 *S.L.D.* 644, aff'd State Board of Education 1976 *S.L.D.* 1159; *George Gamvas v. Board of Education of the Township of Lakewood, Ocean County,* 1976 *S.L.D.* 509; *Michael J. Keane v. Flemington-Raritan Regional Board of Education, Hunterdon County,* 1970 *S.L.D.* 176 Petitioner further avers that his transfer was illegal since there was no specific action by the Board to effect it.

The hearing examiner has considered all such facts and arguments and sets forth the following findings of fact and conclusions of law:

1. Petitioner did from the date of February 1, 1973 to the date of October 2, 1975, a period of two years, eight months, perform all the duties of principal of East Side High School with full certification as a principal and at the direction of the Board.

2. Such service was at all times performed under a title of "Acting Principal," and at least until May 1975 the status of the former principal was that of a teaching staff member on leave of absence.

3. In May 1975, the former principal retired although such retirement may have been unknown to the Board. (Stipulation of Facts; Tr. 99)

4. Petitioner's last notification of reemployment as Acting Principal occurred thereafter as a result of an action of the Board on August 26, 1975. (PR-1)

5. On October 2, 1975, petitioner was informed that he would be transferred to a position in the Board's central offices, which he regarded as a promotion, and which he accepted.

6. Subsequent to October 2, 1975, petitioner has been afforded all the primary benefits of a principal in the Board's employ, but has not had a clearly delineated job description and has performed many duties of a clerical, rather than professional, nature.

The issue for determination is a unique one without specific case law precedence in the context of *N.J.S.A.* 18A:16-1.1; namely, whether such statute

bars a tenure accrual which would otherwise be clear and unambiguous pursuant to the statutory prescription of *N.J.S.A.* 18A:28-5 and 6. If it does, a period of two and one half years during which petitioner served as principal in fact of East Side High School must be set aside as inapplicable to a tenure entitlement, and such service must be held to accrue only to petitioner's prior tenure as a teacher. If it does not so apply, petitioner's entitlement to a tenure status as a principal is clear and he has earned the right to the protection the statutes afford.

The hearing examiner concludes that such issue depends for determination on these sections of *N.J.S.A.* 18A:16-1.1 which provide that local boards of education "***may designate some person to act in place of any officer or employee***" but that "***no person so acting shall acquire tenure in the office or employment in which he acts***." The statutory prescription is clearly directed at the need to maintain functional school operations irrespective of employee absence and to insure that the entitlement to accrue service toward a tenured status is afforded to only one person in a specific position at one time. Thus, conflicting claims to such positions are avoided. The claimant with a position title prefaced by the modifier "acting" is clearly excluded from an entitlement to count such time toward a tenure accrual until or unless a vacancy occurs in the position while the service continues. It has already been held that performance of the duties of an office either as a so-called "substitute" or in an acting capacity begins to accrue or accrues if the position of employment is otherwise vacant. The title affixed to a position may not in such circumstances abort a tenured entitlement. *Van Wagner, supra; Juanita Zielenski v. Board of Education of the Town of Guttenberg, Hudson County,* 1970 *S.L.D.* 202, rev'd State Board of Education 1971 *S.L.D.* 664; aff'd Docket No. A-1357-70 *New Jersey Superior Court, Appellate Division,* February 16, 1972 (1972 *S.L.D.* 692) Petitioner in the instant matter cannot advance such a claim since at all times, at least to the month of May 1975, his service as principal was rendered in an "acting" capacity and his service subsequent to that date as principal does not meet the precise requirements for a tenure accrual in a new position. *N.J.S.A.* 18A:28-6 Neither does his service as vice-principal entitle him to tenure in that position.

Accordingly, pursuant to the rules with respect to seniority (*N.J.A.C.* 6:3-1.10) petitioner is entitled only to add his service as vice-principal and as acting principal to his tenured status as teacher and there is no merit in the instant Petition. The hearing examiner recommends that it be dismissed.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record in the instant matter, including the report of the hearing examiner, and observes that no objections, exceptions or replies thereto have been filed by the parties. The principal finding of the report is that petitioner had served the requisite period for a tenured accrual as a school principal but in an "acting" capacity and that such service is not creditable toward tenure. The finding is precisely grounded in the limitations set

forth in the statute *N.J.S.A.* 18A:16-1.1 and it is this statute which bars petitioner's claim. The Commissioner so holds and concurs in all respects with the report of the hearing examiner.

Accordingly, the Petition is dismissed.

COMMISSIONER OF EDUCATION

June 23, 1977

Benjamin Mrozowski,

Petitioner,

v.

Board of Education of the Camden County Vocational and Technical High School, Camden County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, William C. Gotshalk, Esq.

For the Respondent, Hyland, Davis and Reberkenny (William C. Davis, Esq., of Counsel)

Petitioner, a janitor employed since 1970 by the Camden County Vocational and Technical School Board of Education, hereinafter "Board," alleges that he was improperly discharged on January 16, 1976 by action of the Board in violation of his tenured status.

The Board contends that petitioner's tenure claim is without merit and that it has performed each and every duty owed to petitioner. This matter is before the Commissioner of Education on a Motion for Summary Judgment by the Board based on the pleadings, exhibits and Briefs.

Petitioner commenced his employment with the Board on November 16, 1970 by way of a contract for the period November 16, 1970 to June 30, 1971. (Exhibit A-1)

For succeeding years petitioner continued in the employ of the Board, entering into separate contracts of employment commencing on July 1 and terminating on June 30 for each of the years 1971-72, 1972-73, 1973-74,

1974-75 and 1975-76. (Exhibits A-2 through A-6) The Board ratified each yearly contract as set forth in its official minutes. (Exhibits B-2 through B-6)

Each of the employment contracts contains the following provision:

> "It is agreed by the parties hereto that this contract may be terminated by either party, at any time, by giving to the other party two weeks' written notice of intention to terminate same."

At its meeting of December 18, 1975, the Board adopted a resolution authorizing the termination of petitioner's employment effective January 16, 1976, pursuant to the terms of the contract. (Exhibit C) Notification in writing was furnished petitioner by letter of January 5, 1976. (Exhibit D)

Petitioner contends that the Board had no right to discharge him because he had acquired a tenure status. (Petitioner's Brief, at pp. 4-5) Petitioner admits that there is authority for the Board's contention that one who is employed under an annual contract with fixed and determinable limits does not acquire a tenure status. (Petitioner's Brief, at p. 4)

Petitioner urges that another philosophy be employed for long term employees and cites *Sullivan v. McOsker,* 84 *N.J.L.* 380 (*E.&A.* 1912):

> "Since tenure statutes are intended to secure efficient public service by protecting public employees in their employment, the widest possible range should be given to the application of the law."
>
> (Petitioner's Brief, at p. 4)

Petitioner contends that a liberal interpretation of the law would not permit a man to be kept on temporary status indefinitely. (Petitioner's Brief, at p. 4) He further states he has been appointed six different times and is enrolled in the State pension system, which connotes permanency of employment. (Petititioner's Brief, at p. 5)

The Board alleges that it has satisfied its duty to petitioner and contends that, where a public school janitor accepts an appointment for a fixed time, tenure does not accrue. (Board's Brief, at p. 3) The Board, in support of its contention cites *Frank Giandomenico v. Board of Education of the Township of Winslow, Camden County,* 1975 *S.L.D.* 258, aff'd Docket No. A-2970-74 New Jersey Superior Court, Appellate Division, November 9, 1976 (1976 *S.L.D.* 1139)

The Commissioner agrees. *N.J.S.A.* 18A:17-3 provides as follows:

> "Every public school janitor of a school district shall, *unless he is appointed for a fixed term,* hold his office, position or employment under tenure during good behavior and efficiency and shall not be dismissed or suspended or reduced in compensation***." (*Emphasis added.*)

In *Giandomenico, supra,* it is stated:

> "***Petitioner's claim to a tenure status is contrary to a long series of decisions rendered by the Commissioner, the State Board of Education, and the New Jersey Courts. Without exception, the decisions hold that tenure for janitors, unlike professional employees, is a matter of personal privilege which may be waived by the acceptance of employment for a definite term. Janitors may be employed without term, in which case they may not be dismissed without a showing of good cause. If, however, as in this instance, a janitor is appointed for a specific term, and he accepts the employment on that basis, no rights survive the expiration of the fixed term.***" (at 259)

Also see *Horan v. Orange,* 58 *N.J.L.* 533 (*Sup. Ct.* 1895); *Hardy v. City of Orange,* 61 *N.J.L.* 620 (*E.&A.* 1898); *Arthur Lynch v. Board of Education of the Town of Irvington, Essex County,* 1938 *S.L.D.* 703 (1934), aff'd State Board of Education 705 (1934); *James Calverley et al. v. Board of Education of the Township of Landis, Cumberland County,* 1938 *S.L.D.* 706 (1931), aff'd State Board of Education 709 (1932); *Edward Ratajczak v. Board of Education of the City of Perth Amboy, Middlesex County,* 1938 *S.L.D.* 709 (1934), aff'd State Board of Education 711, aff'd 114 *N.J.L.* 577 (*Sup. Ct.* 1935), aff'd 116 *N.J.L.* 162 (*E.&A.* 1936); *John J. Williams et al v. Board of Education of the Town of West Orange, Essex County,* 1938 *S.L.D.* 714 (1933), aff'd State Board of Education 718 (1933); *Joseph McGarry et al. v. Board of Education of the City of Paterson, Passaic County,* 1938 *S.L.D.* 732 (1925), aff'd State Board of Education 735 (1926); *Isaiah Shepherd v. Board of Education of the Borough of Seaside Heights, Ocean County,* 1938 *S.L.D.* 737 (1935), aff'd State Board of Education 739 (1936), aff'd New Jersey Supreme Court as *Board of Education of Seaside Heights v. Shepherd,* 15 *N.J. Misc.* 394, aff'd 119 *N.J.L.* 413 (*E.&A.* 1938); *Frederick H. Kriser, Thomas Clark et al. v. Board of Education of the City of Trenton, Mercer County,* 1939-49 *S.L.D.* 61 (1937), aff'd State Board of Education 64 (1938), modified on other grounds (122 *N.J.L.* 323 (*Sup. Ct.* 1939); *David Whitehead v. Board of Education of the Town of Morristown, Morris County,* 1949-50 *S.L.D.* 65; *James Mignone v. Board of Education of West Orange, Essex County,* 1965 *S.L.D.* 104; *Frederick Olley v. Board of Education of Southern Regional High School, Ocean County,* 1968 *S.L.D.* 20; *John Gilliam v. Board of Education of the Toms River Regional School District, Ocean County,* 1974 *S.L.D.* 540, rem. State Board of Education 1975 *S.L.D.* 301, decision on remand 302.

Further in *Giandomenico, supra,* the Commissioner stated:

> "***In view of the fact that petitioner was appointed in each instance as a janitor by separate actions of the Board for a specific period of time, *** the Commissioner finds that by accepting such employment for a specific period of time petitioner waived any rights to the acquisition of tenure.***" (at 260)

The Commissioner finds no merit in petitioner's argument that enrollment in the State pension plan connotes permanency of employment, nor does the mere multiplicity of appointments.

In the instant matter, each of the Board's six appointments of petitioner to the position of janitor was by a contract for a determinate length of time and each contract contained a termination clause. Petitioner's employment was terminated by the Board in accordance with the precise condition expressed in the contract.

For the aforementioned reasons the Commissioner finds that petitioner has no claim to a tenure status and that his employment was properly terminated by the Board. Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

June 23, 1977

Wanda Goldsworthy,

Petitioner,

v.

Board of Education of the Borough of Somerville, Somerset County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

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

For the Respondent, Richard J. Murray, Esq.

Petitioner, formerly employed as a teaching staff member by the Board of Education of the Borough of Somerville, Somerset County, hereinafter "Board," alleges that the Board failed to give her the real reasons why she was not reemployed for 1975-76. Petitioner requests immediate reinstatement to her former employment with the Board. The Board denies the allegations and asserts that its actions with respect to petitioner's non-reemployment are in all respects proper. The Board moves for dismissal of the matter, opposed by petitioner, on the grounds that petitioner has failed to state a cause of action upon which relief could be granted.

The Motion to Dismiss is referred directly to the Commissioner of Education for adjudication on the record, including the pleadings, an affidavit and letter memoranda of the parties in support of their respective positions on the Motion.

The Commissioner observes that the Court, in *Di Cristofaro v. Laurel Grove Memorial Park,* 43 *N.J. Super.* 244 (*App. Div.* 1957), held with respect to the conditions necessary for a matter to be disposed of by way of a Motion to Dismiss that:

> "***First, it is to be noted that on such a motion [to dismiss] as this – one which, if successful, means sudden death to the action – the court searches the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary.***"
> (at 252)

The Commissioner observes with respect to petitioner's complaint herein that she had been employed as a teaching staff member by the Board during the 1972-73, 1973-74, and 1974-75 academic years. Petitioner was notified during the spring of 1975 by her immediate supervisors that her employment for 1975-76 would not be continued. The supervisors explained that this action was necessitated by the return of a tenured teaching staff member who had been on a maternity leave of absence and who had been assigned the same grade level as petitioner. Petitioner, by letter dated April 25, 1975, requested a formal hearing by the Board into the stated reason for her non-reemployment and advised the Board that:

> "***As of this date, I have not received any individual reasons as to why I was not rehired. A teacher returning from maternity is an indication of a need for a teacher to be replaced, but it does not fulfill guidelines as to why I particularly was not rehired. All of my evaluations are above average and both of my immediate supervisors have indicated that they are satisfied with my teaching performance. Therefore, I have to assume there are other reasons why I did not receive a contract since teachers with less experience have received a contract.***" (C-5)

The Board, by letter from its counsel dated May 19, 1975, advised petitioner:

> "***It is the Board's decision not to grant you a formal hearing as you requested; however, I am instructed to inform you that the reason for your non-retention [for 1975-76] is that a tenured teacher is returning from maternity leave at your grade level.***" (C-1)

The Board defends its refusal of petitioner's request for a formal hearing on the grounds that no requirement for any kind of hearing existed at that time.

The Commissioner notices that teaching staff members whose employment is not renewed are not entitled to a formal adversary hearing before the employing board of education. Such affected employees are, however, entitled to an informal appearance before the board. *Donaldson v. Board of Education of the City of North Wildwood, Cape May County,* 65 *N.J.* 236 (1974) Petitioner was entitled to an informal appearance before the Board. The purpose of such an informal appearance is to provide the teaching staff member the opportunity to

refute the stated reasons for non-reemployment thereby attempting to dissuade the board from its determination not to offer reemployment. *Barbara Hicks v. Board of Education of the Township of Pemberton, Burlington County,* 1975 *S.L.D.* 332

The Commissioner observes that the Board did grant petitioner an informal opportunity to be heard during the last week of June 1975 subsequent to which petitioner was advised by letter (C-3) dated June 30, 1975, that the Board had affirmed its earlier decision not to reemploy her for 1975-76. Thus, the procedural error originally made by the Board by its refusal to grant petitioner an informal opportunity to be heard, notwithstanding her request for a formal hearing, was corrected.

Petitioner does not allege that the Board violated the provisions of *N.J.S.A.* 18A:27-10 which require that each nontenure teaching staff member whose employment is not to be renewed be given written notice of non-reemployment by April 30. Rather, petitioner does allege that the Board simply did not provide her reasons for her non-reemployment as required by *N.J.S.A.* 18A:27-3.2. Petitioner contends the Board's stated reason for her non-reemployment, that a tenured teaching staff member returned from a maternity leave of absence, is not the real reason. Petitioner asserts that she became *persona non grata* to someone in the employ of the Board for some unknown reason.

Petitioner grounds this allegation on the fact that, subsequent to her non-reemployment by the Board, she applied for a teaching position in the employ of the Board of Education of the Bridgewater-Raritan Regional School District, Somerset County, hereinafter "Bridgewater Board." A member of the Bridgewater Board, D.H., attests in her affidavit (C-6; C-6A) that petitioner's name had been included for appointment to a teaching position on an agenda she had received. D.H. also attests that petitioner's name had been removed from the agenda by the time the regular public meeting at which she was to be appointed was conducted. D.H. attests that she was informed by the then Superintendent of the Bridgewater-Raritan Schools that petitioner's references did not measure up to the standards of the Bridgewater-Raritan School District. Consequently, the decision was made not to employ petitioner.

The Board argues in support of its Motion to Dismiss that petitioner's stated claim must be found to be more properly against the Bridgewater Board. The Board also asserts that it alone has the discretion to select from among its nontenure teaching staff members those whose employment shall be continued. In the instant matter, the Board argues that while petitioner may be a good teacher there were other nontenure teachers in its employ who were better qualified. Consequently, when the tenure teacher returned from maternity leave and a vacancy had to be created, petitioner was selected as the one whose employment would not be continued.

The Commissioner has considered the total record herein and finds that while the stated reason of the Board for petitioner's non-reemployment is not as

precise as perhaps it could have been, the reason does meet the requirements of *Donaldson, supra,* and *N.J.S.A.* 18A:27-3.2. The fact that petitioner's references do not measure up to the expected standards of the Bridgewater Board does not, in the Commissioner's judgment, give rise to a claim against the Board herein. The Commissioner so holds.

Petitioner does not provide an offer of proof that the Board failed to renew her employment for constitutionally proscribed reasons or in violation of her statutory rights. Accordingly, the Commissioner finds and determines that petitioner has failed to state a cause of action upon which relief could be granted. The Board's Motion to Dismiss is hereby granted. The Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

June 23, 1977

Alice W. Cardman and Millburn Education Association,

Petitioner,

v.

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

Respondent.

COMMISSIONER OF EDUCATION

DECISION

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

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

Petitioner, formerly employed as a teaching staff member by the Board of Education of the Township of Millburn, hereinafter "Board," alleges that the Board improperly discriminated against her because of her age in its determination not to reemploy her for the 1975-76 academic year. Petitioner demands judgment in the form of immediate reinstatement to her former teaching position. The Millburn Education Association, hereinafter "Association," joins petitioner in her complaint. The Board denies the allegations and asserts that its action with respect to petitioner's non-reemployment is in all respects proper and legal.

The matter is referred directly to the Commissioner of Education for adjudication on the record, including the pleadings, affidavits, exhibits, and letter memoranda of the parties in support of their respective positions.

Petitioner, who possesses certification as an elementary school teacher (C-1), was employed by the Board as a teaching staff member for the 1972-73, 1973-74 and 1974-75 academic years. Petitioner was notified by letter dated April 15, 1975 from the Superintendent of schools that her employment would not be continued for the 1975-76 academic year. The Superintendent explained the reason for this determination by the Board as follows:

> "***Our declining enrollment has caused the elimination of several positions. This fact, combined with the return of tenured teachers from leaves of absence, has created a situation of excess teaching staff members. We do anticipate the possibility that additional retirements, resignations and requests for leaves of absence will come to our attention during the coming weeks. As vacancies occur we will post them and will be happy to consider you for positions for which you qualify and express an interest.***" (J-1)

Petitioner asserts that subsequent to her receipt of this letter from the Superintendent, vacancies have occurred in positions for which she is qualified. Petitioner explains that while she has applied for the vacant positions, the Superintendent has failed to recommend and the Board has failed to reemploy her as a teaching staff member. Petitioner asserts that the Board's action in not appointing her to any of the vacancies which have occurred is "***motivated by discriminatory considerations of [her] age." (Petition of Appeal, Par. 4)

With respect to petitioner's allegation that the Board improperly discriminated against her because of her age, the Commissioner observes that petitioner's chronological age is not revealed in the record. There are no facts alleged in the Petition which show how petitioner arrived at that conclusion. The Commissioner will, nonetheless, review the actions of the Board with respect to petitioner's non-reemployment.

The record shows that petitioner's final evaluation (P-1) by the principal of her school for the 1974-75 academic year is dated January 29, 1975. The principal rated the performance of petitioner satisfactory in each area evaluated. It is noted that the rating of satisfactory is the most positive rating to be achieved in the evaluation form. The principal recommended that petitioner be granted an employment contract, with increment, for 1975-76 if a position were available.

The day before this final evaluation (P-1) of petitioner's performance was prepared, the Superintendent sent a memorandum dated January 28, 1975 to all nontenure personnel which reads, in pertinent part, as follows:

> "Within these next few days all teachers will be discussing their evaluation and recommendation forms with their principals. It is urgent that we

exercise every caution to be sure that each person fully understands the circumstances under which recommendations for employment are being made.

"***[Y]ou will notice that the recommendation states in a form similar to this; 'Recommended for a contract (and tenure, if applicable) *if a position is available*.'

"All non-tenured teachers who are recommended for further employment will receive the same recommendation as that which is stated above. Receiving such a recommendation means two things. First, *** we want you to stay with us if there is a position available. Secondly, it means that you have received a positive recommendation but that we do not make any commitment or implication which guarantees that you will receive a contract for the coming school year.

"Contracts will be recommended for approval by the Board of Education as quickly as possible. These determinations of available positions depend upon such factors as tenured teachers returning from leaves of absence, actual enrollments in the various schools and courses, and resignations or retirements.***" (*Emphasis in text.*) (P-2)

The minutes (C-2) of the Board's regular public meeting held April 14, 1975 show that the Board determined not to offer petitioner, and twenty-one other nontenure teaching staff members, employment for the 1975-76 academic year. The following day, April 15, 1975, the Superintendent advised petitioner, in writing, of this determination of the Board. (J-1, *ante*) The Superintendent attests that of the twenty-two nontenure teachers not offered reemployment at the April 14 meeting of the Board, fourteen were subsequently reemployed for the 1975-76 academic year. (C-3, at pp. 1-2) The Superintendent further attests that seven tenured teaching staff members who were on leaves of absence for various reasons returned to active employment with the Board for the 1975-76 academic year. (C-3, at p. 2) Finally, the Superintendent attests that the total pupil enrollment since 1972-73 has decreased from 4,159 pupils to 3,751 pupils for 1975-76. (C-3, at p. 2)

The minutes of Board meetings held April 28 (C-13), May 27 (C-4), June 9 (C-5), June 23 (C-6), and September 8, 1975 (C-7), certified by the Board Secretary as being accurate, establish that fourteen of the twenty-two teaching staff members originally not reemployed were, in fact, reappointed for the 1975-76 academic year. (C-8)

The minutes of Board meetings conducted on March 11 (C-9), April 8 (C-10), September 9, 1974 (C-11), and January 20, 1975 (C-12), also certified by the Board Secretary, establish that seven teaching staff members returned from various leaves of absence to continue their employment with the Board for 1975-76. (C-8)

The president of the Association attests that she and a representative of

the New Jersey Education Association, met with the Superintendent on May 8, 1975 to discuss the reemployment of nontenure teachers who were not employed for 1975-76. (P-3, at pp. 2-3) The president attests that it was agreed at this meeting that if a nontenure teacher whose employment had not been continued received a satisfactory evaluation and if a position became available, the person would automatically be reemployed.

The president further attests (P-3, at p. 2) that as a result of this meeting she distributed a memorandum to all Association members, with a copy to the Superintendent, dated May 12, 1975 in which she advised, in pertinent part:

> "***[The Superintendent] has agreed with the Association that it will not be necessary for non-tenured teachers whose contracts were not renewed to reapply for positions as they become available. These people will automatically be recommended for contracts as positions become available." (P-4)

The president attests that petitioner had been assigned to teach a combination fifth and sixth grade class. The president attests that the Board assigned a nontenure teacher, who had been assigned a third grade class, to petitioner's class for 1975-76. The president attests that during September 1975, a third grade teaching position became available and that she believed, based on her meeting with the Superintendent on May 8, 1975, *ante,* that petitioner would be reemployed. The president explains that the Superintendent then informed her that petitioner would be considered for reemployment should an upper grade assignment become available. The Superintendent advised the Assistant Superintendent by memorandum (P-5) dated September 30, 1975, that petitioner would be considered for reemployment should a vacancy occur in an upper grade assignment.

Finally, the president complains that the person appointed to fill the third grade vacancy had no experience in the employ of the Board and further that when a fifth grade vacancy occurred after September 30, 1975, the Board recalled a teacher who was on maternity leave. (P-3, at pp. 4-5)

The Commissioner has reviewed the factual circumstances herein as well as petitioner's offer of proof (P-6) in support of her demand for a hearing into her allegation of age discrimination. Petitioner argues that there was a violation of the alleged agreement between the president and the Superintendent on May 8, 1975, *ante,* whereby petitioner would automatically be reemployed when a vacancy occurred. No proof has been presented to the Commissioner that the Board's controverted actions were based upon proscribed reasons. *Claire Haberman v. Board of Education of the Borough of Morris Plains, Morris County,* 1975 *S.L.D.* 848 Nor does the verified Petition of Appeal set forth any alleged facts in support of petitioner's contention of improper age discrimination. *Marilyn Winston et al. v. Board of Education of the Borough of South Plainfield,* 125 *N.J. Super.* 131 (*App. Div.* 1973), aff'd 64 *N.J.* 582 (1974), dismissed with prejudice Commissioner of Education, 1974 *S.L.D.* 999 Thus, in the absence of specific allegations with respect to petitioner's conclusion that the Board's action of not reemploying her was based on

constitutionally proscribed reasons, an adversary hearing is not warranted. The Commissioner so holds.

Finally, the Commissioner observes that the president strongly asserts, on behalf of petitioner, that the Superintendent violated his alleged agreement of May 8, 1975 through the failure of the Board to reemploy her when vacancies occurred in areas in which she was qualified. The Commissioner will briefly address this argument.

Boards of education are agencies of the State and as such have only those powers as are specifically granted, necessarily implied or incidental to authority expressly conferred by the Legislature. *Edwards v. Mayor and Council of Moonachie,* 3 *N.J.* 17 (1949); *N.J. Good Humor, Inc. v. Bradley Beach,* 124 *N.J.L.* 162 (*E.&A.* 1939) Such powers can neither be increased nor diminished except by the Legislature. *Burke v. Kenny et al.,* 6 *N.J. Super.* 524 (*Law Div.* 1949) Boards of education have been specifically authorized by the Legislature to appoint teaching staff members by a recorded roll call majority vote of the full membership. *N.J.S.A.* 18A:27-1 Neither this Board nor any other local board of education may delegate its responsibility to appoint teaching staff members to any of its agents, officers, or other employees.

Consequently, even if the Superintendent agreed to an automatic reappointment of petitioner when a vacancy occurred, such an agreement is null and void. This is so because the Superintendent has no authority to enter into such an agreement on behalf of the Board nor may the Board delegate such authority to its Superintendent. The Commissioner so holds.

In the instant matter petitioner, as a nontenure teaching staff member, had no claim to preferential treatment with respect to reemployment. Accordingly, she was entitled solely to be treated as any other applicant for a vacancy which may have been declared by the Board.

The Commissioner will not substitute his judgment for that of a local board of education where the controverted action is within the discretionary authority of the board absent a showing that the action is arbitrary, capricious, or unreasonable. *Thomas v. Morris Township Board of Education,* 89 *N.J. Super.* 327 (*App. Div.* 1965), affirmed 46 *N.J.* 581 (1966)

The Commissioner, having found no basis to intervene in the instant matter, hereby dismisses the Petition of Appeal.

COMMISSIONER OF EDUCATION

June 23, 1977

Richard R. Gearing,

Petitioner,

v.

Board of Education of the Borough of Manasquan, Monmouth County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Chamlin, Schottland, Rosen & Cavanagh (Michael D. Schottland, Esq., of Counsel)

For the Respondent, Joseph N. Dempsey, Esq.

Petitioner, who was employed as an elementary school principal from February 1975 through June 1976 by the Board of Education of Manasquan, hereinafter "Board," alleges that the Board's determination not to reemploy him violated his rights of due process and free speech and also was violative of the statutory requirements controlling a board's exercise of discretion. The Board denies that its determination not to reemploy petitioner was in any way illegal or other than a reasoned exercise of its discretionary authority.

The matter is before the Commissioner of Education on Cross-Motions for Summary Judgment in the form of the amended pleadings, Briefs, exhibits and affidavits. (Exhibits, except as otherwise identified, are those attached to the Board's Verified Answer.)

An examination of the factual context of the controverted matter reveals that the Superintendent, who was employed by the Board effective November 1975, provided petitioner with a five page evaluation report dated January 29, 1976. (Exhibit G) Therein the Superintendent assigned petitioner ratings of low or unsatisfactory in the areas of leadership, problem solving, professional knowledge and understanding, pupil relations, and supervision. He also assigned acceptable or commendable ratings in the areas of staff morale, staff and community relations, and attention to detail. In summation, the Superintendent stated:

> "***[Y]ou have some admirable skills as an administrator, and your dedication to self-improvement is an enviable characteristic. Based on my evaluation of your work to date, however, you must demonstrate a great deal of improvement in many areas if you expect to remain in Manasquan. While I have delineated strengths and weaknesses prior to this point, let me summarize by stating that, while you try, the products of your efforts are either unacceptable or need a great deal of improvement.
>
> "If my decision was made today, I would ask you to leave the district and

assume a career elsewhere. While I would encourage you to continue in educational administration, I would simultaneously warn you, that unless you make a concerted effort to improve your skills in the areas noted as weaknesses, you will experience many difficulties in handling the complicated planning, implementation and evaluative processes which must be utilized to assure equitable opportunities for students in modern schools.

"I offer assistance in any area in which you seek growth and will meet to discuss this evaluation at your convenience." (Exhibit G)

The Superintendent's second, and last, formal written four page evaluation of petitioner, dated April 6, 1976, commended petitioner for improvements in playground discipline, staff morale, attention to detail and routine, and certain aspects of his evaluation of teachers but sharply criticized his performance in other areas of his responsibility, *inter alia*, as follows:

"***During the past two months, I have seen no evidence to indicate improvement in any of the areas in which you were found deficient in my evaluation issued on January 29, 1976. With the exception of work in the areas of student discipline and staff evaluation, I have seen no concrete evidence to warrant an upgrade in ratings assigned during the past evaluation.

***

"Since I have still seen no improvement in performance, I am informing you that I am not going to recommend you for a contract for the 1976-77 school year. In reaching this decision I have been guided by the following data:

"In my previous evaluation, and during our follow-up conferences, I asked for evidence which would demonstrate improvement in your effectiveness to lead the elementary school, and in your professional knowledge and understanding of curricular and administrative operations. Since you were clearly informed at that time of my intention of not recommending you as principal, unless improvements were forthcoming, I expected actions on your part which would have influenced the decision I have now reached. Your failure to submit even a single completed goal, along either the original planning format we discussed, or the improved format utilized by Bob Elder and adopted by the Instructional Council, is a serious omission. Since you were given the freedom of either opt for programs which we have jointly discussed, or substitute those projects which you felt would be best for solving problems existing in your school, it is difficult to understand why you did not take the initiative to complete the requested planning process for this year. Your failure to do so lies heavily in my mind, as a weakness which you must correct quickly, in light of the increased sophistication which T&E places on all administrators in this state.

***

"While I question many of your recommendations, and had to make a final decision for you, due either to your inability to make a decision, or your lack of desire to assume responsibility in a difficult situation, I simply cannot accept the fact that you still do not understand the difference between current expense and capital outlay. Your years of experience as a principal, plus the discussions which we had following problems in building this year's budget, should have been sufficient to allow you to grasp this critical elementary distinction.***

"Your weakness in professional knowledge and understanding should also continue to receive a great deal of attention. Your willingness to continue formal schooling is proof of your intent to improve in this area. I urge you to continue to seek help in this area. The journals, books and programs we have shared are another source of knowledge. I suggest that instead of collecting a plethora of information, you begin an indepth analysis of selected areas including trends in curricula, instructional practices and administrative procedures including planning, budgeting and evaluation as a more realistic path for needed improvement.

***

"In summary, based upon my professional judgment of your performance as principal of Manasquan Elementary School, summarized on evaluations issued on January 26, 1976 and April 6, 1976 and discussed during our meeting on March 11, 1976, it is my opinion that you are not the person to provide the educational administrative leadership needed at the school. I, therefore, do not recommend you for a contract for the coming school year.***"

(Exhibit H)

Petitioner requested and was granted opportunity to address the Board prior to its action on the Superintendent's recommendation. (Exhibits C, D) At that meeting petitioner, who was allowed representation, presented orally in rebuttal to the Superintendent's recommendation extensive reasons as to why he believed his experience, references, and service to the Board commended him to continued employment. Additionally, he presented to the Board for the same purpose documentary materials totaling over 100 pages. (Exhibit E)

The Board on April 26 voted, nevertheless, not to reemploy petitioner upon the expiration of his contract on June 30. (Exhibit A) On April 30, in response to petitioner's request for reasons the Board furnished him the following statement:

"***Based upon an assessment of your evaluations by the Superintendent of Schools, we did not feel that you met the standards for administrators in the school district." (Exhibit B)

Petitioner requested an informal appearance before the Board pursuant to *Donaldson v. Board of Education of North Wildwood,* 65 *N.J.* 236 (1974) but was unable to effect an early appearance when he was prevented from returning to his work for the remainder of the school year after being stricken on May 5 by illness requiring hospitalization. (Exhibit I) The Board offered petitioner an appearance on July 19, if petitioner was declared physically fit by his physician. Petitioner declined. (Exhibits J, K) Thereafter, on August 30, the Board Secretary notified petitioner, *inter alia,* as follows:

> "The Board of Education has directed me to advise you that your request for an informal hearing *** has been granted.***
>
> "The Board of Education is offering Tuesday, September 14, or Tuesday, September 21st at 9:30 P.M. as potential meeting dates.***
>
> "The Board of Education also reminds you that you had a full and complete hearing *** on April 13, 1976***. Nevertheless, the Board of Education is open to hear what arguments you have, whether to repeat or add to them if you feel you can dissuade the Board of Education from its decision to remove you from its employment.***" (Exhibit F)

Petitioner, who had filed the Petition of Appeal in the instant matter on July 26, 1976, did not, in fact, avail himself of the proffered informal appearance. (Exhibits L, M)

The Board in its Brief in Support of Motion for Summary Judgment, contends that petitioner was afforded the due process to which he was entitled in the form of a statement of reasons for his non-reemployment and an opportunity for an informal appearance with representation on separate occasions both before and after the Board's determination not to reemploy him. *Donaldson, supra; Barbara Hicks v. Board of Education of the Township of Pemberton, Burlington County,* 1975 *S.L.D.* 332 (Board's Brief, at pp. 1-3, 5-7)

The Board argues further that petitioner's allegations that the criticisms of the Superintendent are not true form insufficient basis to require a plenary hearing. *Linda McCorkle v. Board of Education of the City of South Amboy,* 1976 *S.L.D.* 733, aff'd State Board of Education 739; *Donald Banchik v. Board of Education of the City of New Brunswick, Middlesex County,* 1976 *S.L.D.* 78 February 3, 1976) are cited as authority for the premise that the Board may depend, in such matters, upon the evaluation of its Superintendent. (Board's Brief, at pp. 3-5) The Board asserts also that petitioner has no property right to continued employment. *Perry v. Sindermann,* 408 *U.S.* 593 (1972); *Sallie Gorny v. Board of Education of the City of Northfield et al., Atlantic County,* 1975 *S.L.D.* 669 Similarly cited is *George A. Ruch v. Board of Education of Greater Egg Harbor Regional High School District, Atlantic County,* 1968 *S.L.D.* 7, aff'd New Jersey Superior Court, Appellate Division, March 24, 1969 (1969 *S.L.D.* 202), wherein it was said by the Commissioner that:

> "***The fact that respondent made available to petitioner the report of his superior which was adverse to petitioner's interest, does not open the

> door automatically to a plenary hearing on the validity of the 'reasons' for nonrenewal of employment. To hold that every employee of a school district, whose employment is not continued until he acquires tenure status, is automatically entitled to an adversary type hearing, such as petitioner demands, would vitiate the discretionary authority of the board of education and would create insurmountable problems in the administration of the schools. It would also render meaningless the Teacher Tenure Act for the reason that the protections afforded thereby would be available to employees who had not yet qualified for such status.***" (1968 *S.L.D.* at 10)

The Board avers that the truth of its reasons and the mental processes by which the Superintendent arrived at his recommendation are not subject to plenary review. (Board's Brief, at pp. 7-9) Cited in this regard is *Long Branch Education Association and William Cook v. Board of Education of the City of Long Branch, Monmouth County,* 1975 *S.L.D.* 1029, aff'd State Board of Education 1976 *S.L.D.* 1150, wherein the Commissioner stated:

> "***[I]n the matter of reemployment of a nontenure teacher, it is not incumbent upon the Board to prove its reasons as in a hearing of charges against a tenured employee. Absent a showing of bad faith, arbitrariness, capriciousness, unreasonableness, statutory or constitutional violation, sham, or frivolity on the part of the Board, its discretionary determination must prevail.***" (at 1037-1038)

Finally, the Board in its argument for dismissal asserts that petitioner's allegations of violation of the constitutionally protected right of free expression is insufficiently detailed to merit serious consideration. *Long Branch, supra; Claire Haberman v. Board of Education of the Borough of Morris Plains, Morris County,* 1975 *S.L.D.* 848; *Mary Ann McCormack et al. v. Boards of Education of Northern Highlands Regional High School District or the Borough of Fair Lawn, Bergen County,* 1976 *S.L.D.* 754, aff'd State Board of Education January 5, 1977

Petitioner, in his Brief in Opposition to the Motion for Summary Judgment by Respondent and in Support of his Motion for Summary Judgment advances the argument that due process was not provided by the Board. In this regard, petitioner contends that a single question asked by a Board member at his appearance on April 13 is indicative that no discussion in fact occurred at that meeting. He argues that the meeting which occurred prior to the Board's determination does not, in any event, satisfy *Donaldson, supra,* and *Hicks, supra.* (Petitioner's Brief, at pp. 2, 12-13) Petitioner alleges that the Superintendent, who had only recently arrived in the district in November 1975 was motivated by bad faith to get rid of petitioner and that this allegation alone is of sufficient moment to require a plenary hearing should petitioner's Motion not prevail. *Ruch, supra* (Petitioner's Brief, at pp. 2-4, 16)

Petitioner argues that in *Banchik, supra,* the New Brunswick Board had provided a list of eight reasons deemed adequate by the Commissioner. The Board herein gave but a single vague, noninformative reason insufficient to meet

the Court's requirement in *Donaldson, supra.* Cf. *McCorkle, supra* (Petitioner's Brief, at pp. 4-4)

Petitioner contends further that the Board or the Superintendent provided him as a nontenured employee with only two evaluations in violation of the requirement of *N.J.S.A.* 18A:27-3.1 that three formal evaluations be provided annually. Petitioner also charges that the two evaluations provided by the Superintendent upon which the Board relied should, in any event, be set aside in the absence of a showing that the Board adopted an evaluation policy pursuant to *N.J.A.C.* 6:3-1.19(c) which was promulgated effective January 16, 1976 and requires that:

> "Each local board of education shall adopt a policy for the supervision of instruction, setting forth procedures for the observation and evaluation of nontenured teaching staff members including *** those not assigned to regular classroom teaching duties. Such policy shall be distributed to each teaching staff member at the beginning of his/her employment."

Petitioner charges that the Board, through its contract with its Superintendent, has illegally abrogated its statutory, nondelegable, nonnegotiable obligations to determine who shall be reemployed and that for this reason its determination should be declared a nullity. *Ronnie Abramson v. Board of Education of the Township of Colts Neck, Monmouth County,* 1975 *S.L.D.* 418, aff'd State Board of Education 424, aff'd Docket No. A-780-75 New Jersey Superior Court, Appellate Division, September 27, 1976 (1976 *S.L.D.* 1103); *Dunellen Board of Education v. Dunellen Education Association et al.,* 64 *N.J.* 17 (1973); *Porcelli et al. v. Titus et al.,* 108 *N.J. Super.* 301 (*App. Div.* 1976); *Board of Education of Township of North Bergen v. North Bergen Federation of Teachers,* 141 *N.J. Super.* 97 (*App. Div.* 1976) (Petitioner's Brief, at pp. 9-11; Petitioner's Exhibit A)

Petitioner argues, in conclusion, that the Amended Petition when read in conjunction with petitioner's affidavit (Exhibit A) presents a sufficiently detailed allegation to at least require, in the event he does not prevail on the Motion, a plenary hearing to determine whether in fact his protected right of free speech was violated. Petitioner avers that proof of such violation may be made by inference and circumstantial evidence. *Winston v. Board of Education of South Plainfield,* 125 *N.J. Super.* 131 (*App. Div.* 1973), aff'd 64 *N.J.* 582 (1974)

For the above reasons, petitioner maintains that the Commissioner should declare the Board's actions concerning his non-reemployment illegal and direct the Board to restore him to his former position as principal with lost salary and attendant emoluments.

The Commissioner having carefully reviewed the pleadings, affidavit, legal arguments and exhibits, proceeds to a determination of each of the principal arguments emanating from the controversy.

Petitioner's allegation that he was denied due process is groundless. The record is clear that he declined to avail himself of an opportunity for an informal appearance proffered by the Board on two occasions. (Exhibits F, L, M) Since this is so, no purpose would be served by determining the adequacy of his appearance before the Board prior to his notification of non-reemployment.

Petitioner's allegation that the Board relinquished to the Superintendent nondelegable, statutory prerogatives is similarly groundless. A careful scrutiny of the Superintendent's employment contract reveals that his authority is limited as follows:

> "***all of the above subject to the managerial prerogative by virtue of Title 18A, vested with the Board of Education***."
>
> (Petitioner's Exhibit A)

Nor does the record reveal that the Superintendent did other than recommend to the Board that they not reemploy petitioner. This procedure is in full conformity with that which was recently iterated by the Court in *Union County Board of Education v. Union County Teachers Association: Cranford Board of Education v. Cranford Education Association,* 145 *N.J. Super.* 435 (*App. Div.* 1976), as follows:

> "***Under the statutory scheme established by the Legislature for the administration and operation of our public school system, *N.J.S.A.* 18A:1-1 *et seq.,* nontenured teachers have no right to the renewal of their contracts, the local boards of education, in turn, are invested with virtually unlimited discretion in such matters***." (at 437)

Petitioner raises the issue whether the single statement of reason given him by the Board for his non-reemployment is sufficient to comply with *Donaldson, supra,* which states that elemental fairness and justice suggest that a nontenure teaching staff member be told the reasons for non-reemployment and be of such nature to "***disclose correctible deficiencies and be of service in guiding his future conduct.***" (65 *N.J.* at 245) The Commissioner is assiduous in his quasi-judicial capacity pursuant to *N.J.S.A.* 18A:6-9 *et seq.* to require compliance with this clear directive of the Court.

In the instant controversy the Commissioner observes that the Board's statement of reasons, while not in itself an informative document, incorporates by reference the "evaluations by the Superintendent of Schools." (Exhibit B) An examination of these evaluations convinces the Commissioner that they are explicit in subjective evaluation of the multifaceted responsibilities with which a principal, to whom the Board looks for leadership, must cope. While it is true that they are conclusionary in nature, they are not precluded for this reason as was stated in *Banchik, supra*:

> "***The very process of determining whether or not to reemploy a teaching staff member must of necessity be conclusionary in nature.***"
>
> (1976 *S.L.D.* at 81)

The Board, having incorporated the detailed and informative evaluations of the Superintendent by reference, has in this instance met the test of *Donaldson, supra.* The Commissioner so holds. No useful purpose could possibly be served by requiring the Board itself to further detail those reasons which it has incorporated by reference. The Commissioner emphasizes, however, that he does not recommend that boards of education adopt such practice, which may unnecessarily engender misunderstanding, charges of bad faith, and costly litigation.

The Commissioner finds insufficiently detailed those allegations of petitioner that he was denied freedom of expression. As was said by the Appellate Court in *Winston, supra*:

> "***[T]he bare assertion or generalized allegations of infringement of a constitutional right does not create a claim of constitutional dimensions.***" (125 *N.J. Super.* at 144)

It remains to determine whether petitioner's allegations concerning his evaluations and the Board's alleged failure to adopt a policy on evaluations, if true in fact, would create an entitlement to the relief which petitioner seeks. *N.J.S.A.* 18A:27-3.1 which became effective July 1, 1975 states:

> "Every board of education in this State shall cause each nontenure teaching staff member employed by it to be observed and evaluated in the performance of his duties at least three times during each school year but not less than once during each semester***. The purpose of this procedure is to recommend as to reemployment, identify any deficiencies, extend assistance for their correction and improve professional competence."

Petitioner in each semester of 1975-76 was provided with one detailed evaluation and the opportunity to state his reaction to the contents thereof both with the Superintendent and the Board. The contents of those written evaluation reports are in full compliance with the statutory requirement. The Commissioner so holds.

Although it is undisputed that a third evaluation was not provided, there is reason to believe that it would have been completed had not petitioner been absent, because of illness, from May 5, 1976. In the interpretation of a statute it has been said that:

> "***We are concerned here not with what the Legislature meant to say, but the meaning of what it did say.***" *Caputo v. Best Foods, Inc.,* 17 *N.J.* 259, 263 (1955)

Petitioner's interpretation that three evaluations must be completed prior to written notice of non-reemployment, while not without logic, is unduly restrictive. Had the Legislature so intended, it would have said so. Indeed, there is reason to believe that the Legislature was no less interested in the identification and correction of deficiencies and improvement of professional competence after April 30 as in the months prior thereto.

Next, the Commissioner addresses the alleged failure of the Board to promulgate a supervisory policy pursuant to *N.J.A.C.* 6:3-1.19(c). Such omission could not negate the validity of the Superintendent's evaluation under *N.J.S.A.* 18A:27-3.1 which must take precedence. The Commissioner so holds. In the event that the Board has not yet promulgated such policy, however, it may no longer delay in complying with the State Board of Education's reasonable regulation which must be complied with forthwith. Such delay, even if true, is not fatal to the Board's case which is viewed as one of substantial compliance with the law.

Absent a showing of constitutional, statutory or due process violation or evidence of bad faith, arbitrariness or capriciousness, the Commissioner enters Summary Judgment for the Board and denies petitioner's Cross-Motion for Summary Judgment. *Banchik, supra; Ruch, supra; Hicks, supra; Donaldson, supra; Gorny, supra; Long Branch, supra* The Board's action is entitled to a presumption of correctness as having been made in compliance with *N.J.S.A.* 18A:27-1 *et seq.* and that which was stated by the Court in *Porcelli, supra,* as follows:

> "***We endorse the principle, as did the court in *Kemp v. Beasley,* 389 *F.2d* 178, 189, (8 Cir. 1968), that 'faculty selection must remain for the broad and sensitive expertise, of the School Board and its officials'***." (108 *N.J. Super.* at 312)

There being no relief to which petitioner is entitled, the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

June 23, 1977

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, June 23, 1977

For the Petitioner-Appellant, Chamlin, Schottland, Rosen & Cavanagh (Michael D. Schottland, Esq., of Counsel)

For the Respondent-Appellee, Joseph N. Dempsey, Esq.

The State Board affirmed the decision of the Commissioner for the reasons expressed therein.

October 12, 1977
Pending New Jersey Superior Court

"H.D." and "M.D.," on behalf of "H.D.,"

Petitioners,

v.

Board of Education of the Township of Roxbury, Morris County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Ralph Neibart, Esq.

For the Respondent, Schenck, Price, Smith & King (Alten W. Read, Esq., of Counsel)

For the Intervenor Education Law Center, Inc. (W. William Hodes, Esq., of Counsel)

Petitioners, parents of H.D., contend that the classification of their son by the child study team, hereinafter "CST," of the Board of Education of the Township of Roxbury, hereinafter "Board," and the subsequent review and confirmation of that classification by the regional child study team were inappropriate. Herein they appeal to the Commissioner of Education the further confirmation of that classification rendered on October 7, 1976 in *Parents, on behalf of "H.D." v. Board of Education of the Township of Roxbury, Morris County,* (unpubl) by an impartial hearing examiner who conducted six days of

hearing from March 4 through May 5, 1976, pursuant to the provisions of *N.J.A.C.* 6:28-1.11(d) which provides as follows:

> "In addition to this review process, a hearing shall be made available, upon request to the local board of education, and shall include the following:
>
> 1. A full hearing before an impartial hearing examiner, conducted at a time and place convenient for the parents, with a verbatim record of the hearing kept;
>
> 2. Full access by the parent to all records, findings and recommendations of the child study team reasonably in advance of the hearing;
>
> 3. The parent shall have a right to the presence of the legal counsel and other representatives;
>
> 4. An opportunity for the parent to be heard, to present witnesses, and to cross-examine witnesses appearing on behalf of the child study team or the chief school administrator or designee;
>
> 5. A decision in writing shall be made promptly and be based upon a *de novo* consideration of the evidence presented at the hearing, and a copy shall be made available to the parent."

The Education Law Center, Inc., hereinafter "intervenor," on December 6, 1976, moved to intervene as *amicus curiae*. The Motion was granted on January 6, 1977, and intervenor's *amicus curiae* Brief was entered into the record. A concise procedural history of the matter is necessary for an understanding of the dispute:

H.D. entered the Roxbury School System in November 1968 as a fourth grade pupil, having in prior years attended elementary school classes in Florida, Massachusetts, France and England where his progress in reading and associated academic skills was inconsistent with an average or higher than average recorded IQ. (P-3-7) This lag in demonstrated progress was confirmed early by the Board's administrators, teachers, psychologist, learning disabilities teacher-consultant and others who prescribed and implemented various plans of special supplementary instruction which also met with only limited success in reading and associated development from 1968 through June 1973. H.D., however, has consistently been able to understand and learn from oral instruction. (P-8-49)

Petitioners unilaterally enrolled H.D. at their own expense in Gables Academy, a private academy for dyslexic pupils in Miami, Florida, for the entire 1973-74 school year. In May 1974 they notified the Board that H.D. would return to Roxbury and requested that a program similar to that at Gables Academy be provided. (P-52)

The Board's CST in September 1974 ordered a neurological examination of H.D. and, after classifying him as perceptually impaired, prescribed a

modified ninth grade program involving remediation in reading skills and mainstreaming in other subjects. (P-57, 68, 75) Petitioners were not satisfied with the program and requested that the Board at its expense return H.D. to Gables Academy which at that time was not on the New Jersey Department of Education's list of approved private schools for handicapped pupils. (P-58, 59, 76) Petitioners' request was denied by the Board. (P-71) The CST, on the recommendation of the regional child study team and the Board's newly appointed director of special services, in May and August 1975, ordered second and third neurological examinations. (P-60, 62) After considering these examination reports and other relevant study reports, the CST in June and October 1975 twice reaffirmed its prior classification of H.D. as perceptually impaired. (R-4, 5, 10, 11; P-86, 99) When petitioners appealed, the Board also affirmed the classification. Upon further appeal, the regional child study team reviewed the additional specialists' and school reports, concurred with the classification, and offered suggestions for educational program modification for H.D. (P-89, 90, 105) Petitioners thereupon sought, and pursuant to *N.J.A.C.* 6:28-1.11(d) were granted, a hearing, the proceedings of which were recorded on magnetic tape (T-I-1 through T-XV-2) by an impartial hearing examiner who issued his decision, hereinafter "HED," on October 7, 1976. It is this decision confirming the appropriateness of H.D.'s classification which is the subject of the appeal now before the Commissioner.

The matter comes before the Commissioner in the form of the pleadings, exhibits in evidence, tapes of proceedings, and Briefs of the litigants and intervenor. The statute and rules of the State Board of Education of reference are as follows:

N.J.S.A. 18A:46-8

"Each handicapped child shall be identified, examined and classified according to procedures, prescribed by the commissioner and approved by the state board, under one of the following categories: mentally retarded, visually handicapped, auditorily handicapped, communication handicapped, *neurologically or perceptually impaired,* orthopedically handicapped, chronically ill, emotionally disturbed, socially maladjusted or multiply handicapped." (*Emphasis supplied.*)

N.J.A.C. 6:28-2.1

" 'Neurologically impaired,' – A child shall be classified as being neurologically impaired as a result of an examination which shows evidence of specific and definable central nervous system disorder. The procedure to determine such impairment shall be administered by a person qualified in the field of neurology. This disability shall be determined by the basic child study team to be related to impairment of the educational functions of the pupil.

" 'Perceptually impaired.'

"1. A child shall be considered to be perceptually impaired who exhibits a learning disability in one or more of the basic processes involved in the

development of spoken or written language but which are not primarily due to sensory disorders, motor handicaps, mental retardation, emotional disturbance, or environmental disadvantage. The disabilities are manifested in the perceptual areas involved in listening, thinking, speaking, reading, writing, spelling, and the study of arithmetic.

"2. The determination of this classification shall rest with the basic child study team.

"3. Each child, so classified, shall have been evaluated in such a manner that an individual educational program related to the learning disability can be specified.

"4. For grouping such children in a special class program for the perceptually impaired, such program shall be described in writing and submitted for prior approval to the Bureau of Special Education and Pupil Personnel Services."

Salient findings set forth in the impartial hearing examiner's decision are as follows:

1. The Board, although aware of H.D.'s retardation in reading, writing and spelling, did not classify his handicap until H.D.'s return from Gables Academy in 1974. (HED, at pp. 3-6)

2. There was no prior request by petitioners nor approval by the Board or the Commissioner for enrollment of, or payment of tuition for, H.D. at Gables Academy for the 1973-74 school year. (HED, at p. 8)

3. Both the CST and the regional child study team acted on supportable evidence, including the three neurologists' reports, when in June and October 1975 they respectively classified and confirmed as proper the classification of H.D. as perceptually impaired. (HED, at pp. 9-12)

4. The educational program and placement provided by the Board for H.D. both before his stay at Gables Academy and after his return were appropriate to his needs. (HED, at pp. 7, 13)

Petitioners' Points of Appeal, hereinafter "PPA," advance the argument that the impartial hearing examiner did not base his decision upon a *de novo* consideration of the evidence presented at the hearing. Petitioners contend that the examiner was compelled by statute and State Board regulation to make a new and independent determination of the proper classification, program and placement "***as if it had not been heard before and as if no decision had been previously rendered.*** On such review, the determinations of the Child Study Team and of the State Review Team are not afforded any presumption of correctness.***" (PPA, at pp. 4-5) *Gaeta v. Scott Paper Co.*, 14 *N.J. Super.* 261 (*App. Div.* 1951)

It is similarly contended by intervenor that "***the Hearing Examiner is

to make independent decisions himself–as if *he* were the child study team. They mean that 'decisions' of the child study team do *not* come to him clothed with a presumption of correctness.***" (*Emphasis in text.*) (Intervenor's Brief, at p. 1) Intervenor contends that *Parents of "K.K." v. Board of Education of Town of Westfield, Union County,* 1971 *S.L.D.* 234, remanded State Board 240, decision on remand 1973 *S.L.D.* 30, aff'd State Board 34, aff'd Docket No. A-1125-73 New Jersey Superior Court, Appellate Division, February 13, 1975 (1975 *S.L.D.* 1086), was in error for failure of the hearing examiner in that case to afford a constitutionally sufficient *de novo* hearing. *In re Masiello,* 25 *N.J.* 590 (1958) Intervenor further contends that the adoption of *N.J.A.C.* 6:28-1.9-11 by the State Board of Education on August 6, 1975, not only barred the impartial hearing examiner from engaging in an appellate type review, but required that he "***make a truly independent judgment on the merits.***" (Intervenor's Brief, at p. 5) Accordingly, intervenor seeks an order of the Commissioner remanding the matter to the hearing examiner in order that he may not only decide on his own what is the proper classification and placement for H.D., but also determine what alternatives in program and placement should be ordered. (Intervenor's Brief, at pp. 2, 7-8, 10)

Petitioners also ground their appeal on a contention that H.D. should have been classified as neurologically or perceptually impaired as listed in *N.J.S.A.* 18A:46-8 rather than as perceptually impaired which in *N.J.A.C.* 6:28-2.1 is defined separately and apart from neurologically impaired. In this regard is cited *"M.D." and "R.D." v. Board of Education of the City of Rahway, Union County,* 1976 *S.L.D.* 323, modified by State Board March 2, 1977. (PPA, at pp. 5-6)

Further points of appeal are that the impartial hearing examiner erred by failing to take note or give proper weight to testimony and/or documents in evidence respecting the classification placement and educational program of H.D. (PPA, at pp. 5-7) Petitioners also contend that the examiner's denial of reimbursement and travel expenses for H.D. at Gables Academy was flawed by a faulty assumption that he was voluntarily withdrawn from Roxbury. In this regard petitioners contend that they were compelled to withdraw him in order to provide a suitable educational program, which the Board allegedly had failed to provide in contravention of its statutory obligation. *N.J.S.A.* 18A:46-7 *et seq.* Finally petitioners contend that they have entitlement to damages for the Board's alleged failure to properly classify H.D. and provide him with a proper educational program which now necessitates extensive supplemental instruction. *Endress et al. v. Brookdale Community College et al.,* 144 *N.J. Super.* 109 (*App. Div.* 1976)

For these reasons petitioners seek an order of the Commissioner directing the Board not only to approve the placement of H.D. at Gables Academy but also to reimburse them for his tuition and transportation expenses at Gables Academy and pay damages for the alleged failure to provide H.D. a suitable educational program.

The Board in its Response to Petitioners' Points of Appeal, avers that the

hearing examiner did in fact base his decision upon a *de novo* consideration of the testimony of numerous witnesses examined and cross-examined during six days of hearing and one hundred-twenty documents marked into evidence. Thus, the Board argues that a "new mind" was provided by the hearing examiner in considering the evidence in full accord with both the dicta enunciated by the Court in *Gaeta, supra,* concerning the nature of a *de novo* hearing and *N.J.A.C.* 6:28-1.11(d). Board's Brief, at pp. 10-12)

The Board reasons that the fact that the hearing examiner did not accept petitioners' factual or legal arguments and contentions found in the record (P-1) is insufficient basis for the reversal of his decision. The Board also argues that *"M.D.", supra,* is importantly distinguishable from the instant matter as argued in the Board's Brief. (R-1) The Board argues further that, since the neurologist, Dr. Brill, and those from Gables Academy on whose reports in evidence petitioners chose to rely heavily, were not called as witnesses, less weight attaches to their written conclusions. (Board's Brief, at pp. 13-16)

The Board contends that since it was under no obligation to place H.D. in the then unapproved Gables Academy and since it at no time ever agreed to do so, it is not obligated by law to fund H.D.'s tuition and expenses resulting from his unilateral enrollment there by petitioners. *In the Matter of "T" et al. v. Board of Education of Tenafly, Bergen County,* 1974 *S.L.D.* 420, aff'd State Board of Education 1975 *S.L.D.* 1161 (Board's Brief, at pp. 17-20)

Finally, the Board avers that its classification, placement and educational program for H.D. were appropriate. Thus, it is argued that no damages, alternate placement or educational program may legally be ordered. Accordingly, the Board recommends that the Commissioner affirm the decision of the hearing examiner issued pursuant to *N.J.A.C.* 6:28-1.11(d) (5).

The Commissioner has carefully reviewed the pleadings, the fifteen magnetic tape recordings of proceedings at the hearing, the documents in evidence (with special attention to the three neurologists' reports), and the legal arguments of counsel for the litigants and intervenor.

Petitioners and intervenor both contend that a *de novo* hearing was not afforded pursuant to *N.J.A.C.* 6:28-1.11(d). The Commissioner does not agree. The record reveals that petitioners were granted full access to records, findings and recommendations of the CST, the right to be represented by counsel, opportunity to be heard, to call and examine witnesses and to cross-examine witnesses called by the Board. These proceedings were held at a time and place of mutual convenience before an impartial hearing examiner and a verbatim record was kept. The report of the hearing examiner supports the conclusion that he based this decision on a *de novo* consideration of the evidence presented at the hearing. This conclusion is buttressed by the fact that numerous probing questions to witnesses were injected into the hearing by the examiner himself. (T-XIII-2)

The extensive examination and cross-examination of petitioners (T-I through T–IV; T–V through T–IX), two neurologists (T-IV-2, T-IX), members

of the CST, the regional child study team and the learning disabilities teacher-consultant (T-X through T-XV) amply illuminate the procedures employed, the decisions reached by the parties, and the reasons for those decisions herein controverted. Petitioners contend that the testimony at the hearing was not given *de novo* consideration by the hearing examiner. Such contention is incompatible with the HED which summarizes and gives weight to salient testimony and documentary evidence, as for example at page 9 where it is stated that:

> "***The hearing examiner has reviewed the three neurological evaluation reports submitted in evidence (P-60, P-62, P-68) and heard the testimony and statements of two neurologists regarding H.D.'s classification.***"
> (HED, at p. 9)

Similarly, the examiner quotes extensively from the neurological reports in evidence and accurately synthesizes the testimony of witnesses regarding the interpretation of those reports. (HED, at pp. 9-11)

A careful review of the verbatim record of the six days of hearing and the text of the HED supports the conclusion that, in fact, petitioners were afforded a *de novo* hearing and that the decision of the hearing examiner was based on a *de novo* consideration of the evidence presented at the hearing. The Commissioner so holds. Such holding is further grounded on the hearing examiner's conclusion as follows:

> "***Finally, the hearing examiner concludes that *based upon the evidence and testimony herein,* the classification and placement of H.D. is in all respects proper and legal. Petitioner's prayer for relief is hereby denied.***" (*Emphasis added.*) (HED, at p. 14)

Accordingly, the prayer for remand is denied. Intervenor's argument that no presumption of correctness attaches to a classification is similarly without merit. A board of education is required by law to provide an educational program for those enrolled in its schools, including handicapped pupils. Concerning the classification of such pupils, the Commissioner stated in *"K.K.," supra,* the following:

> "***It is clear from a reading of this statute [*N.J.S.A.* 18A:46-6] that there is a judgment involved prerequisite to classification, namely, whether or not the child under study can, or cannot, 'be properly accommodated through the school facilities usually provided.' It is also clear that the task of judging the severity of handicap is one that is delegated specifically by statute (*N.J.S.A.* 18A:46-11) to the 'psychological examiner' and 'special education personnel' employed by each board of education in the State.
>
> "Admittedly, this is a difficult task, but *in order to insure that it is carried out properly, the State Board of Education has required each district to employ highly-qualified personnel representing many disciplines. The certification standards for these team members are high.* When, as in this instance, such a team makes a judgment it is qualified and mandated to

> make – to classify or not to classify a child as handicapped and in need of special class or other special placement – , that judgment will not be determined to be faulty or incorrect by the Commissioner, absent a clear showing of procedural fault or an arbitrary exercise of discretion without proper diagnostic information.***" (*Emphasis supplied.*) (at 239-240)

See also *John Scher v. Board of Education of West Orange,* 1968 *S.L.D.* 92 for further enunciation of a board's proper reliance on reports of its specialized personnel.

Accordingly, when a board of education has reason to believe that a responsible classification has been made by its child study team, with their several areas of expertise, it is required by law to effect an appropriate placement either within its own school or another public school or, if such do not provide an appropriate educational program, in a qualifying private educational institution. The appropriate educational program is to be determined by administrators and educational program specialists who must give proper consideration to the recommendations of the child study team. Such classification and prescribed program will be effective until, on appeal, it is determined that either the procedures of classification, the classification itself or the educational program for a pupil, or any combination thereof, is contrary to statute, the rules of the State Board of Education or otherwise flawed by unreasonable interpretation. As was stated by the New Jersey Superior Court in *Board of Education of Plainfield v. Plainfield Education Association,* 144 *N.J. Super.* 521 (*App. Div.* 1976):

> "***It is elementary that a grant of authority to an administrative agency is to be liberally construed so as to enable the agency to discharge its statutory responsibilities. *In re Promulgation of Rules of Practice,* 132 *N.J. Super.* 45, 48-49 (App. Div. 1974). In short, the authority delegated to an administrative agency should be construed so as to permit the fullest accomplishment of the legislative intent. *Cammarata v. Essex Cty. Park Comm'n,* 26 *N.J.* 404, 411 (1958). Moreover, when construing a statutory enactment it is fundamental that the general intention of the act controls the interpretation of its parts. *Hackensack Water Co. v. Ruta,* 3 *N.J.* 139, 147 (1949). All statutory provisions are to be related and effect given to each if such be reasonably possible. *Jamouneau v. Harner,* 16 *N.J.* 500, 513 (1954).***" (at 524)

A petitioning parent or pupil, however, has the right pursuant to *N.J.A.C.* 6:28-1.11 to appeal a classification, placement or program and, if it is believed irreparable harm could attach, to file a Motion for Interim Relief, *pendente lite,* before the Commissioner. Their rights are likewise guaranteed to appeal any impartial hearing examiner's decision to the Commissioner, as herein.

The Commissioner's appellate function in such cases was enunciated in *"R.D.H." and "J.D.H." v. Board of Education of the Flemington-Raritan Regional School District, Hunterdon County,* 1975 *S.L.D.* 103, aff'd State Board of Education 111, aff'd Docket No. A-3815-74 New Jersey Superior

Court, Appellate Division, November 8, 1976 (1976 *S.L.D.* 1161), as follows:

> "***The jurisdiction and authority of the Commissioner with respect to the classification and placement of handicapped children is, thus, not primary in nature but one of appellate review. In all such cases, ***the Commissioner's authority is concerned with the correctness of procedures followed by local boards and with the reasonableness of their respective exercise of discretion. Absent a showing of gross negligence or abuse in such matters, the Commissioner has not, and will not, substitute his own discretion for that of local boards or of properly certificated personnel directed by such boards to render professional judgments. This determination follows the general rule that, when an administrative agency created and empowered by legislative fiat acts within its authority, its decisions are entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decisions are arbitrary, capricious or unreasonable. *Thomas v. Morris Township Board of Education,* 89 *N.J. Super.* 327 (*App. Div.* 1965), 46 *N.J.* 581 (1966); *Boult and Harris v. Board of Education of the City of Passaic,* 1939-49 *S.L.D.* 715, 136 *N.J.L.* 521 (*E.&A.* 1948)
>
> "It remains to determine whether or not in the instant matter there has been such abuse or whether the facts pose other reason for intervention. (See *Jonathan Traurig v. Board of Education of the Township of Livingston, Essex County,* 1971 *S.L.D.* 260.)***" (at 110)

In such a sensitive area as pupil classification the appellate review capacity of the Commissioner must be exercised with thoroughness in view of the far-reaching ramifications which affect both individual pupils and the operation of school systems.

In the instant matter the Commissioner's review of the record leads him to conclude that the matter is importantly distinguishable from *"M.D.," supra,* in that the members of the CST and the learning disabilities teacher-consultant testified herein that it was the team opinion and their individual several opinions that the Roxbury school district was able to provide a viable educational program for H.D. whom they had classified as perceptually impaired. This contrasts sharply with *"M.D."* wherein members of that child study team, who had made an identical classification, testified that they deemed a special private school placement to be required for the pupil so classified. It was on such grounds that the Commissioner and the State Board of Education ordered tuition reimbursement to the parents in *"M.D."* In the instant matter, the CST found the Roxbury school district, with its capacity to deliver reading specialist services, supplemental instruction, and one-on-one instruction, to be adequate for H.D. Indeed there is testimony in the record that it was believed that H.D. would progress more satisfactorily in his home, school and community environment among his peers. (T-XIII-1) In this respect, the Commissioner finds *"M.D."* to be without relevance to a determination of the matter herein controverted.

It remains for the Commissioner to determine whether in his judgment,

the classification, placement and educational program for H.D. were reasonable and appropriate from his consideration of the evidence presented at the *de novo* hearing. A careful review of the three neurologists' reports and the testimony of two at the hearing fails to reveal to the Commissioner evidence of gross brain damage or "***evidence of specific and definable central nervous system disorders***" as specified in *N.J.A.C.* 6:28-2.1. Absent such evidence, the Commissioner also concludes that H.D. does not qualify for classification as neurologically impaired. This determination is further grounded on the testimony of two neurologists who testified that they believed his classification as perceptually impaired and the educational program provided at Roxbury to be appropriate.

The Commissioner finds it disturbing that the classification of H.D. was not made at an earlier age. Nevertheless, it must be recognized that the Board's professional staff did promptly identify him as a pupil needing supplemental instruction and that appropriate supplemental instruction, frequently totally individualized, was provided both prior to and following his classification. (T-XI-1, 2) The Board's qualified experts and the regional child study team did not find it necessary to make appreciable changes in his educational program because of his classification. Accordingly, it is determined that the weight of credible evidence in the record leads to the conclusion that H.D. was correctly classified and afforded an educational program commensurate with his capacity for educational development. The Commissioner so holds.

Petitioners also rely upon *"M.D.," supra,* in contending that the only proper classification for H.D. is "neurologically or perceptually impaired." In this instance also the Commissioner cannot agree. The Commissioner is mindful of the Court's admonition regarding statutory construction and interpretation articulated in *Caputo v. The Best Foods, Inc.*, 17 *N.J.* 259 (1955):

> "***We are concerned here not with what the Legislature meant to say, but the meaning of what it did say.***" (at 263)

It is also imperative that a statute be construed in accord with that which was said in *Vedutis v. Tesi*, 135 *N.J. Super.* 337 (*Law. Div.* 1975):

> "***[W]here literal interpretation would lead to anomalous or absurd results, the spirit of the law controls the letter. *Giordano v. Newark City Comm'n,* 2 *N.J.* 585, 594 (1949).***" (at 343)

Usage in *N.J.S.A.* 18A:46-8 of the correlative conjunction *or* does not signify that either a classification as *neurologically impaired* or *perceptually impaired* is improper. This interpretion is substantiated by the fact that the Legislature, in the same statute, used the same correlative conjunction to connect two separate, distinct and not necessarily related handicaps as follows: "socially maladjusted or multiply handicapped." To conclude that a pupil found to be multiply handicapped must be classified as "socially maladjusted or multiply handicapped" would be an absurd conclusion which would neither comport with medical expertise nor with legislative intent. Similarly, to

conclude that a pupil exhibiting characteristics of perceptual impairment and, upon competent examination by a neurologist is found not to evidence "specific and definable nervous system disorder," must be classified as "neurologically or perceptually impaired," is insupportable and contrary to legislative intent.

The Commissioner is constrained, however, to advise all boards of education and other citizens of the State to give full consideration to *"M.D.," supra,* and to the State Board of Education affirmance and modification of the Commissioner's decision, *ante.* It is incumbent upon local boards which cannot in their own schools provide suitable education for either perceptually impaired pupils or neurologically impaired pupils to make appropriate placement in other public schools or in approved private schools and to provide tuition and such other costs as are required by statute and rules of the State Board of Education. The reimbursement policies of the State Department of Education provide for State aid reimbursement for perceptually impaired pupils as required by law. *"M.D.," supra*

Absent a finding of procedural fault, unreasonable interpretation of statute, State Board rules or evaluative reports, or failure to provide a suitable educational program for H.D., the Commissioner in his appellate review capacity affirms the Hearing Examiner Decision. Accordingly, Petitioners' Appeal is dismissed.

COMMISSIONER OF EDUCATION

June 23, 1977

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, June 23, 1977

For the Petitioners-Appellants, Ralph Neibert, Esq.

For the Respondent-Appellee, Schenck, Price, Smith & King (Alten W. Read, Esq., of Counsel)

The State Board denies request for Oral Argument and remands this case to the original Hearing Examiner for application of appropriate *de novo* criteria to the record already established. In reaching his conclusion, the Hearing Examiner shall not accord a presumption of correctness to the prior determination of the Child Study Team. The State Board further directs that the Hearing Examiner be requested to make separate findings with respect to the placement prior to the evaluation of the Child Study Team in the summer of 1974, and the placement after that date.

November 9, 1977

In the Matter of the Election Inquiry Held in the School District of the City of Garfield, Bergen County.

COMMISSIONER OF EDUCATION

DECISION

Pursuant to a letter request dated April 6, 1977 from Candidate Lucy Matijakovich, hereinafter "petitioner," an inquiry concerning the conduct of the annual school election held March 29, 1977 in the School District of the City of Garfield was held on April 29, 1977 in the office of the Bergen County Superintendent of Schools before a representative of the Commissioner of Education. Prior to the inquiry, petitioner submitted a list of alleged specific irregularities as requested by the Assistant Commissioner of Education in charge of Controversies and Disputes.

Testimony regarding these irregularities was elicited from petitioner, the Board Secretary, the judge of elections, election workers, and other interested persons. None of the testimony was refuted, although it must be noticed that the actual persons accused of violating provisions of the statutes did not attend presumably because they had not been informed regarding the inquiry.

Fifteen specific irregularities are set forth. The fifteenth involves a recount

of the ballots recorded on the voting machines, which was a separate matter considered earlier by another representative of the Commissioner. This inquiry is limited, therefore, to the fourteen remaining allegations of irregularities.

Petitioner complains that there was electioneering within 100 feet of the polling place in two locations, as set forth in complaints one and three. Her complaint is corroborated by the testimony of an inspector and the judge of elections, both of whom testified that they moved the persons away on one occasion, although they later returned. The judge of elections testified that on another occasion he asked local firemen to move away from the polling place when he heard of their electioneering while selling mugs for the fire company.

The Commissioner's representative finds that electioneering did occur as set forth in the complaint in violation of *N.J.S.A.* 18A:14-72 and 81.

The factual evidence regarding the second complaint was provided by testimony of an election worker for petitioner who notified an election worker appointed by the Board when he noticed a card supporting another candidate on the voter registration table. He did not know who put it there, or how long it remained on the table. He testified that it was removed promptly when he complained.

Petitioner's fourth complaint was corroborated by an election worker who testified that she did not turn the poll list around to compare voters' signatures with the signature copy register. She testified that she did visually compare the signatures. Comparison of signatures is required by *N.J.S.A.* 18A:14-51.

Petitioner complains that a voter signed her married daughter's family name to the poll list and was given a voting slip and allowed to vote. This complaint was corroborated by an election worker who testified that the voter was called and returned to the polls to sign her name correctly on the poll list. The voter who signed her daughter's name was not present at the inquiry and no explanation was offered for this obvious irregularity.

Regarding complaint number six, petitioner's testimony that a school janitor and other unauthorized persons were allowed to tamper with the back of the machines after the close of the election was corroborated by the testimony of several witnesses. Petitioner stated that only authorized persons should have been allowed to open the machines so that the ballots could be counted.

Petitioner testified that she was permitted to enter the voting booth with her daughter-in-law who did not know how to operate the voting machine. She testified that there was no visible display on the face of the machine available so that election workers could demonstrate the operation of a machine to voters. Because she was allowed to enter the voting booth with a voter, petitioner queries whether this practice was permitted in other polling places.

The Commissioner's representative finds that petitioner was allowed to enter a voting both with another voter in violation of *N.J.S.A.* 18A:14-53.

The eighth complaint is that at least two persons were not allowed to vote. Additional testimony shows that one of those persons was, in fact, an ineligible voter. No determination was made about the other individual. Nevertheless, petitioner complains that that voter was not instructed how to check on his eligibility to vote or to receive a ballot. *N.J.S.A.* 18A:14-52

Petitioner's ninth complaint is that a list of absentee voters was not supplied to any polling place so that a check could be made to assure that no one voted twice.

The Commissioner's representative finds no requirement that a list of absentee voters be supplied to any polling place during annual school elections. He recommends that this allegation be dismissed.

Complaint number ten is that the first twenty voters did not sign the poll list alphabetically, and therefore their signatures were not compared with the signature copy register. This district has blank polling lists furnished with alphabetized pages or sections for the voters' signatures. It may have been helpful to sign this list alphabetically for signature comparison purposes, but the Commissioner's representative is not aware of any statutory requirement that poll lists must be signed in alphabetical order. He recommends that complaint number ten be dismissed.

Petitioner's eleventh complaint is that no sample ballot was posted at most polling places. The Board Secretary testified, however, that he supplied the sample ballots and directed that they be posted on the entrance door at each polling place. No convincing evidence was presented that the sample ballots were not posted.

The Commissioner's representative recommends that allegation number eleven be dismissed.

The Board Secretary concurs with petitioner's twelfth complaint that many inexperienced election workers were utilized. He testified that he obtained the services of all the experienced persons who were willing to work, but then had to rely on less experienced persons in order to have sufficient election workers since many were unwilling to work for $2.00 per hour as provided by *N.J.S.A.* 18A:14-8. No violation of any statute is alleged.

The Commissioner's representative recommends that complaint number twelve be dismissed.

Complaint number thirteen concerns the detention of most candidates in the Board office to vote on whether or not "checkers" should be used at the polls. The majority of the candidates present voted for the checkers.

The Commissioner's representative learned from the testimony regarding this complaint that none of the checkers were election workers, candidates or challengers. He concludes that these persons were not authorized to remain in

the polling places and were, in fact, in violation of *N.J.S.A.* 18A:14-73.

Submitted in evidence in support of complaint fourteen is a form supporting Candidate Joseph Stefanco which petitioner testified was received through the mail by one of her supporters. Her specific complaint is that Candidate Stefanco used County Board of Freeholders' stationery and envelopes to mail these notices. The envelope is clearly printed "Board of Chosen Freeholders, Administration Building, Hackensack, New Jersey 07601" and petitioner testified that she recognized Joseph Stefanco's signature affixed to the envelope. (Exhibit A)

The Commissioner's representative is not aware of a violation of any election statute because a candidate apparently used Freeholders' stationery to mail literature supporting his candidacy; nevertheless, the use of taxpayers' money to foster support for an elective seat on the Board must be deplored. The literature clearly states "Paid for by J. Stefanco"; nevertheless, the envelope is printed as shown, *ante,* and a determination should be made as to whether or not Candidate Stefanco paid for these materials. He recommends that the Commissioner forward a copy of his decision to the County Board of Freeholders for their information.

Although the Commissioner's representative has recommended that allegations nine through twelve be dismissed, the remaining allegations one through eight and thirteen are true in fact and represent serious violations of the school election laws. The pertinent statute requires that the Board Secretary be primarily responsible for the conduct of the annual school election. In that regard, *N.J.S.A.* 18A:14-63 reads as follows:

> "It shall be the duty of the secretary of the board of education to perform any such duties, not in conflict with those imposed upon any other officer by this law, as may be necessary for the proper conduct of a school election."

The Commissioner's representative learned, subsequent to the inquiry, that the Board Secretary began his employment in March 1977, only a short time prior to the annual school election held on March 29, 1977. In fairness to the Board Secretary, many of the procedures leading to this election had to be performed by someone else before he was employed. Obviously he had no control over those completed procedures and he had little time to complete the remaining arrangements for the election. In districts accustomed to annual school elections, irregularities are few in number and experienced professionals and election workers deal effectively with emerging problems. This matter was further complicated by the fact that this was the first annual school election held in the School District of the City of Garfield in over thirty years. The electorate had previously voted to change from a Type I (appointed) board of education to an elected board. The appointment of inexperienced election workers added to the dilemma.

Without directives issued by the Commissioner, it appears as though the Board Secretary will be especially attentive to his duty as set forth in *N.J.S.A.*

18A:14-63 so that these irregularities, *ante,* will not recur. Nevertheless, the Commissioner's representative offers the following recommendations:

1. That the judge of elections and the election workers be instructed thoroughly by the Board Secretary on the proper conduct of the school election. Assistance will be offered on request by the office of the County Superintendent of Schools and the Commissioner's office if necessary.

2. That sufficient policemen be brought in or made available to assist election workers in moving unauthorized persons away from the polling places.

These recommendations will have the effect of preventing thirteen of the fourteen irregularities set forth, *ante.* The fourteenth is reserved for the Commissioner's determination. This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record of the instant matter, including the report of his representative and concurs with the findings of fact, conclusions and recommendations.

Since allegation fourteen was not proven, but on its face appears to be a serious matter, the Commissioner will forward a copy of this decision to the Board of Chosen Freeholders, Bergen County, so that they may investigate further and take any action deemed necessary or appropriate.

The Commissioner deplores the lack of compliance with statutory requirements which is evidenced by the numerous irregularities which took place at this school election. He is constrained to order that a thorough review be made of all election requirements by the Board of Education of the City of Garfield, and that following such review the Secretary of the Board be directed to conduct a training session for all election board officers who will be engaged in the next school election. Such training shall include adequate written instructions for the conduct of a school election, and opportunities for the discussion of questions which may arise from election board workers. Consideration should be given to having police officers at least visit polling places during the course of the election in order to render any assistance required by election board officers to uphold the election laws.

By means of thorough preparation, the election board workers should be able to properly follow all the statutory requirements which govern school elections.

The evidence of irregularities brought to light by the inquiry, while not condoned in any way by the Commissioner, does not warrant the setting aside of the election results. It is the clear intent of the law that elections are to be given effect whenever possible. It has been held by the courts of this State that gross irregularities, when not amounting to fraud, do not vitiate an election. *Love v. Board of Chosen Freeholders,* 35 *N.J.L.* 269 (*Sup. Ct.* 1871); *Stone v. Wyckoff,*

102 *N.J. Super.* 26 (*App. Div.* 1968) It is clear that irregularities and deviations from election laws by election officials provide insufficient grounds from voiding an election if the will of the people has been fairly expressed and determined and has not been thwarted. *Petition of Clee,* 119 *N.J.L.* 310 (*Sup. Ct.* 1938); *In re Livingston,* 83 *N.J. Super.* 98 (*App. Div.* 1964) It is only when the deviations from statutory procedure are so gross as to produce illegal votes which would not have been cast or to defeat legal votes which would have been counted, so as to make impossible a determination of the will of the people, that an election will be set aside. *In re Wene,* 26 *N.J. Super.* 363 (*Law Div.* 1953) sets forth the rule as follows:

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

The Commissioner's order, as hereinbefore set forth, for reformation of election procedures in the Garfield School District, is to be effectuated for the next school election.

COMMISSIONER OF EDUCATION

June 23, 1977

Board of Education of the City of South Amboy, Middlesex County,

Petitioner,

v.

Bureau of Facility Planning, Division of Field Services, New Jersey Department of Education,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, George J. Otlowski, Jr., Esq.

For the Respondent, William F. Hyland, Attorney General (Mark Schorr, Esq., of Counsel)

Petitioner, the Board of Education of the City of South Amboy, hereinafter "Board," has filed a Petition of Appeal with the Commissioner of Education which alleges, *inter alia,* that a decision of the Bureau of Facility Planning, State Department of Education, hereinafter "Planning Bureau," which denied approval of a proposed school building site in the City of South Amboy for construction of a school addition, was improperly founded and denies the Board an opportunity to provide a thorough and efficient educational program for its pupils. It requests approval of the site by the Commissioner. The Planning Bureau avers that its controverted action was not an arbitrary or unreasonable one and otherwise leaves the Board to its proofs.

A hearing was conducted on January 27, 1977 at the State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

Testimony at the hearing with respect to the instant controversy was elicited from one member of the Board, Thomas Lebandoski, and from the Director of the Planning Bureau, Irving M. Peterson. A total of nine documents were admitted into evidence. Certain facts may be set forth succinctly as a frame of reference for consideration of the arguments and a statement of issue.

The City of South Amboy has only one school complex for the education of all pupils, grades kindergarten through twelve. On January 3, 1977, a total of 985 pupils were enrolled in all grade levels and in attendance at this school in a double session schedule. These sessions are provided for 510 pupils in grades kindergarten through six and for 475 pupils in grades seven through twelve. The school they all attend is located on what has become known as the "John Street site" and such site encompasses approximately two and one-half acres of land.

As a result of the double session schedule, and the need for new facilities to make possible its elimination, the Board has over a period of many years been considering a building program. Pursuant to such consideration it has reviewed

the possible use of alternative sites for building purposes and in fact has on one occasion proposed a building program for what is known as the "land fill site" of approximately one square mile located at one side of the City. (Tr. 25) Such proposal was rejected by the voters on July 8, 1975 in public referendum and the matter has subsequently been reexamined. (Tr. 36) As part of their reexamination two members of the Board, including Thomas Lebandoski, have proposed a reconsideration of the possibility of a building addition at the presently used John Street site. The Planning Bureau has, however, not approved further development of this site and it is this fact which forms the basis of the instant appeal.

The specific determinations of the Planning Bureau which are questioned herein were set forth in letters of record dated August 19, 1975 from the Acting Director of the Planning Bureau to the South Amboy Superintendent of Schools (R-7g) and in a letter of January 12, 1977 from the same Director to counsel for the Board. (R-5)

The letter of August 19, 1975 (R-7g) attached to the Petition of Appeal as Exhibit A is the motivating source of the Petition and constitutes a synopsis review of five properties in or near the City of South Amboy. It is recited in pertinent part as follows:

> "***Dr. Richard Juve of this office visited the properties in question on July 29, 1975. We have re-evaluated the situation and conclude the following:
>
> "1. Similar to my report on January 16, 1973 to the County Superintendent of Schools the best location for a new school, in our judgment, would be at the land-fill area. This is more true today than in the past because the Board of Education has since acquired title to a portion of that area.
>
> "2. As in the January 1973 report, the second best location, in our judgment, would be the Penn Central property. Acquisition may be difficult, as it has been elsewhere where railroad property is involved but this is not certain. Access ways would be needed from Stevens Avenue and Main Street.
>
> "3. Although not included in your list of properties, there is land in Sayreville which would also be relatively suitable, if available (the farm off Bordentown Avenue next to the Parkway, the water works area, and possibly part of the Sayreville land-fill area). The Statutes make provision for such acquisitions (18A:20-4.2).
>
> "4. Veterans Field should not be considered for middle school or high school use because of its severe size limitation, even if expanded.
>
> "5. It is still our belief that no new construction should be planned for the existing school site, for reasons mentioned in previous reports, etc.***" (R-7g)

The letter of January 12, 1977 (R-5) is more specifically concerned with the "primary reasons" for rejection by the Planning Bureau of the John Street site. Such reasons are listed in the letter, *inter alia,* as follows:

"1. More suitable sites were available in South Amboy (particularly the landfill site but also some property owned by a railroad). Both sites were considered satisfactory in regard to size, shape, topography, soil conditions, accessibility, environment, safety, cost, and availability of utilities and municipal services.

"2. It is undesirable to have two distinct populations, having unique needs and in vastly differing stages of their human development, together in such close proximity as is found on the small site and in the single structure as is the case now at the South Amboy School and which would be perpetuated with further construction at this location.

"3. The size of the site, approximately 3 acres, is totally inadequate in terms of outdoor education (including physical education) facilities for the *elementary school* program. This inadequacy is further aggravated with the presence on the same site of a high school program, which *alone* needs a considerably larger site. We are aware that in an urban setting sufficient quantities of usable land are not always available; nevertheless, it should be expected of a community that they make every effort to *approach* the State's minimum site standards. The availability of land in South Amboy has been such that the minimum site standards for the high school could be met in South Amboy at either the railroad property or at the landfill site. Construction at the John Street site would, in effect, *reduce* the play areas at that site. Available land in Sayreville of suitable size was also determined to be an alternative to the Board. (The elementary school site standard of the Department is 10 acres plus 1 acre per 100 pupils; the high school site standard of the Department is 30 acres plus 1 acre per 100 pupils.)

"4. There was more noise, fumes and traffic congestion around the John Street site than elsewhere.

"5. Additional recreation areas were needed in South Amboy. [A] school site elsewhere of sufficient size and developed for joint school and community use would be an asset to the community."
(*Emphasis in text.*)(R-5)

It is noted that the Planning Bureau had had extensive correspondence with school and municipal officials in South Amboy over a period of approximately seven years and had indicated on some occasions that the John Street site might or would be approved. A letter of November 4, 1970, stated the points of opposition to the John Street site in detail but in the last paragraph requested comments with respect to the site "***so that we can continue this

educational review toward approval.***" (at p. 3) (R-7a) Subsequent letters of March 1, 1971 (R-7B), June 22, 1971 (R-7c), and October 18, 1972 (R-7d), continued to use the phrase in a similar or modified form although the Planning Bureau's opposition to the John Street site was otherwise explicitly set forth.

At the hearing Thomas Lebandoski set forth his views in detail with respect to the adequacy of the John Street site, the specific subject matter of this Petition, and of the other sites suggested over the years as alternatives. His views with respect to the John Street site were that:

(a) it was centrally located in the city and easily accessible to both pupil and community groups; (Tr. 10)

(b) public transportation passes the property and was available to all pupils and citizens; (Tr. 10)

(c) it was located on high ground with good drainage; (Tr. 11)

(d) if an addition to the present school were built there would be "***a definite buffer between the high school students and the grammar school students***"; (Tr. 12)

(e) it was advantageous for pupils grades kindergarten through twelve "to live together" and to learn to think of each other; (Tr. 13)

(f) the site is adequate since the population of South Amboy is stable and not increasing;

(g) expansion of the present school would not limit nor take away present recreational areas since a parking lot across the street from the school, of approximately 100 by 200 feet, could be acquired and utilized for such purposes; (Tr. 14-16)

(h) other recreational areas may be made available and utilized which are located "within two minutes walking distance" from the school; (Tr. 16)

(i) traffic in the area is local traffic.

Mr. Lebandoski testified further that in his opinion the construction of "***large facilities [does] not necessarily give good education.***" (Tr. 42) He testified he favored a program wherein the City "***put every bit of [its] money into the educational process directly to the students***." (Tr. 42)

The Director of the Planning Bureau testified that the Bureau had not been aware in 1970 of other site alternatives available to the Board but was opposed to the John Street site as unsuitable to the needs of pupils. (Tr. 58) He testified that the site had been reviewed for adequacy in the context of guidelines of the State Board of Education and was deficient in almost every respect. He specifically cited *N.J.A.C.* 6:22-5.1(c), 6:22-3.13, 6:22-5.2 etc., and his testimony emphasized the importance of an adequately sized site for

recreation programs, outdoor projects in art and science, and to "***[j]ust about every subject in the curriculum***." (Tr. 52) He testified that an adequate site where land is available was recommended as one which contained 35-40 acres. (Tr. 51) He testified that the John Street site contained just a small macadam area for recreational purposes and that such area was not suitable for elementary pupils and was "certainly" not suitable for high school pupils nor for a combination of grade levels. (Tr. 54)

The single issue to be determined as the result of an examination of such arguments and the total record of this matter is concerned with the adequacy or inadequacy of the John Street site as a possible site for a future building addition for school purposes in South Amboy. Board Member Lebandoski joined by one other Board member but not by a majority of the Board avers it is adequate. The Planning Bureau maintains that in the context of rules of the State Board of Education the site cannot be approved and that, accordingly, construction plans may not go forward.

The applicable rules of the State Board of Education with respect to the school sites are recited in some detail as follows in order that the controversy may be put in perspective.

N.J.A.C. 6:22-3.13

> "(b) No land may be acquired by a board of education without prior approval of the State Department of Education."

N.J.A.C. 6:22-5.1

> "(a) School sites should be selected well in advance of actual needs. The selection of a site for a school building involves technical problems and educational factors which require the cooperative efforts of the professional parties concerned. Suggestions for selecting a school site must be sufficiently broad and flexible to allow for variations in the character of the school district in which the site is located, the size and type of school to be built, and the nature of the educational program activities to be accommodated.
>
> "(b) It is recommended that consideration be given to the following factors in site selection: size and shape, topography, accessibility, environment, safety, health of pupils and school personnel, accessibility of public utilities and services, surface and subsurface conditions, the orientation of projected building on the site, initial cost and development cost and the overall master plan for schools in the district.
>
> "(c) Before any action is taken to purchase or otherwise acquire sites intended for future schools or school expansion, *it is required that the local school district must first receive approval of its adequacy from the bureau of facility planning services of the department of education.* Within practical limitations of staff, the bureau will assist

in evaluating sites for school districts. Approval by the bureau consultants will signify to the board of education that a thorough investigation and careful weighing of a number of factors have been made in approving the prospective school site. This approval will do much to create a favorable reaction among voters when a referendum is required. By virtue of specialized training and wide experience, there are other persons particularly knowledgeable in the field of site selection who may be called upon for expert assistance. Advisory services should be utilized in selecting a suitable setting for the school plant.***" (*Emphasis supplied.*)

N.J.A.C. 6:22-5.2

"(a) The size of any school site should be determined largely by the nature and scope of the contemplated educational program. Actual layouts of the spaces needed by the various phases of the program should be made. Because the site-size problem varies in accordance with the needs of the type of school organization and in terms of the age and development status of the community or school district, the following rules must be taken as minimum for which all should strive and which most should exceed.

"(b) For primary schools it is suggested that there be provided a minimum site of ten acres plus an additional acre for each 100 pupils of predicted ultimate maximum enrollment.

Example: A primary school of 500 pupils, projected maximum enrollment, would have a minimum site of 15 acres.

"(c) For junior high schools and middle schools it is suggested that there be provided a minimum site of 20 acres plus an additional acre for each 100 pupils of predicted ultimate maximum enrollments.

Example: A junior high or middle school of 500 pupils, projected maximum enrollment, would have a minimum site of 25 acres.

"(d) For senior high schools it is suggested that there be provided a minimum site of 30 acres plus an additional acre for each 100 pupils of predicted ultimate maximum enrollment.

Example: A senior high school of 1,000 pupils, projected maximum enrollment, would have a minimum site of 40 acres.

"(e) Larger school sites have become necessary for a variety of reasons. On-the-site parking for pupils, faculty, and the public have made increased demands on school space. Growing communities, which have not been able to make provision for adequate parks and recreation areas for the public, have found it both desirable and economical to combine public recreational and school recreational areas. Where public park land adjoins a public school site, it should be made suitable for and available to the school for its use in its

out-of-doors program. Sometimes schools and communities jointly plan school and community facilities to get the maximum use of a site.

"1. The growing popularity of one-story schools in place of multi-storied structures makes its demand upon space, as does also the pressing realization that future additions to the building will probably be necessary in the not-far-distant future. It is true, too, that some schools like to have adequate space for school gardens and an agricultural demonstration area, and rate highly their educational value. The trend for providing space for a great variety of outdoor teaching areas necessitates larger sites. Larger sites result in substantial improvement in educational programs, community services, and efficiency of operation.

"2. Experience has indicated that ultimate site requirements should be met with the initial site acquisition because land adjacent to a new school soon becomes occupied with housing developments.

"3. Almost all suburban communities are burgeoning in population. Their possible destinies, in point of future population, are only vaguely felt and dimly perceived. A small restricted school site, a few years hence, is likely to prove a ponderous obstacle to adjustment to new conditions, and may prove to be one of the most compelling factors in the creation of a 'blighted' district. A large school site has always the opposite effect.

"4. Even for small schools *a large site is essential.* Actually for many activities such as baseball, tennis, track, soccer and football, the same space needs are felt by both large and small schools."

(*Emphasis supplied.*)

N.J.A.C. 6:22-5.9

"Economy, as well as convenience and efficiency, would dictate that inexpensive access to gas, water, sewer, electric, and telephone service be considered in acquiring a site. Since it is recommended that all public utility services be placed underground, it can readily be seen that extensive pipelaying and wiring, connected with distant points, would involve large financial expenditures. Every effort should also be made to avoid the possible difficulties due to the presence of main utility lines on or over the site under consideration. When site facilities are planned, consideration should be given to outdoor drinking fountains, hose connections near the various courts and playing fields, and lights for courts, playground areas, driveways, and parking lots. A desirable feature in selecting a site would be to choose one near a source of public fire protection."

Thus it is envisioned by the State Board of Education that modern concepts of education require a "large" school site as an essential and basic necessity when planning a school building program. While recognizing the need

for "broad and flexible" suggestions with respect to the adequacy of various site possibilities "***to allow for variations in the character of the school district***," the State Board also set forth rules which "***must be taken as minimum for which all should strive and which most should exceed.***" *N.J.S.A.* 6:22-5.2

The Planning Bureau must of necessity use such rules as benchmarks for consideration in the site approval process. In exercising a discretion to approve or disapprove site proposals the Bureau must be "flexible" but is required to insure by the approval process that basic concepts determined as appropriate by the State Board are not impinged. The question for determination herein is whether the discretion of the Planning Bureau has been abused.

Such questions have come before the Commissioner in the past in *Board of Education of the Township of Edgewater Park, Burlington County v. William L. Apetz, Burlington County Superintendent of Schools,* 1961-62 *S.L.D.* 167 and *In the Matter of the Request of the Board of Education of the Central Regional High School District, Ocean County, to Utilize a School Site,* 1974 *S.L.D.* 1059. In both instances the question was concerned with an exercise of discretion by State officials pursuant to rules of the State Board. The decision in *Edgewater Park* was concerned with the refusal of a County Superintendent to approve classrooms for emergency use and the Commissioner held, *inter alia,* that his refusal was:

> "***based upon full and fair consideration of the criteria established by the State Board of Education for approval of emergency classrooms and that the evidence supports his action.***" (at 169)

In *Central Regional* the issue was whether the Planning Bureau had abused its discretion by refusing to approve the erection of a second school building on a site which was comprised of approximately 96 acres. The Commissioner determined that the Planning Bureau had in effect abused its discretion and that the local board of education should be allowed to proceed with its building plan.

The issue herein is the same although the facts are so widely at variance as to pose no parallel. In *Central Regional, supra,* the plot of land involved in controversy which failed of approval was large and spacious although in some respects below the standards of the State Board. The plot of land at contest herein, approximately two acres in extent, is far below even the minimum site specifications as set forth, *ante,* and would appear to be completely at variance with not only the specific recommendation of the State Board of Education but also with the intent of the New Jersey Legislature as expressed by it in the passage of the Public School Education Act (*N.J.S.A.* 18A: 7A-1 *et seq.*) This Act, while calling for an opportunity for every pupil to live and succeed to his/her maximum potential socially, economically and politically in a democratic society, also called for a "breadth" of program offerings in the total school environment. While the term has not been clearly defined, it would appear to be inconsistent with the strictures which an implementation and approval of the proposal controverted herein would impose.

While the John Street site may be centrally located, while there may be utility service available, while an adjacent parking lot may be converted to a small playground and other nearby recreational areas expanded, and while the site may in fact be high and very dry, the central fact of prime importance remains; namely, that what is proposed here is the accommodation of approximately 900 to 1000 pupils on two acres of land.

The hearing examiner finds that a refusal of such proposal is entirely consistent with the letter and intent of the State Board rules, *ante,* which govern such matters and that a contrary ruling is rendered impossible by them. Accordingly, the hearing examiner must recommend that this Petition be dismissed.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed and considered the report of the hearing examiner and the three exceptions thereto as set forth by the Board. Such exceptions aver that the referenced land-fill site is incorrectly designated as "one square mile" in area and that the document R-7(c) uses the words "review" and "approved" with reference to the consideration afforded the John Street site by the Planning Bureau. The third exception is an avowal that testimony at the hearing was elicited from Board member Levandoski and not, as stated, from a member named Lebandoski. In this latter regard it is clear that both the report of the hearing examiner and the transcript are in error. The Commissioner determines that the other exceptions are also well taken. The land-fill site is located at the extreme end of South Amboy, a city approximately one square mile in total area. (Tr. 25, 29) The document R-7c does in fact use the words "review" and "approved."

In all other respects, however, the Commissioner concurs with the report of the hearing examiner and determines that the Planning Bureau has correctly exercised its discretion in the context of the guidelines of the State Board of Education with respect to the John Street site. This site of approximately two acres cannot be adjudged as one which is adequate to accommodate a modern and efficient program of education for 900 to 1000 pupils and may not be approved. The Commissioner so holds.

Accordingly, the Petition is dismissed.

COMMISSIONER OF EDUCATION

June 24, 1977

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, June 24, 1977

For the Petitioner-Appellant, George J. Otlowski, Jr., Esq.

For the Respondent-Appellee, William F. Hyland, Attorney General (Mark Schorr, Esq., of Counsel)

The State Board of Education accepts the Written Report of Oral Argument conducted October 19, 1977 by the Legal Committee. The State Board further affirms the decision of the Commissioner for the reasons expressed therein. (Exceptions by the Board attorney are noted.)

Anne Dillman abstained in the matter.

November 9, 1977

**In the Matter of the Tenure Hearing of Juanita Zielenski,
School District of the Town of Guttenberg, Hudson County.**

COMMISSIONER OF EDUCATION

DECISION

For the Complainant Board, John Tomasin, Esq.

For the Respondent, Moser, Roveto & McGough (George P. Moser, Esq., of Counsel)

Written charges against respondent, a teacher with a tenure status, including conduct unbecoming a teacher, inefficiency, incapacity, using profanity and other charges related to respondent's performance of her teaching duties, were certified to the Commissioner of Education by the Board of Education of the Town of Guttenberg, hereinafter "Board," by resolution dated May 8, 1973. Respondent was suspended from her teaching duties by the principal and Board Secretary on May 4, 1973. The complainant Board certified that the charges would be sufficient, if true in fact, to warrant dismissal or reduction in salary.

A conference of counsel was conducted on September 19, 1973 at the State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner, wherein it was agreed that the Board would consider an amendment to its charges and such other specifications in the context of the statute *N.J.S.A.* 18A:6-12 [repealed *c.* 304, *L.* 1975, effective February 7, 1976] which provides that tenured teaching staff members must be given 90 days to correct the inefficient performance of teaching duties. Subsequently, on November 5, 1973, the Board filed four supplemental charges before the Commissioner including insubordination and nonperformance of duties.

A hearing on the charges was conducted at the office of the Hudson County Superintendent of Schools, Jersey City, on February 13, 1974 at which time the Board advanced a Motion to hold the matter in abeyance pending the results of a psychiatric examination of respondent pursuant to *N.J.S.A.* 18A:16-2 and 3. Respondent accepted the Board's recommendation and was, in fact, under psychiatric treatment at the time. Respondent requested, and the Board granted, a leave of absence without pay for the remainder of the 1973-74 school year to allow her to continue treatment by her psychiatrist.

Respondent returned to her teaching duties in September 1974 and taught within the scope of her certificate until June 1975. Subsequently, on August 28, 1975, the Board, by resolution, filed its written charges against respondent.

Respondent denies the charges and asserts that the actions of the Board toward her constitute a pattern of harassment as the result of prior disputes between respondent and the Board. See *Juanita Zielenski v. Board of Education of the Town of Guttenberg, Hudson County,* 1970 *S.L.D.* 202; rev'd State Board of Education, 1971 *S.L.D.* 664; aff'd Docket No. A-1357-70 New Jersey Superior Court, Appellate Division, February 16, 1972 (1972 *S.L.D.* 692).

A hearing on the instant charges was conducted at the office of the Hudson County Superintendent of Schools, Jersey City, February 13, 1974, August 28, 1975, November 17, 20, 1975, January 14 and March 3, 1976, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner follows:

CHARGE NO. 1

The charge of conduct unbecoming a teacher, *i.e.,* the use of profanity, arose as a result of an alleged incident between respondent and a pupil assigned to her classroom. Pupils who witnessed the alleged incident were called by the Board to testify in support of the charge. All pupils were sequestered during the proceedings and did not hear the testimony of their peers or of others who testified. Three pupils testified that they witnessed a pupil, "M.P.," approach respondent's desk to hand in a work assignment. They stated that they observed respondent throw M.P.'s paper into the wastepaper basket and shout angrily and curse him. They stated that the cursing was loud and could be heard throughout the entire room. (Tr. II-21, 28, 57, 59, 61-62, 77-78)

Respondent does not deny using profanity. She does deny, however using

the phrases the pupils alleged that they heard. Respondent stated that M.P. was late when he arrived in her classroom and attempted to hand over to her a work assignment that was overdue. She stated:

> "***It was late, and when he handed it to me I got angry at him. I crumpled the paper up and threw it in the wastepaper basket.***"
>
> (Tr. V-62)

> "***When I threw the paper in the wastepaper basket he said something like, oh, you got nervous, you are going to shake, you should take a pill. When he said that to me, I got angry at him, and I cursed at him.***"
>
> (Tr. V-63)

Respondent further testified that she called the pupil an S.O.B. while the other pupils in the classroom were busy with a lesson. (Tr. V-63)

Having reviewed all of the evidence with respect to this charge, the hearing examiner finds it to be true in fact. Notwithstanding the contradictory testimony with regard to the phrases used when cursing the pupil, respondent admitted the allegation that she did indeed use profane language as charged.

CHARGE NO. 2

The Board charged respondent with "failing to maintain order and a proper teaching decorum."

Extensive testimony was proffered by pupils, parents, parent volunteers, aides and teachers with regard to this charge. The pupils stated that respondent's classroom was very noisy and out of control almost every day, with the pupils running around the room and throwing spitballs, paper clips and paper airplanes. (Tr. II-24 *et seq.*) The parent volunteers and teacher aides corroborated the pupils' testimony. Four parent volunteers who assisted regularly in the school library stated that they observed the pupils in a regular state of noisy disorder and utmost confusion. (Tr. II-42-54, 110-124; Tr. III-30-32, 140-145) One parent volunteer testified as follows:

A. "It was very noisy. In fact, one day when I was in the library a chair was turned over [in respondent's room] and I assumed there was no teacher in the class. So, I went over there and the teacher was standing in the classroom and their chairs were being turned over.

Q. "Was that Miss Zielinski?

A. "Yes.

Q. "What was she doing?

A. "Just standing there.***" (Tr. III-141)

A fifth grade teacher with six years' experience in the district testified that

the procedure for the conduct of fire drills was to have the pupils assigned to the classroom teacher stay together, not talk during the drill, pay attention to instructions, maintain an orderly manner and move out of the building quickly. She stated that during these drills respondent's class "***behaved very poorly and when there is a fire drill, it's a very serious type of thing and everybody is supposed to be silent and face the front in a straight line.***" (Tr. IV-11-12) She testified further that during the exercise the pupils in respondent's classroom were very noisy and she observed the pupils pushing on the stairs. She stated that respondent did not correct the pupils for these violations of procedure. (Tr. IV-14-16)

Another co-worker, a teacher with fifteen years' experience in the system, testified with regard to respondent's classroom management as follows:

> "***Well, the students were very noisy. They shouted to each other across the room, got out of their seats and did in general exactly what they wanted to do and it was very disturbing since at that time I was teaching remedial students and we had to have some sort of quiet because they were having enough difficulty as it was and the noise was just unbearable, really, being in the next room.***" (Tr. IV-58)

The Superintendent of Schools for the district testified that he also served as respondent's building principal and had done so since September 1972. (Tr. IV-117, 120) He stated that respondent was assigned to teach a sixth grade classroom by the previous administrator for the 1972-73 school year and that he had not disturbed that assignment. He testified that he observed respondent's classroom on the average of four times a week during the course of the 1972-73 school year and that disorder prevailed until he made an appearance to restore order in her classroom. (Tr. IV-122-124)

The principal testified that respondent was suspended from duty for the 1973-74 school year (P-5) and returned to the district for the 1974-75 school year assigned to teach a fifth grade class. (Tr. IV-132-133) He stated that during the course of the school year her classroom was noisy, lacked control and he observed the pupils throwing chalk, papers, spitballs and paper clips. It was his testimony that he spoke to respondent on several occasions about the lack of classroom order and discipline, but she stated that she could not stop or control the pupils in her classroom. (Tr. IV-136, 138-149)

Respondent attributed her difficulties with classroom management and control for the entire 1972-73 school year to two boys who were known to be discipline problems. She testified, however, that the school principal would discipline the boys when she brought specific incidents of their misbehavior to his attention. (Tr. V-6-11, 50-54)

Respondent denied that she had any discipline problems with her fifth grade class during the first part of the 1974-75 school year. It was subsequent to the Christmas vacation of that school year that the pupils became unruly. She testified that the pupils in her classroom had informed her that the other fifth

grade classes in the building were permitted to have longer recess periods than she afforded her class. She stated further that her pupils had reported to her that the other classrooms were allowed to participate in more parties than respondent had permitted. Respondent asserted that her denial of more recess time and the lack of classroom parties contributed to the discipline problems she had with her fifth grade class for the remainder of the 1974-75 school year. (Tr. V-55, 58) Respondent testified that she had not inquired of the other teachers or the principal of the school to ascertain the truth or falsity of her pupils' statements with regard to the amount of time for a recess period or the appropriateness of classroom parties. (Tr. V-57-58)

The hearing examiner finds the testimony of respondent lacks credibility with respect to the Board's charge. She does not deny that her classroom became unruly and that she had discipline problems subsequent to the 1974 Christmas vacation period. Her assertion, however, that this was due to the lack of recess and party time is without merit. Further, the testimony of her co-workers that her classroom was indeed noisy and that she did not exercise appropriate control over her pupils is sufficiently well founded to hold for the Board. The hearing examiner finds, therefore, that respondent did, in fact, fail to maintain order in her classroom as related to the Board's Charge No. 2.

CHARGE NO. 3

The Board charged that respondent "conducted *** classes in a careless, defiant and indifferent manner, without keeping proper decorum in class and without maintaining an appropriate teaching environment in *** class, in a most inefficient manner, and without displaying minimum capacity and/or ability to teach *** pupils and classes in the manner to which they are entitled.***"

The principal testified that subsequent to the annual Parents' Night held in October 1974, he received a number of complaints and criticisms from parents of pupils assigned to respondent's classroom. As the result of the parents' complaints and his own observation, he testified that he wrote an evaluation of respondent's work as of October 31, 1974, and personally hand-delivered the document to her. (Tr. IV-141; P-6) The principal's evaluation of respondent is as follows:

> "The following evaluation and criticisms are observations by me since your return to Anna L. Klein School in September. A number of students and parents have been critical of you over the past few weeks. I have defended you to the utmost as a person. I think the following should be taken into consideration and adjustments will be necessary by you to appease all concerned.
>
> "1. The most potent asset a teacher has is personality. The children and parents have criticized your short answers during conversations or discussions or no answer at all. During 'Parents Night' a number of parents complained of your lack of competency in discussing their child's progress.

"2. Your concept of discipline is lacking; it should be to establish, maintain or repair order in the classroom. Discipline is a function of good teaching.

"3. Your preparation of lessons in your class are ill-prepared and in most cases do not cover the length of the period.

"4. Motivation of your students is a major fault. Classes are dull and uninteresting causing your children to lose interest and possibly lead to class disruption.

"5. Professional relationships with your fellow teachers is non-existent and could cause a morale problem with the rest of the school staff.

"I sincerely hope that you can make adjustments to the above facts."

(P-6)

The principal testified that he discussed his evaluation with respondent but that there was little if any response on her part. He stated "***I think it went in one ear and out the other***." (Tr. IV-141-145)

Subsequently, in December 1974, the principal stated that respondent informed him that she had completed all of the work in the two assigned social studies textbooks. He testified that he had checked with the other fifth grade teachers and found that they had completed approximately one-third of the first social studies textbook during the same period of time. (Tr. IV-145-146) The principal stated that as the result of respondent's disclosure he arranged a conference with the other fifth grade teachers, the learning disabilities teacher-consultant and the school psychologist for the purpose of helping respondent develop educationally sound lesson plans for the total fifth grade program and course of study. He asserts that respondent met with this group of co-workers on one occasion and, although they agreed to meet with respondent again, she never met with them. (Tr. IV-146-147)

Subsequent to respondent's refusal to meet with her co-workers, the principal testified he requested that two classroom teachers and one remedial reading teacher meet with respondent and attempt to help her to plan the teaching learning activities for the remainder of the 1974-75 school year. The three teaching staff members proffered extensive testimony with regard to the lack of pupil work displayed and the absence of interest centers. (Tr. IV-8-9) The staff testified that respondent's classroom and lesson presentations were dull and uninteresting (Tr. IV-8-9, 17, 60), that respondent did not explain assignments or help pupils when they requested aid (Tr. IV-17, 59, 62-65), and that respondent did not discuss assignments or motivate her pupils with discussion following the completion of assignments. (Tr. IV-53-54, 59, 63-65, 71-76) The staff members testified that they attempted to work with respondent in a professional manner but that respondent did not respond nor communicate with them. (Tr. IV-65)

Subsequently, on February 11, 1975, the principal testified that he wrote respondent as follows:

> "Regarding our numerous talks and conferences on your defiant attitudes toward your teaching methods and policies, I must warn you of possible cause for suspension, if you do not take steps to rectify the problem.
>
> "Recently, I did ask you to sit in on a conference with Mr. Nicoletta, Miss Lipp and Mrs. Demontreux and Mrs. Sulpizio. The reason for the said conference:
>
> "1. To offer you assistance in your teaching methods. The above named teachers assured you of their cooperation and set forth a plan for all to follow. Until this date, you have not complied or even spoken to your peers on this matter.
>
> "2. Also discussed your display of pupils projects in the classroom, to eliminate the feeling of coldness in the classroom. As of this date – there is not a single piece of pupils work on display in the classroom.
>
> "3. Discussed the lack of ventilation in the classroom as the children complained of being ill and nauseous. You refuse to keep the windows open for air circulation.
>
> "4. Discuss the lack of preparation in all your lessons. There is no discussion or motivation on your part. You have not rectified this problem. We all know interest is a feeling of value. Work is interesting when it is carried on in such a way that children may see its value, even feel its value.
>
> "5. Discipline is the major problem in your classroom – without discipline – learning does not take place. It must not be forgotten that the friendship and support of parents are strong allies of good discipline. Your contact with parents is non-existent. In fact, you seem to avoid parents and parental discussion.
>
> "6. Your relationship with your peers has not improved, in fact, the feeling among your peers is that it has dwindled.
>
> "Please feel free to discuss the above facts with me at anytime." (P-7)

The principal stated that he discussed all of the points of his observation and evaluation, *ante,* and brought to respondent's attention that he and her fellow staff members had offered their assistance. He testified "***there was no answer, a shrug of the shoulders.***" (Tr. IV-152) He testified further that there was no improvement in respondent's performance from February through June 1975, at which time he discussed respondent's suspension and non-reemployment with the Board. (Tr. IV-164-165)

Respondent did not set forth an affirmative defense with regard to the

specifics of the principal's observations of February 11, 1975, and the allegations therein. (P-7) Her defense was elicited by respondent's counsel on cross-examination of the principal, who had invited counsel to observe her in a teaching situation. The principal testified that during that particular observation the pupils were quiet and orderly and that respondent was teaching a reading lesson. The principal stated, however, that respondent's approach to that specific lesson was incorrect. (Tr. IV-168-173) It was, further, respondent's defense that she had served as a second grade teacher for three and a fraction years, was out of teaching service for three years and subsequently placed in a sixth grade and fifth grade, respectively, and that the latter assignment was inappropriate.

The hearing examiner finds no merit in respondent's argument. The hearing examiner observes that the principal's evaluation and observations of February 11, 1975, state specific inefficiencies to be corrected by respondent and comports with the then statutory provisions in *N.J.S.A.* 18A:6-12 as follows:

> "The board shall not forward any charge of inefficiency to the Commissioner, unless at least 90 days prior thereto and within the current or preceding school year, the board or the superintendent of schools of the district has given to the employee, against whom such charge is made, written notice of the alleged inefficiency, specifying the nature thereof with such particulars as to furnish the employee an opportunity to correct and overcome the same."

The hearing examiner observes that support for this charge is found in the testimony of the three teaching staff members who assert that they attempted to assist respondent but respondent resisted and ignored their assistance. The hearing examiner recommends, therefore, that the Commissioner determine that respondent is guilty of inefficiency as charged.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record of the instant matter, including the report and findings of the hearing examiner. It is noted that counsel have expressed no exceptions to the hearing examiner report pursuant to *N.J.A.C.* 6:24-1.17(b).

The Commissioner observes that respondent used profanity to a pupil which was heard by other pupils in the classroom. Such action by a teacher cannot be condoned. As the Commissioner stated *In the Matter of the Tenure Hearing of Ernest Tordo, School District of the Township of Jackson, Ocean County,* 1974 *S.L.D.* 97:

> "***Teachers are public employees who hold positions demanding public trust, and in such positions they teach, inform, and mold habits and attitudes, and influence the opinions of their pupils. Pupils learn, therefore, not only what they are taught by the teacher, but what they

> see, hear, experience, and learn about the teacher. When a teacher *** violates the public trust placed in him, he must expect dismissal or other severe penalty as set by the Commissioner.***" (at 98-99)

Respondent's use of profanity constituted gross misconduct sufficient to substantiate the Board's charge of conduct unbecoming a teacher. Such coarse display demonstrated respondent's disregard for her professional responsibilities and public trust.

It is clear that on February 11, 1975, the principal served upon respondent a series of difficiencies to be corrected with the admonition that subsequent action would be taken against her by the Board in the event she did not rectify the problems. The Commissioner observes that such action was in compliance with the statute then in force, *N.J.S.A.* 18A:6-12. The record shows that respondent failed to improve her performance within the ninety days provided by the statute and the Board consequently certified its charges against respondent.

The Commissioner repeats his position with respect to the protection of tenure as previously articulated *In the Matter of the Tenure Hearing of Joseph A. Maratea, Township of Riverside, Burlington County,* 1966 *S.L.D.* 77, aff'd State Board of Education 106, aff'd Docket No. A-515-66 New Jersey Superior Court, Appellate Division, December 1, 1967 (1967 *S.L.D.* 351):

> "***The Commissioner is assiduous to protect school personnel in their employment when they are subjected to unfair or improper attacks or when they are unable to perform effectively because of conditions not of their own making or beyond their control. An employee is not entitled to the protection of tenure, however, when, by his own acts or failures, he creates conditions under which the proper operation of the schools is adversely affected. When the responsibility for the conditions unfavorable to the effective operation of the schools rests with the employee then, the Commissioner holds, the protection of tenure is forfeit.***" (at 106)

Having found the charges against respondent to be true in fact and of such moment to constitute gross conduct unbecoming a teacher and inefficiency, the Commissioner determines that Juanita Zielenski has forfeited her rights to tenure in the School District of Guttenberg. He therefore dismisses respondent effective as of the date of her suspension.

COMMISSIONER OF EDUCATION

July 5, 1977

William S. Humen,

Petitioner,

v.

Board of Education of the City of Bayonne, Hudson County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

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

For the Respondent, John J. Pagano, Esq.

Petitioner, a teaching staff member employed by the Board of Education of the City of Bayonne, hereinafter "Board," alleges that the Board has improperly and illegally transferred him from his assignment as school psychologist for the Child Study Team North to the Child Study Team South within the Bayonne school system. Petitioner requests that the Commissioner of Education: (a) order the Board to continue his assignment with the Child Study Team North; (b) restrain the Board from interfering with petitioner's professional activities, judgments and opinions; (c) terminate any steps of reprisal and harassment; and (d) reimburse petitioner for expenses and counsel fees in the within action. The Board denies that its actions controverted herein are illegal and avers that its decision to transfer petitioner was a decision it was statutorily empowered to make.

On November 24, 1975, a conference of counsel was held at the State Department of Education, Trenton, at which time respondent filed a Motion to Dismiss the Petition of Appeal with a Motion for Summary Judgment. Petitioner filed a letter memorandum on December 4, 1975 with respect to respondent's Motion to Dismiss and Motion for Summary Judgment, wherein it was asserted that the matter was ripe for summary disposition only in the event the Commissioner would rule in petitioner's favor, otherwise the matter should proceed to a full plenary hearing. Subsequently, on January 5, 1976, petitioner filed a counter-Motion for Summary Judgment wherein it was averred that petitioner's transfer was void *ab initio* and, therefore, petitioner must be returned to his original assignment. The hearing examiner advised both parties by letter dated January 12, 1976, that the Motions would be held in abeyance and that the matter was to move forward to a hearing.

A hearing was held in the office of the Hudson County Superintendent of Schools on March 1 and March 29, 1976. Briefs were subsequently filed. The report of the hearing examiner is as follows:

Petitioner asserts that his transfer of assignment by the Superintendent of Schools, subsequently ratified by the Board, was *ultra vires*. Petitioner further

asserts that the said transfer was designed to harass him, to cause an improper subordination of his position in deference to that of school superiors and to cause conflict and interfere with petitioner's efficient operation as a school psychologist and as a member of a child study team. (Petition of Appeal, at p. 2)

The record reveals that the Board had established special educational services in the district as prescribed by Chapter 46 of Title 18A of the New Jersey Statutes. To carry out the provisions of these statutes, the Board provided three separate child study teams, two of which were designated as Child Study Team North and Child Study Team South. Both child study teams consisted of three members each and included a school social worker, a learning disabilities teacher-consultant and a school psychologist.

On or about June 11, 1975, the Coordinator of Special Services for the school district addressed a memorandum to the Superintendent, with copies forwarded to petitioner and the Principal of Special Services for the school district, wherein the Coordinator opined that to best serve the needs of the pupils, petitioner should be transferred from Child Study Team North to Child Study Team South, beginning September 1975. (P-5) The Coordinator's memorandum continued, *inter alia,* as follows:

> "***I feel that some problems have arisen which, regardless of their origin, would make his [petitioner's] continued work with CST-North less [than] that of which he is capable.***" (P-5)

Subsequently, counsel for petitioner addressed a letter to the Superintendent dated June 21, 1975, wherein he advised the Superintendent that he represented petitioner and further, that it was counsel's belief that petitioner's transfer would violate his seniority rights and the Board's policy against involuntary transfers. (P-6) Counsel's letter stated:

> "***If Mr. Humen is to change his professional judgment he would violate his oath as a school [psychologist], and subject himself as well as the school system to receive malpractice charges." (P-6)

Petitioner avers that he was directed by the Coordinator to administer certain examinations on classified pupils which, in his judgment, were not necessary. (Tr. I-22-24) He testified that he was pressured by the principal of an elementary school to evaluate a pupil who had exhibited bizarre behavior. (Tr. I-28) He stated that the elementary principal "***wanted this child placed in special education and that she had already told me that the child was emotionally disturbed.***" (Tr. I-27) Petitioner continued to testify that the learning disabilities teacher-consultant insisted that he administer an intelligence quotient examination of this pupil after he had determined not to administer the test. (Tr. I-29-30) Petitioner stated that he would administer the IQ examination to the pupil only because of the tremendous pressure placed upon him. He asserted, however, that it was not in keeping with his professional judgment to administer that particular test. (Tr. I-31) It was petitioner's opinion that an examination was not necessary if his clinical judgment and professional opinion were satisfactory to take care of a particular situation. (Tr. I-29)

With respect to his stated position, petitioner addressed a letter to the president of the New Jersey Association of School Psychologists (employed as a Regional Psychologist for the New Jersey Department of Education, Bureau of Special Services) wherein he asserted, *inter alia,* as follows:

> "I have been faced with a recurrent problem over the past school year which seems to have increased in intensity and may present itself again next year.
>
> ***
>
> "The issue which I am asking your clarification in is as follows:
>
> "In three specific instances the Coordinator has ordered me to do further testing on a referred child. He had selected the tests but never specified a time when they were to be completed. I objected to this unnecessary testing and stated the reasons as they pertained to each individual case. Nevertheless I did the testing.***" (P-1)

Petitioner asked the president to categorize the issue as legal or illegal, proper or improper, sound or unsound, or under any additional framework which would best suit his situation. (P-1)

On July 24, 1975, the president responded to petitioner's letter, *inter alia,* as follows:

> "***As I see the impact of a supervisor on child study team members, it would be acceptable for the supervisor to advise any individual that a sound argument for a particular diagnostic impression had not been presented and require additional assessment. It would be professionally inappropriate for any individual to cross discipline lines and order use of specific tests (e.g. For a supervisor who is by training a psychologist to order an LDT-C to use an ITPA would be inappropriate but to require further support for an argument of language deficiency would not. The LDT-C in the latter case then exercises professional judgment.)
>
> "If the designated supervisor is of the same discipline background as the subordinate it would be acceptable to require additional support for an argument but only student-trainees should be ordered to use certain tests.***
>
> "At this point it would seem that you and your coordinator need to discuss your concerns and reach a mutually agreeable conclusion. He needs to recognize the impropriety of ordering use of specific tests and you need to recognize his need for firmly supported, defensible professional judgments. It may be that there are concessions that must be made by both of you.***" (P-2)

With regard to petitioner's allegation that the Board had interfered with his professional activities, judgments and opinions, the president testified with

respect to the role of the members of child study teams, particularly school psychologists. She stated that the basic child study team includes a school social worker, school psychologist and learning disabilities teacher-consultant with each discipline autonomous in its data gathering process but completely interdependent on the others in terms of diagnostic classification, determination of program planning and placement recommendation for pupils. (Tr. I-12) She testified that the entire child study team should reach a unanimous conclusion, not a majority decision, with respect to the classification of a handicapped pupil. (Tr. I-13-14) She also stated that neither a school psychologist, nor any individual member of a child study team, could legally classify a pupil on his opinion alone. (Tr. I-14-15) *N.J.A.C.* 6:28-1.3, 1.4; *N.J.S.A.* 18A:46-5

Petitioner testified that he became aware that the Coordinator wished to have him transferred from Child Study Team North to Child Study Team South in June 1975 when the Coordinator presented his annual evaluation of petitioner for the 1974-75 school year. (Tr. I-36-39; P-4) He stated further that the Coordinator did not specifically inform him of the reasons for the recommended transfer (Tr. I-39-42), but that the Coordinator stated "***that he was very displeased with me and that I had not followed his directives***." (Tr. I-36)

Subsequently on July 7, 1975, counsel for petitioner sent a letter by certified mail, return receipt requested, to the Board wherein counsel stated as follows:

> "Please be advised that I represent William S. Humen, employed by you as a school psychologist. I have had a long meeting with Mr. Humen concerning a prospective transfer to the Child Study Team South. The background, specific rationale for the transfer and the total picture presented by the events of the last several months, indicate that before the Board of Education approves the contemplated steps, that there should be an airing of the entire matter.
>
> "Without detailing all of the problems as we see them, it is obvious that there must be serious concern as to whether the professional judgment of an expert is not being tampered with and pressured in a manner which may very well violate the relationship between a psychologist and a student who has been entrusted to the psychologist for his examination, diagnosis, and prognosis. There is also involved the possibility of malpractice charges against Mr. Humen's superiors, a violation of Mr. Humen's professional responsibility which would expose him to disciplinary proceedings before his professional board, and correspondingly expose the Bayonne Board to serious charges.
>
> "Whether or not this contemplated transfer arises from a mistake in judgment, or is more related to personal motivation is, at this juncture, beside the point. I would suggest that a meeting be arranged so that the matter can be fully aired, to the benefit of all concerned.
>
> "Parenthetically, I call to your attention the fact that school psychologists

are excluded from coverage in the agreement between Local 729 and the Board." (P-7)

The Superintendent wrote to petitioner's counsel on July 28, 1975 to advise counsel that the assignment of staff personnel in the capacity of petitioner was on a systemwide basis and that those staff members may be assigned and/or reassigned to the various offices within the school district. (P-8) The Superintendent did not acknowledge counsel's request for a meeting with the Board as suggested in the letter of July 7, 1975. (P-7)

Subsequently, on August 11, 1975, petitioner's counsel again wrote to the Board requesting a meeting prior to the proposed transfer of petitioner. (P-9)

On August 12, 1975, counsel for the Board acknowledged petitioner's letter of August 11, 1975 (P-9), and informed counsel that the Board did not meet in the month of August. (P-10)

Subsequently on August 28, 1975, petitioner received a letter from the Principal of Special Education stating that petitioner was to report to the Superintendent's office on September 2, 1975 for his 1975-76 school year assignment. (P-11) Petitioner testified that he reported to the Superintendent's office on September 3, 1975, and was handed a letter dated August 28, 1975, wherein it was stated that petitioner was directed to report to Child Study Team South commencing September 2, 1975 to perform the duties of school psychologist until further notice. (P-12) Petitioner stated that, in addition to the Superintendent, the Coordinator of Special Services was present and the letter stated that the Coordinator was his assigned supervisor. (Tr. I-59-60; P-12)

Petitioner testified that he had not received any notification from the Board that he had been transferred from Child Study Team North to Child Study Team South. (Tr. I-59-60) Petitioner, however, introduced into evidence the document marked P-13 dated September 11, 1975, addressed to the Board from the Superintendent which listed the names of eight employees, including the name of petitioner. The document reported, *inter alia*:

"Effective September 1st, 1975, I have made the below-listed Psychologist-teacher transfers and assignments:***

"Name	From	To
***		
William Humen	Child Study Team – North	Child Study Team – South"

The document was approved and adopted by the Board on September 11, 1975.

Petitioner proffered extensive testimony with regard to alleged harassment of him by the Board subsequent to the filing of his Petition of Appeal. (Tr. I-61-111; P-14-29) The hearing examiner observes that the Petition of Appeal

was filed with the Commissioner on September 10, 1975. The hearing examiner, therefore, will consider only those allegations set forth in the Petition and the contentions, *sub judice.*

Petitioner stated that his transfer from Child Study Team North to Child Study Team South was originally made by the Superintendent effective September 2, 1975 (P-12) and subsequently ratified by the Board on September 11, 1975. (P-13) Petitioner argues that the transfer was an illegal act at its inception and, therefore, could not have been ratified by the Board at a later date. Petitioner cites *Norma Whitcraft and Cherry Hill Education Association v. Board of Education of the Township of Cherry Hill, Camden County,* 1974 *S.L.D.* 901 wherein the Commissioner interpreted *N.J.S.A.* 18A:25-1 and held that when the Legislature stated that an action was to be taken by the local board of education, a decision of an administrator was not sufficient. (Petitioner's reply letter memorandum to the Board's Motion for Summary Judgment, at p. 2) *N.J.S.A.* 18A:25-1 provides:

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

Petitioner asserts that as a matter of law the Board could not have ratified an illegal action taken by the Superintendent. It was, therefore, beyond the power of a public body (the Board) to ratify an act which was illegal at its inception, *Comely v. Board of Trustees of Firemen's R. Fund,* 122 *Conn.* 650, 191 *A.* 729 (*Sup. Ct.* 1937) and *Selinger v. Selinger,* 115 *N.J. Eq.* 261, 170 *A.* 853 (*Chan.* 1934), rev'd on other grounds 117 *N.J. Eq.* 427, 176 *A.* 193 (*E.&A.* 1935). (Petitioner's reply letter memorandum to the Board's Motion for Summary Judgment, at p. 3)

Respondent asserts that it was its duty and obligation to provide educational facilities including teachers and other personnel for the education of the public school children, and it may assign and transfer personnel within the limits of their certification. The Board did not meet in the month of August 1975; however, during the month of August in preparation for the opening of the schools, the Superintendent directed petitioner to report to Child Study Team South commencing September 2, 1975. (P-12) Respondent avers that the Superintendent is the chief executive officer of the Board and it was his duty to see that the new school year started at the beginning of September and that personnel were properly assigned. (Memorandum on Behalf of Respondent, at p. 9)

The Board presented documents into evidence in support of its argument that the Superintendent had the authority to reassign petitioner prior to its ratification of such action. At its annual organization meeting held on March 18, 1975, the Board adopted its rules and regulations, *inter alia,* as follows:

> "1. RESOLVED, that this Board of Education, pursuant to N.J.S.A. 18A:11-1 and other applicable statutes, hereby approves and adopts as its rules and regulations for the year March 18th, 1975 to and including

March 17th, 1976, the Rules and Regulations annexed hereto and the amendments thereto adopted by the previous Boards, with the exception of the Salary Schedule and any provisions that are inconsistent with any existing Federal laws and the Laws of the State of New Jersey***." (R-1)

The Board presented the adopted rules and regulations with regard to the office of the Superintendent of Schools, *inter alia,* as follows:

"1. *Function of the Superintendent*:

***

"d. The Superintendent shall direct the Central Administration and through it exercise general control and oversight over the school system in all its parts.

"e. He shall have power to make such rules and to give such instructions as may be necessary to give effect to all regulatory instruments authorized by the Board; and in all matters within the school law and not provided for in Board regulations, he shall have discretionary power.

***

"3. *Relationship to the Board of Education*:

***

"e. He shall keep the Board informed of all developments affecting the control and direction of the internal affairs of the school system over which he has been granted general administrative authority, including especially all regulations or instructions affecting staff personnel management***.

***

"4. *Relationship to School Personnel*:

"a. He shall recommend to the Board for appointment, assignment, transfers, suspension, promotion or dismissal, any or all employees of the Board except those in the office of the Secretary as required by law (18:6-30) [Now: *N.J.S.A.* 18A:6-1, 17-5 and 17-6].***" (R-2)

The Superintendent testified that it was his responsibility to determine that the schools were properly staffed and to assign or reassign staff members as the need arose from time to time. He stated that such arrangements were frequently called to the attention of the Board, particularly where a contractual obligation required that the Board ratify the action. He asserted that petitioner was reassigned and not transferred. (Tr. II-10)

The Superintendent testified that in the months of July and August 1975, he had considered a recommendation to the Board to dismiss an entire child

study team due to budgetary constraints. (Tr. II-34) He stated that he had met with the administrative staff on August 27 and 28, 1975 to review decisions for the opening of school. (Tr. II-33) On the dates of August 27 and 28, 1975, he made a number of decisions with regard to the assignment of personnel and, he testified, he immediately circulated those decisions to the personnel so affected. (Tr. II-35; P-12)

The Superintendent further testified that the Board meeting of September 11, 1975, was the first opportunity for him to present the names of personnel to be assigned, reassigned or transferred subsequent to his decision of August 27 and 28, 1975. (Tr. II-11-12; P-13) He stated that it had been the practice to submit a monthly report to the Board subsequent to staffing assignments, reassignments or transfers which tended to occur from time to time as needed. (Tr. II-12) He asserted that his decision to assign petitioner to Child Study Team South prior to the Board's approval was founded in R-2 and he stated that:

> "***It [R-2] specifies that he [Superintendent] shall act as the appointing officer under the personnel procedures as set up elsewhere in these rules for all certificated and non-certificated employees. It is a procedure of our Board of Education and our school district, that the Superintendent shall assign, reassign, or transfer, or assign persons, whether they are hired, whether they are returning from a leave, whether they are already in the direct employ of the Board of Education, so that the staffing shall be properly assigned and in the judgment of the Superintendent of Schools is located where this service can be most appropriate.***" (Tr. II-28-29)

The Principal of Special Education for the school district testified that his subordinate, the Coordinator of the Child Study Teams, had recommended that petitioner be reassigned from Child Study Team North to Child Study Team South. (Tr. II-70-71) He stated that he had discussed petitioner's reassignment with the Superintendent and further, it was his opinion that such reassignment within the child study team was for the betterment of the school system. He testified that during his tenure as principal he had recommended transfers and reassignments of other teachers, school psychologists and social workers. The Principal asserted that petitioner had not complained to him with regard to petitioner's allegation that he had been pressured or harassed. (Tr. II-70-73) He stated further that he had considered the rights of petitioner and determined that the reassignment did not change petitioner's salary status and there was no change in his duties. (Tr. II-73) The principal concluded his testimony with the statement that he did not have any personal problems with petitioner and that the reassignment was made for scholastic and educational reasons. (Tr. II-74)

The Coordinator of the Child Study Teams, a certificated school psychologist, testified that he had discussed the possibility of a reassignment with petitioner prior to his evaluation of petitioner dated June 11, 1975. (Tr. II-112-113; P-5) He stated that petitioner had agreed to the recommended reassignment to Child Study Team South and that petitioner had said, "***that would be fine, there would be no problem.***" (Tr. II-99)

The Coordinator testified that petitioner was reassigned because of some basic personality problems within Child Study Team North and that a part of the problem was manifested when petitioner choose not to perform an intelligence test which had been requested. (Tr. II-89) He stated, "***Mr. Humen had to have his own way at times. If he did not have his own way, he would become very difficult. It caused problems with the Team. *** This would make other Team members uncomfortable.***" (Tr. II-90) He testified that petitioner did not respect his authority as the Coordinator of Child Study Teams. (Tr. II-90) It was the Coordinator's recommendation to reassign petitioner because he believed that it would be in petitioner's best interest and for the betterment of the school system as a whole. He testified that he believed petitioner would improve in his functions by a reassignment with a different group of people because petitioner's relationship with the members of Child Study Team North was less than what it should have been. (Tr. II-90)

The Coordinator testified that petitioner had refused his request and the request of his fellow Team members to administer an intelligence test. (Tr. II-93) He asserted that petitioner would

> "***say he was going to do something, and then not do it. This caused him a problem, because the other Team members wanted this testing to be done. When he did not do it, they thought that he was just doing as he pleased.***" (Tr. II-100)

The Coordinator testified that on one occasion he had examined petitioner's scoring on a Bender-Gestalt test and found that petitioner had made an error. He stated that although the error did not substantially affect the outcome of the examination results, such a mistake was not generally made by an experienced psychologist. (Tr. II-101-102)

With respect to the testimony and the letter (P-2) submitted by the President of the New Jersey Association of School Psychologists, the Coordinator testified that both supported his position with regard to his request for petitioner to administer an intelligence test for additional data on a classified pupil. (Tr. II-117-118) The Coordinator testified that he had not held any animosity towards petitioner.

The Board conceded that a transfer of a teacher cannot legally be accomplished by the Superintendent. Action by the Board was necessary and, moreover, the Board argues that such action had retroactive effect pursuant to which reads as follows:

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

The Board avers that petitioner's assignment, not transfer, by the Superintendent from September 2 to September 11, 1975 was approved retroactively to September 1, 1975, when the Board approved and adopted the Resolution of September 11, 1975. (Memorandum on Behalf of Respondent, at

p. 11; P-13) The authority of the Superintendent to assign petitioner to Child Study Team South is founded in *N.J.S.A.* 18A:17-20, asserts the Board. The statute provides:

> "The superintendent of schools shall have general supervision over the schools of the district or districts under rules and regulations prescribed by the state board and shall keep himself informed as to their condition and progress and shall report thereon, from time to time, to and as directed by, the board and he shall have such other powers and perform such other duties as may be prescribed by the board or boards employing him.
>
> "He shall have a seat on the board or boards of education employing him and the right to speak on all educational matters at meetings of the board or boards but shall have no vote."

The Board contends, therefore, that its action to reassign petitioner retroactively was proper and valid.

The hearing examiner has examined all of the testimony pertinent to petitioner's allegations under consideration herein and observes that the testimony of the Board is in a direct dichotomy with that of petitioner with regard to his allegations that the Board interfered with his professional activities, judgments and opinions and that the Board had taken steps of reprisal and harassment against petitioner. Petitioner failed to produce sufficient proofs that the Board had indeed engaged in such activities, therefore the hearing examiner recommends that these allegations be dismissed.

With regard to the Board's reassignment of petitioner, the hearing examiner finds from the record that the Board had reasons to effectuate such a reassignment. The hearing examiner leaves to the determination of the Commissioner a judgment as to whether or not a superintendent may direct the transfer and/or reassignment of a tenured teacher and a board subsequently ratify the superintendent's action as provided by *N.J.S.A.* 18A:25-1. The hearing examiner also leaves to the Commissioner's determination what relief, if any, may be afforded petitioner in the instant matter.

Finally, in regard to petitioner's prayer for reimbursement for his expenses and counsel fees, the hearing examiner finds no authority on behalf of the Commissioner to grant such relief. See: *Celina G. David v. Board of Education of the Borough of Cliffside Park, Bergen County,* 1967 *S.L.D.* 192; *John S. Romanowski v. Board of Education of the City of Jersey City, Hudson County,* 1966 *S.L.D.* 219; *Arthur L. Page v. Board of Education of the City of Trenton, et al., Mercer County,* 1975 *S.L.D.* 644, aff'd State Board of Education 1976 *S.L.D.* 1158. In *David,* the Commissioner held:

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

The hearing examiner recommends, therefore, that petitioner's prayer for reimbursement of expenses and counsel fees be denied.

This concludes the report of the hearing examiner

* * * *

The Commissioner has reviewed the record of the instant matter, including the report of the hearing examiner and the objections filed by the parties. Petitioner takes particular exception to that part of the report wherein the hearing examiner determined that he would consider only those allegations set forth in the Petition of Appeal and that he would not consider petitioner's allegations subsequent to the filing of the Petition on September 10, 1975. The issues as set forth and agreed upon by the parties at a conference of counsel conducted on November 24, 1975, prior to the hearing, are as follows:

"1. May the Respondent Board assign personnel within the limits of their certification?

"2. Did the Respondent Board act retroactively upon the recommendation of the Superintendent to transfer personnel?

"a. May the Superintendent transfer an individual before the Board has taken official action with such a transfer?

"3. In the event the transfer is invalid, may the Board make an invalid act valid?"

Petitioner submitted that, prior to the Commissioner's determination, the matter should be remanded to the hearing examiner to include all of the events which occurred subsequent to September 11, 1975, and subsequent to the filing of the Petition of Appeal.

The Commissioner finds no merit in petitioner's request for such a remand. The absence of testimony with respect to petitioner's allegations of actions of the Board subsequent to the filing of the Petition of Appeal does not materially alter the contentions. Petitioner's request for remand is therefore denied.

The uncontroverted facts reveal that the Superintendent transferred petitioner from his position as school psychologist of the Child Study Team North to a similar position with Child Study Team South commencing on September 2, 1975 and prior to an open public meeting of the Bayonne City Board of Education held September 11, 1975. Notwithstanding the Board's argument that it had promulgated policies which provided the Superintendent the authority to reassign petitioner prior to its ratification of such action on September 11, 1975, the Commissioner looks to the statute, *N.J.S.A.* 18A:25-1, which provides:

"No teaching staff member shall be transferred, except by a recorded roll

call majority vote of the full membership of the board of education by which he is employed."

As was stated in *Norma Whitcraft and Cherry Hill Education Association v. Board of Education of the Township of Cherry Hill, Camden County,* 1974 *S.L.D.* 901:

> "***[T]he Commissioner has already interpreted the statute of reference (*N.J.S.A.* 18A:25-1) to mean that an action of the local board of education, not a decision by a school administrator, is required prior to the time when the transfer is to be effective. *James Mosselle v. Board of Education of the City of Newark,* 1973 *S.L.D.* 197; affirmed State Board of Education, [1974 *S.L.D.* 1414].***" (at 904)

The Commissioner finds and determines, therefore, that the Superintendent's action to transfer and/or reassign petitioner prior to the action of the Board pursuant to *N.J.S.A.* 18A:25-1 was *ultra vires*. The Commissioner is constrained to point out to the Bayonne City Board of Education and all other boards of education that strict adherence must be given to the statutes of this State.

Petitioner argues that as a matter of law it was beyond the power of the Board to ratify an act which was illegal at its inception. The Commissioner cannot agree and holds that the judgment made by the Board on September 11, 1975 to transfer petitioner was made within the scope of its statutory authority. Therefore, the Commissioner will not substitute his own discretion in this matter for that of the Board. With respect to such decisions of local boards of education, the Court said in *Thomas v. Morris Township Board of Education,* 89 *N.J. Super.* 327, 332 (*App. Div.* 1965):

> "***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.***"

Having found no reason for his intervention in this matter, the Commissioner further finds that petitioner has no inherent right to assignment to Child Study Team North in the Bayonne City School District. This finding is founded in *N.J.S.A.* 18A:27-4 as follows:

> "Each board of education may make rules, not inconsistent with the provisions of this title, governing the employment, terms and tenure of employment, promotion and dismissal, and salaries and time and mode of payment thereof of teaching staff members for the district, and may from time to time change, amend or repeal the same, and the employment of any person in any such capacity and his rights and duties with respect to such employment shall be dependent upon and governed by the rules in force with reference thereto."

Accordingly, since the Board in this instance has exercised its right to transfer or reassign petitioner, the action of the Board must be sustained. The Petition is dismissed.

COMMISSIONER OF EDUCATION

July 5, 1977

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, July 5, 1977

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

For the Respondent-Appellee, John J. Pagano, Esq.

The State Board denied request for Oral Argument and affirmed the decision of the Commissioner of Education for the reasons expressed therein.

October 12, 1977

Pending New Jersey Superior Court

Board of Education of the City of Plainfield,

Petitioner,

v.

Boards of Education of the Borough of Dunellen, Township of Edison, Township of Piscataway, Borough of South Plainfield, Middlesex County; Boards of Education of the Borough of North Plainfield, Borough of Watchung, Township of Green Brook, Somerset County; Board of Education of the Scotch Plains-Fanwood Regional School District, Union County,

Respondents.

COMMISSIONER OF EDUCATION

ORDER

For the Petitioner, King and King (Victor E. D. King, Esq., of Counsel)

For the Board of Education of the Borough of Dunellen, Johnson & Johnson (Edward J. Johnson, Jr., Esq., of Counsel)

For the Board of Education of the Township of Edison, R. Joseph Ferenczi, Esq.

For the Board of Education of the Township of Piscataway, Rubin & Lerner (Frank J. Rubin, Esq., of Counsel)

For the Board of Education of the Borough of South Plainfield, Wilentz, Goldman and Spitzer (Robert J. Cirafesi, Esq., of Counsel)

For the Board of Education of the Borough of North Plainfield, Reid & Vogel (Charles A. Reid, Jr., Esq., of Counsel)

For the Board of Education of the Borough of Watchung, Buttermore & Mooney (Robert J.T. Mooney, Esq., of Counsel)

For the Board of Education of the Township of Green Brook, Harman R. Clark, Jr., Esq.

For the Board of Education of Scotch Plains-Fanwood Regional, Johnstone & O'Dwyer (Jeremiah D. O'Dwyer, Esq., of Counsel)

Petitioner, the Board of Education of the City of Plainfield, hereinafter "Board," advanced a Petition of Appeal against eight contiguous or neighboring districts on December 9, 1971, and averred therein that, standing alone, it was unable to effect a remedy for racial imbalance problems in its schools. Thereafter, the Commissioner of Education issued a Decision on Motion to Dismiss on May 12, 1972, and a second similar Decision on Motion on March 28, 1973. Ultimately, after an appeal to the State Board of Education there was a remand to the Commissioner, the submission of an amended and simplified Petition of Appeal and a conference of the parties wherein it was agreed that the principal issue for consideration was whether the Commissioner should direct a

study of conditions in the Plainfield area. This issue was submitted for consideration by the Commissioner in a report of a hearing examiner grounded in a set of stipulated facts and detailed documents. *Board of Education of the City of Plainfield, v. Boards of Education of the Borough of Dunellen et al.,* April 18, 1975 The Commissioner was not called upon to address the findings of the report because on May 21, 1975, petitioner addressed a letter to the hearing examiner which requested, *inter alia,* that the matter be held in abeyance pending a decision of the Superior Court, Appellate Division, in *Board of Education of the City of New Brunswick v. Board of Education of the Township of North Brunswick et al.,* 1973 *S.L.D.* 578, aff'd State Board of Education 1974 *S.L.D.* 1414. Such decision was never required to be made by the Court, because all appeal proceedings in *New Brunswick* were withdrawn by the New Brunswick Board, and dismissed by the Court on December 12, 1976.

In the interim since this dismissal in *New Brunswick, supra,* petitioner in the instant matter has not moved for further consideration of its limited Petition and the Commissioner finds no reason to consider it further. The pleadings are stale. Time has rendered the Petition as one which is no longer clearly viable.

Accordingly, the Commissioner accedes to the Motions to Dismiss advanced by respondents in May 1975. The Petition is dismissed.

COMMISSIONER OF EDUCATION

July 5, 1977

M. Herbert Axler,

Petitioner,

v.

Philip Unger,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, M. Herbert Axler, *Pro Se*

For the Respondent, Philip Unger, *Pro Se*

Petitioner, a resident of Oakland, New Jersey, alleges in a Petition of Appeal filed with the Division of Controversies and Disputes, State Department of Education, on July 27, 1976, that respondent, identified only as a member of

an unspecified board of education or as a teacher "***in the N.J. School System***" (also unidentified) had released confidential information about petitioner's son to which he was privy. (Petition of Appeal) Petitioner stated that it was his understanding that

> "***any information which a Member of the Board is privy to or is disclosed to the Member of the Board or by parents who wish their names withheld should not be required by the Respondent at a June 28th meeting which was open to the Public***."

and that respondent should be "***aware of a juvenile's rights regarding public disclosure of information***." Petitioner requested that respondent be "advised" of the "N.J. State Laws" and that "action be taken according to the State Laws."

Respondent denies all allegations and asserts that the Petition fails to set forth a cause of action and is "***so unintelligible as to make any proper response impossible.***"

Subsequent to receipt of the Answer, the Deputy Assistant Commissioner, Division of Controversies and Disputes, addressed the following letter to petitioner on September 14, 1976:

> "I have reviewed the Petition in the above-entitled matter in the context of the Answer thereto and have concluded that the Petition does not pose a controversy under the school laws (*N.J.S.A.* 18A) for which relief may be granted. Such conclusion is grounded on the fact that board members are responsible for the wisdom of their actions, and their use or abuse of discretion, to the constituents who elect them to office and not to the Commissioner of Education. The principles in this regard were set forth in the case of *Frances Licato v. Patrick Crilley, et al.*, 1973 *S.L.D.* 361 and in a number of other cases cited therein. A copy of *Licato* is enclosed for your perusal.
>
> "Accordingly, unless the Petition is amended to include specific allegations as a cause of action by the Commissioner and a prayer for a relief which poses the possibility of a remedy, it will be considered dismissed.
>
> "If you wish to appeal this decision you should prepare a Brief pertinent thereto for consideration by the Commissioner and forward a copy to Mr. Unger. The Commissioner may then consider the matter directly."

Thereafter there was no response from petitioner for a period of approximately eight months and on May 2, 1977, petitioner was advised that the Petition would be removed from active consideration. On May 3, 1977, petitioner indicated he did not agree with such advice and the matter is now before the Commissioner as a matter of law.

The Commissioner has reviewed the pleadings, and determines that he concurs in all respects with the disposition of this matter. The Petition is vague

and presents no cause for action in its present form. As the Commissioner said in *Licato, supra,* wherein it was also alleged that members of a board of education had disclosed confidential information:

> "***The charges herein other than those involving election campaign activities are clearly, for the most part, that respondents abused their rights to exercise discretion: either jointly or singly, that they decided to issue, and did issue, minority board reports; circulated a document labeled 'confidential'; called a meeting of the board. But, in the context of the opinions *** such actions by local board members are not subject to review by the Commissioner under the school laws for the reasons cited *** and there is no code of ethics embedded in other statutory prescription which is applicable.***" (1973 *S.L.D.* at 369)

The citations of reference included *Downs v. Board of Education of the District of Hoboken,* 12 *N.J. Misc.* 345, 171 *A.* 528 (*Sup. Ct.* 1934), aff'd *sub nomine Fletchner v. Board of Education of Hoboken,* aff'd 113 *N.J.L.* 401 (*E.&A.* 1934) and *William A. Wassmer et al. v. Board of Education of the Borough of Wharton, Morris County,* 1967 *S.L.D.* 125.

Accordingly, the Petition is dismissed.

COMMISSIONER OF EDUCATION

July 5, 1977

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, July 5, 1977

For the Petitioner-Appellant, M. Herbert Axler, *Pro Se*

For the Respondent-Appellee, Philip Unger, *Pro Se*

The State Board denied Application for Stay and request for Oral Argument, and affirmed the decision of the Commissioner of Education for the reasons expressed therein.

September 7, 1977

Lila Lane,

Petitioner,

v.

Board of Education of the City of Newark, Essex County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Philip Feintuch, Esq.

For the Respondent, Pickett & Jennings (Robert T. Pickett, Esq., & Gary H. Shapiro, Esq., of Counsel)

Petitioner, who has served from 1946 to the present as an elementary school teacher and reading teacher in the employ of the Board of Education of the City of Newark, hereinafter "Board," alleges that the Board has discriminatorily and unreasonably denied her opportunity for promotion. The Board denies all allegations of impropriety and asserts that its promotional procedures were properly established through collective negotiations in an effort to overcome discriminatory imbalances in its administrative staff.

The matter is jointly submitted for Summary Judgment by the Commissioner of Education on a Stipulation of Facts, documents in evidence and Briefs. The facts are these:

Petitioner, who has held a New Jersey elementary school principal's certificate since 1966, scored above the 90th percentile on the first part of a promotional examination given by the Board in 1968. Although petitioner took the second part of that examination, she was never apprised of her score since the examination was suspended by the Board. In 1969 as a consequence, at least in part, of the decision of the United States District Court in *Porcelli v. Titus,* 302 *F.Supp.* 726 (*D.N.J.* 1969), the concept of written examination was abandoned and a promotional pool was established. Thereafter, petitioner took an oral examination and was placed in the promotional pool which, by unilateral proclamation of the Board, expired on June 30, 1975. Prior to its expiration, however, petitioner applied and was examined for all, but not appointed to any, of the posted elementary principalship or elementary vice-principalship vacancies.

The examinations for those vacancies were conducted in conformity with Article III, Section 7 of the then existing negotiated agreement between the Board and the Newark Teachers Union, Local 481, A.F.T/AFL-CIO, effective February 1, 1973 through January 31, 1976. (J-1) Section 7(B) provides, *inter alia,* that candidates are to be screened by a committee consisting of three administrative personnel, an educator from without the district and a teacher from within the district. It further specifies that:

***

"5. The screening committee shall recommend to the Superintendent those candidates judged to be worthy candidates for promotion. These successful candidates shall constitute the pool from which promotions shall be made.

"a. The vote of each member of the committee shall be entitled to equal weight under any procedure established.

"b. Any teacher who fails to be placed in the pool may request from the committee the reasons in writing for his non-inclusion in the pool.

"6. The criteria for use by the screening committee shall be cooperatively developed by representatives of the Union and the Superintendent's staff.

"7. New candidates shall be selected for the pool once each year in March.

***

"11. Selection shall be based on consideration of qualifications, seniority, personal preference of the applicant, integration of staff, and the welfare of children and the community.

"12. The Committee, when appointed, shall serve for one (1) year. Reappointment of any member shall be permitted.***"

(J-1, at p. 32)

The negotiated agreement also specifies that:

***

"2. The Superintendent, on the basis of his examination of the qualifications of the candidates and any other procedures which he may choose to employ, shall be the sole judge as to the individuals he may select for recommendation to the Board for the appointment to any such position.***" (J-1, at p. 32)

Petitioner, contending in her Brief that the selection of candidates for promotion within a school system is a managerial prerogative which must not be encumbered by collateral influences, cites, *inter alia, Board of Education of Englewood v. Englewood Teachers Association,* 64 *N.J.* 1 (1973) wherein it is stated:

"***[M]ajor educational policies which indirectly affect the working conditions of the teachers remain exclusively with the Board and are not negotiable whereas items which are not predominantly educational policies

and directly affect the financial and personal welfare of the teachers do not remain exclusively with the Board and are negotiable.***" (at 7)

Petitioner avers that a candidate selected for promotion must be the best qualified and that such matter is not negotiable. *Board of Education of the Township of North Bergen v. North Bergen Federation of Teachers,* 141 *N.J. Super.* 97 (*App. Div.* 1976) Petitioner contends that in the instant matter the Board's statutory managerial prerogative has been illegally surrendered to a committee, the individual members of which are improperly empowered, individually and collectively, to exercise a veto over even the best qualified of candidates. (Petitioner's Brief, at pp. 3-7; Petitioner's Supplemental Brief, at pp. 2-3)

Petitioner contends that the negotiated agreement, insofar as it contains promotional policy, is invalid and prays the Commissioner to set aside any promulgated lists which have resulted from the exercise of such policy. (Petitioner's Brief, at pp. 7-8; Petitioner's Supplemental Brief, at pp. 3-4)

Conversely, the Board asserts that its negotiated agreement merely establishes promotional procedures which shall be employed in the screening of applicants for promotion and that negotiating those procedures was sanctioned by the Superior Court in *North Bergen, supra,* as follows:

"***We conclude that, while the parties should meet to set promotional criteria, the ultimate criteria must be left to the board as a matter of major educational policy. ***On the other hand, *procedures* by which promotional vacancies are filled should be negotiated, and if violated, be subject to arbitration. Such procedures would, of course, be subject to the board's ultimate authority to promote.***" (*Emphasis in text.*)
(141 *N.J. Super.* at 104)

The Board contends that its negotiation with the Union of procedures to be employed in filling promotional vacancies was in no way violative of its statutory obligation to determine who shall staff its schools since its ultimate managerial prerogative of determining whom to promote remains intact. (Board's Brief, at pp. 5-8)

The Commissioner has carefully considered the arguments of law as apply to the stipulated relevant facts of the controverted matter and finds for the Board. This determination is grounded upon a thorough analysis of both the stipulated facts and the text of the Board's promotional policy. As was enunciated by the Commissioner in *Harry A. Romeo, Jr. v. Board of Education of the Township of Madison, Middlesex County,* 1973 *S.L.D.* 102:

"***In ascertaining the meaning of a policy, just as of a statute, the intention is to be found within the four corners of the document itself. The language employed by the adoption should be given its ordinary and common significance. *Lane v. Holderman,* 23 *N.J.*. 304 (1957) Where the wording is clear and explicit on its face, the policy must speak for itself

and be construed according to its own terms. *Duke Power Company, Inc. v. Edward J. Patten, Secretary of State et al.*, 20 *N.J.* 42, 49 (1955); *Zietko v. New Jersey Manufacturers Casualty Ins. Co.*, 132 *N.J.L.* 206, 211 (*E. & A.* 1944); *Bass v. Allen Home Development Co.*, 8 *N.J.* 219, 226 (1951); *Sperry & Hutchinson Co. v. Margetts*, 15 *N.J.* 203, 209 (1954); 2 *Sutherland, Statutes and Statutory Construction* (*3rd ed.* 1943), *section* 4502***" (at 106)

The clear language of the Superior Court in *North Bergen, supra,* as cited above is controlling in the instant matter. A careful review of the text of Section 7, Promotions, of the negotiated agreement reveals only that the Board and the majority representative of its teachers has agreed to follow for a designated period certain procedures which, negotiated or otherwise, are common to the promotional practice of numerous boards of education. As was said in *Quinlan v. Board of Education of North Bergen*, 73 *N.J. Super.* 40 (*App. Div.* 1962):

"***When an administrative agency has acted within its authority, its actions will not generally be upset unless there is an affirmative showing that its judgment was arbitrary, capricious or unreasonable.***"
(at 46-47)

Similarly pertinent is that which was stated by the Commissioner in *Leroy Lynch et al. v. Board of Education of the Essex County Vocational School District, Essex County*, 1974 *S.L.D.* 1308, aff'd State Board of Education 1975 *S.L.D.* 1098 as follows:

"***[T]he Board followed its policy with respect to promotions of teaching staff members, and exercised its judgment by recommending several candidates from whom the Superintendent chose one as his recommendation to the Board. The record discloses that the Board did consider the factors of certification, the nature of the position to be filled, the experience of the applicants in regard to the type of position being applied for, seniority, and the potential for success for each individual applicant. Although in most school districts the screening process is usually performed by experienced school administrators, it is not a fatal defect in this instance that the initial screening and interviewing process was performed by a committee of Board members.

"The appointment of teaching staff members, and the pattern of staff utilization are two of the vital factors which influence and determine the quality of the educational program within a given school district. This is so because the ability and competence of the teaching staff members have a higher coefficient of correlation to the instructional process and the achievement of pupils than any other factor such as the schoolhouse, or the materials for instruction. It was an understanding of these principles that caused the court in the case of *Victor Porcelli et al. v. Franklyn Titus, Superintendent, and the Newark Board of Education*, 108 *N.J. Super.* 301 (*App. Div.* 1969), *cert. den.* 55 *N.J.* 310 (1970), to state that:

'***We endorse the principle, as did the court in *Kemp v. Beasley,*

> 389 *F.* 2*d* 178, 189, (8 *Cir.* 1968), that 'faculty selection must remain for the broad sensitive expertise of the School Board and its officials.'***' (at p. 312)

> "***[T]his Board and all other local boards of education have the responsibility to appoint the most able and competent person to fill any teaching staff position, including all administrative and supervisory positions. This is a basic responsibility which underlies the comprehensive requirement of all local education boards to provide the most thorough and efficient program of education possible, given all the circumstances unique to each school district.***" (at 1315)

Although the Board was under no statutory obligation to negotiate promotional procedures, the language of the Court in *North Bergen, supra,* is conclusive that it was free to do so pursuant to *N.J.S.A.* 34-13A, *as long as it retained its authority to make the ultimate determination of who should be promoted.* There is no evidence herein that such authority was relinquished. The use of screening committees and the practice of receiving final recommendations from a superintendent is both common and thoroughly defensible, since it brings into play the expertise of highly qualified and experienced educators.

In the instant matter the negotiating parties agreed that, in addition to three local administrators, two of five members of the screening committee had to be a teacher selected by the Union and an educator from without the district. Petitioner alleges that one or two members of the screening committee could and did improperly veto the candidacy of a qualified applicant for promotion. The policy itself, however, specifies that each screening committee member has a vote of equal weight. (J-1, Section 7(B)(5)(a)) The Commissioner views this charge as an insufficiently detailed allegation which is not buttressed by the Stipulation which was jointly submitted as including all of the relevant facts necessary to a determination. When such Stipulation is jointly made, the inclusion of alleged facts not iterated therein may not receive serious consideration, absent a formal motion to reopen. The Commissioner so holds.

Absent a convincing showing of arbitrariness, impropriety, bad faith, or illegal action by the Board or its screening committee, the Commissioner enters Summary Judgment in favor of the Board. Petitioner has failed in her burden of proof. Accordingly, the relief which she seeks may not properly be granted and the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

July 11, 1977

Keystone Roofing Co., Inc.,

Petitioner,

v.

Kulzer Roofing, Inc., and Board of Education of the Borough of Merchantville, Camden County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Martin Margolit, Esq.

For the Respondent Kulzer, George J. Botcheos, Esq.

For the Respondent Board, Brown, Connery, Kulp, Wille, Purnell & Greene (George Purnell, Esq., of Counsel)

Keystone Roofing Co., Inc., hereinafter "Keystone," challenges the award of a bid to Kulzer Roofing, Inc., hereinafter "Kulzer," by the Board of Education of the Borough of Merchantville, hereinafter "Board," stating that the award of the bid to Kulzer is illegal since Kulzer failed to meet the statutory requirement of prequalification of bidders. Kulzer argues that it has a binding contract with the Board and that it is qualified to do business in New Jersey.

At a conference held on April 20, 1977, it was determined that the issue would be submitted to the Commissioner of Education for summary judgment. Briefs were submitted by each of the litigants and several documents were submitted in evidence.

The facts in this matter are not in dispute and are recited as follows:

The Board determined to repair or replace all or portions of a roof on its schoolhouse at 120 South Centre Street. The complete specifications were prepared by an architect and, subsequently, seven bids based on those specifications were received by the Board on February 8, 1977, including those of Keystone and Kulzer. Kulzer's bid was not accompanied by an affidavit of qualification as required by *N.J.S.A.* 18A:18-9 which reads as follows:

> "Every board of education shall require that all persons proposing to bid on any contract with the board for public work, the entire cost whereof will exceed $10,000.00, shall first be classified by the State Board as to the character and amount of public work on which they shall be qualified to submit bids. So long as such requirement is in effect, the board of education shall accept such bids only from persons qualified in accordance with such classification."

Kulzer admittedly did not pre-qualify as a bidder. (Kulzer Brief, at p. 2)

The Board document, "Revised Form of Proposal – Roofing Work," sets forth a section entitled "Alternate Bids" in which the roofing work was divided into sections A,B,C,D,E, & F. The proposal sought bids on roofing for each of the sections, with and without insulation. When the bids were opened, it was determined that Keystone's bid was the lowest bid for the entire project. (Board's Brief, at p.3)

The bids were then referred by the Board to its building committee. After consultation with the architect and consideration of available funds, the Committee recommended to the Board acceptance of certain alternates provided for by the specifications and bid documents. These recommendations involved elimination of certain portions of the work and with such eliminations, Kulzer's bid was lowest for the work to be performed. The Board overlooked the fact that Kulzer had not pre-qualified as required, and by resolution of the Board on March 22, 1977, the contract was awarded to Kulzer. (Board's Memorandum, at p. 2) The alternate work selected by the Board eliminated section B entirely and called for the replacing of the roof over the remaining sections, with insulation. When the bids were examined for this work, Kulzer was the lowest bidder at $103,298. I. Alper Roofing Co. bid $103,787 and Keystone bid $104,085. I. Alper Roofing Co. is not a party in this litigation.

Kulzer argues that it has met the requirements of the relevant statutes in that it submitted an application for classification to the State Board of Education in January 1977. Kulzer maintains that it was told by the "Division of Building and Construction" (Department of the Treasury) that foreign (out-of-State) corporations could not do business in New Jersey; however, pursuant to a provision of the "Contractor's Financial Statement and Experience Questionnaire," issued by the Department of the Treasury, Kulzer could qualify if it were the successful bidder. The pertinent portion of that document is reproduced as follows:

> "AUTHORIZATION TO DO BUSINESS IN THE STATE OF NEW JERSEY
>
> "If the successful bidder is a corporation not organized under the laws of the State of New Jersey or is not authorized to do business in the State of New Jersey, the award of contract and payment of consideration thereunder shall be conditioned upon said corporation promptly filing a certificate of doing business in the State of New Jersey *and complying with the provisions of the law of the State of New Jersey in that regard.*" (*Emphasis added.*) (Kulzer Brief - Exhibit F)

The Commissioner finds nothing in Exhibit F which would allow Kulzer to be considered as a qualified bidder pursuant to *N.J.S.A.* 18A:18-9. Kulzer's reliance on Exhibit F is misplaced. That document applies to all public works contracts in New Jersey and demands, also, that the applicant comply "***with the provisions of the law of the State of New Jersey***." Kulzer did not comply

with *N.J.S.A.* 18A:18-9. Other public works agencies may not have pre-qualification requirements. In the instant matter, the Commissioner determines that Kulzer was not pre-qualified; therefore, it could not be considered as a proper bidder by the Board.

In the matter of *Begraft v. Borough of Franklin,* 133 *N.J. Super.* 415 (*App. Div.* 1975) the Court held as follows:

> "***Having failed to so qualify by the date fixed for the reception of bids, plaintiff was disqualified from submitting a bid. Moreover, defendant board of education was without the authority to accept the bid, since such disqualification could not be waived by the board. And, qualification by plaintiff after the date fixed for the submission of bids but prior to the actual award of the contract, does not satisfy the requirement of either the statute or the invitation to bid.***" (at 417)

The Commissioner determines that the matter herein contested for the purposes of determining pre-qualification is the same as the situation considered by the Court in *Begraft, supra.* The Board erred in its award of the contract to Kulzer and that award must be set aside. Further, the Board is precluded from entering into any contract with Kulzer since Kulzer is ineligible. Having so determined, the Commissioner concludes that the Board resolution and issuance of a purchase order to Kulzer are illegal and must likewise be set aside. A review of Exhibit A attached to Kulzer's Brief discloses that the bidders must understand the bidding document. (Paragraph one) That same document provides that the Board may reject any and all bids and, further, that "This proposal is submitted with the understanding that the contract will be completed within _____days." Nothing in the record discloses that this document was executed and the Board states that this agreement was never tendered to Kulzer. (Board's Brief, at p. 5) Accordingly, the purchase order (Kulzer Brief – Exhibit E) cannot be considered a contract.

A final question to be answered is whether or not the Board may excise a portion of the work actually bid and award the remainder to the lowest responsible bidder of the portions of the whole part.

Although the Board's proposal does not state that portions of the work may be awarded as alternates instead of the entire roofing project, a fair and reasonable review of the specifications most certainly leads to that conclusion. The proposal and specifications require that each bidder submit a base bid to replace the roof over sections A through F and also submit bids on each of the same sections for roofing alone, and with insulation. Had the Board limited itself to only the total project, there would have been no need to specify individual costs for each section, with and without insulation. If any of the bidders failed to understand this document, such failure was not the fault of the Board. In *Camden Plaza Parking v. City of Camden,* 16 *N.J.* 150 (1954) the Court held that an unsuccessful bidder has no standing to attack the alleged lack of preciseness in the invitation to bid.

For the reasons stated, the Commissioner directs the Board to award the

roofing contract, in whole or in part, as described in the specifications and alternates, to the lowest, qualified responsible bidder.

COMMISSIONER OF EDUCATION

July 11, 1977

Jacquelyn Previti,

Petitioner,

v.

Board of Education of Camden County Vocational and Technical Schools, Camden County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Goldberg, Simon & Selikoff (Joel S. Selikoff, Esq., of Counsel)

For the Respondent, Hyland, Davis & Reberkenny (William C. Davis, Esq., of Counsel)

Petitioner, formerly employed by the Board of Education of the Camden County Vocational and Technical Schools, hereinafter "Board," alleges that the reasons afforded her by the Board for her non-reemployment are false. She requests a plenary hearing before the Commissioner of Education in order to prove her allegation. The Board denies the allegation and moves for dismissal of the matter for failure of petitioner to state a cause of action upon which relief could be granted. In the alternative, the Board seeks dismissal of the matter on the grounds that petitioner is guilty of laches. Petitioner opposes the Board's Motion to Dismiss.

The matter is referred directly to the Commissioner for adjudication on the record, including the pleadings, exhibits, and Briefs of the parties in support of their respective positions. The salient facts of the matter are these:

Petitioner was first employed by the Board as a teaching staff member assigned to teach health and physical education for the 1971-72 academic year. Petitioner was reemployed by the Board for the 1972-73 and 1973-74 academic years. During April 1974 petitioner was notified by the Board that she would not be reemployed for the 1974-75 academic year.

Thereafter, on June 10, 1974, the New Jersey Supreme Court rendered its decision in *Donaldson v. Board of Education of North Wildwood,* 65 *N.J.* 236 (1974) which requires boards of education to provide written statements of reasons, when requested, to nontenure teachers whose employment is not continued for the subsequent academic year.

Petitioner asserts in her Brief filed in opposition to the Motion to Dismiss that subsequent to the Supreme Court's decision in *Donaldson, supra,* the Camden Vocational Association, on her behalf, requested the Board to provide her written reasons why her employment was not renewed. Although this request was allegedly made around the middle of June 1974, petitioner submitted no documentary evidence as proof of such a request. Petitioner also alleges that by letter dated June 16, 1974, she requested a written statement of reasons for her non-reemployment from the Superintendent of Schools. Petitioner did not file any documentary evidence in support of this allegation. Petitioner asserts that both her requests were ignored. (Petitioner's Brief, at pp. 1-2)

Petitioner asserts that she requested a statement of reasons from the Superintendent again by letter dated August 21, 1974. The Superintendent, by letter dated August 22, 1974, advised petitioner as follows:

> "In response to your letter of August 21, 1974, which is the first letter you have seen fit to submit to this office concerning your dismissal, may I take this opportunity to inform you that your contract was not recommended for renewal because your supervisors did not feel the quality of your work was satisfactory." (C-1)

Thereafter, petitioner retained counsel who, by letter to the Superintendent dated November 27, 1974, asked for a more detailed statement of reasons. (C-3) Petitioner was given the requested detailed statement of reasons on January 23, 1975, which states in full as follows:

> "[Petitioner] has been notified in writing, through either copies of observation reports that she has signed, signifying that she has been made aware of the information, or through specific memos or composite reports, that she has been deficient in the following areas:
>
> "1. Inadequate supervision of the locker room.
>
> "2. Inadequate security of the locker room and her office.
>
> "3. Failure to attend faculty meetings.
>
> "4. Purchasing materials without proper authorization by the Board of Education or the administration.
>
> "5. Not meeting deadlines in turning in budget or supply requisitions.

"6. Omitting students' names from the honor roll causing embarrassment to the student as well as the school.

"7. Improper planning of instruction.

"8. Poor use of teaching time in the classroom.

"9. The wasting of student time while in the classroom.

"10. Poor student motivation.

"11. Making unauthorized changes in the curriculum.

"12. The general housekeeping of the areas for which she was responsible.

"13. Poor preparation and presentation of material to the students.

"All of these have been indicated in writing to her during her time here at the school. In general, it all adds up to what I indicated to her in my letter of August 22, 1974, 'her contract was not recommended for renewal because her supervisors did not feel that the quality of her work was satisfactory.'***" (C-2)

The Board argues in support of its Motion to Dismiss that petitioner has failed to set forth any allegations which, if proven true, would warrant her requested relief. The Board explains that the directive of the New Jersey Supreme Court in *Donaldson, supra,* has been considered by the Commissioner to be prospective in regard to a statement of reasons and cites *Barbara Hicks v. Board of Education of the Township of Pemberton, Burlington County,* 1975 *S.L.D.* 332. The Board asserts that notwithstanding the prospective nature of the requirement for it to provide a statement of reasons, it honored petitioner's request on August 22, 1974 (C-1), and again on January 23, 1975. (C-2)

The Commissioner has reviewed the Amended Petition of Appeal and petitioner's Brief in opposition to the Board's Motion to Dismiss. He finds that petitioner's claim to a plenary hearing is based solely on the allegation that the reasons in the detailed statement (C-2) are false. There is no claim entered by petitioner that she was refused reemployment for proscribed reasons (race, color, religion, sex, political affiliation, etc.) or in violation of any other constitutional rights. Petitioner does not claim that her supervisors were arbitrary or capricious with respect to their judgments of her teaching performance, nor does petitioner assert any specific instances of improper actions by the Board or its administrators which would provide grounds for a plenary hearing. *Winston v. Board of Education of Borough of South Plainfield,* 125 *N.J. Super.* 131 (*App. Div.* 1973), affirmed 64 *N.J.* 582 (1974); *Joan Sherman v. Malcolm Connor and Board of Education of the Borough of Spotswood,* 1973 *S.L.D.* 51, aff'd State Board of Education 1974 *S.L.D.* 1433, aff'd Docket No. A-2122-73. New Jersey Superior Court, Appellate Division, January 28, 1975 (1975 *S.L.D.* 1157); *Claire Haberman v. Board of Education*

of the Borough of Morris Plains, Morris County, 1975 *S.L.D.* 848 Furthermore, the Board went beyond its responsibility in affording petitioner a written statement of reasons, because such a requirement was imposed subsequent to June 10, 1974. *Donaldson, supra; Hicks, supra*

The Commissioner finds and determines that petitioner has failed to state a cause of action upon which relief could be granted. There is no need to reach the Board's argument that petitioner is guilty of laches.

The Board's Motion to Dismiss is granted. The Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

July 12, 1977

Elsie Wilson,

Petitioner,

v.

Board of Education of the Borough of Florham Park, Morris County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Saul R. Alexander, Esq.

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

Petitioner is employed as a school nurse by the Board of Education of the Borough of Florham Park, hereinafter "Board." Petitioner alleges that the Board has improperly established her salary since the 1972-73 academic year in contravention of *N.J.S.A.* 18A:29-4.2. Petitioner filed a separate Petition of Appeal in which she asserts that, subsequent to her salary being improperly established, the Board illegally reduced her compensation for the 1974-75 academic year in violation of her tenure and seniority rights. The Board denies each of the allegations and asserts that its action with respect to petitioner's salary and reduction of compensation and employment time is in all respects proper and legal.

A hearing was conducted in the matter on June 10, 1974, April 15 and August 5, 1975 at the office of the Bergen County Superintendent of Schools and State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner of Education. Thereafter, the Board filed a Brief in support of its position. The report of the hearing examiner is as follows:

Petitioner's separate Petitions of Appeal with respect to her salary claim and the alleged improper reduction of her full-time employment are consolidated and shall hereinafter be reported as one matter.

Petitioner has been employed as a school nurse by the Board since the 1952-53 academic year. Petitioner possesses a standard school nurse certificate, but does not possess a baccalaureate degree. Petitioner claims that by virtue of the passage of *N.J.S.A.* 18A:29-4.2, her base salary of $10,850 for the 1972-73 academic year was improperly established. Petitioner's salary was set at the thirteenth or maximum step of the nurses' scale of the Board's salary guide policy. Petitioner asserts that *N.J.S.A.* 18A:29-4.2 demands that her 1972-73 salary be established according to the higher rates set forth in the bachelor's degree scale of the Board's teachers' salary guide. (J-11) Petitioner contends that her base salary for 1972-73 should have been $13,075 which is the amount of the thirteenth step of the bachelor's degree scale.

N.J.S.A. 18A:29-4.2, which became effective July 1, 1972, provides in full as follows:

> "Any teaching staff member employed as a school nurse and holding a standard school nurse certificate shall be paid according to the provisions of the teachers' salary guide in effect in that school district including the full use of the same experience steps and training levels that apply to teachers."

The Commissioner, in *Evelyn Lenahan v. Board of Education of the Lakeland Regional High School District, Passaic County,* 1972 *S.L.D.* 577, held that the legislative intent of the referenced statute is as follows:

> "***a school nurse holding a standard school nurse certificate *and a bachelor's degree, or an academic degree higher than a bachelor's* shall be compensated in the same manner as any other teaching staff member holding a parallel degree or parallel level of training. Placement on the proper step of the salary guide shall be determined in the same manner as placement is determined for any other teaching staff member. A school nurse who holds a standard school nurse certificate, but who does not hold a bachelor's degree, is to be compensated according to the non-degree teachers' salary guide in effect in each respective district. If a non-degree teachers' salary guide does not exist in a district, such a category must be created and its compensation rates determined according to proper negotiating procedures, or the Board may alternatively compensate all school nurses holding the appropriate certificate at the level set for a teaching staff member with a bachelor's degree.***" (*Emphasis in text.*) (at 581-582)

See also *Julia Ann Sipos et al. v. Board of Education of the Borough of Manville, Somerset County,* 1973 *S.L.D.* 434.

The Commissioner has held in a series of subsequent decisions that a board of education may not discriminate by way of salary establishment between non-degree school nurses and other non-degree teaching staff members. A board of education which establishes salaries for any non-degree teaching staff member according to a bachelor's scale of its teachers' salary guide must also establish non-degree school nurse salaries in the same manner. (See *Betty Ascough et al. v. Board of Education of the Toms River Regional School District, Ocean County,* 1975 *S.L.D.* 389; *Passaic Education Association et al. v. Board of Education of the City of Passaic, Passaic County,* 1975 *S.L.D.* 425; *Pearl Schmidt v. Board of Education of the Passaic County Regional High School, Passaic County,* 1975 *S.L.D.* 19; *Shirley A. Martinsek v. Board of Education of the Eastern Camden Regional School District, Camden County,* 1974 *S.L.D.* 1210, rev'd and rem. State Board of Education 1975 *S.L.D.* 1100.)

In the instant matter the Board, for the 1968-69 academic year, had established as part of its teachers' salary guide a salary scale entitled "bachelor with provisional certificate." (R-5) This salary scale, with its lowest rates of all the salary scales of the salary guide, was used to establish yearly salaries for school nurses, including petitioner, and for one other teaching staff member who did not possess a baccalaureate degree.

The bachelor with provisional certificate salary scale was continued as part of the Board's teachers' salary guide for 1969-70 (R-6) and for 1970-71. (R-7) It is noticed that the title of the salary scale was changed for the 1970-71 academic year to "provisional and nurse." (R-7)

The Board President testified that school nurses and the one other teaching staff member without a degree had their salaries established according to this salary scale until the 1971-72 academic year. (Tr. I-30) The other teaching staff member was awarded a baccalaureate degree and her salary for 1971-72 was established according to the rates of the bachelor's degree scale of the Board's salary guide. (R-8) Petitioner's salary for 1971-72 was established according to the rates set forth in the provisional and nurses' salary scale, the title of which was changed for the 1971-72 academic year to that of "nurses." (R-8) The Board continued the nurses' salary scale into 1972-73 as part of its teachers' salary guide and continued to establish petitioner's salary according to the rate set forth therein. (J-11) Thereafter, the Board changed the title of the salary scale from that of nurses to that of non-degree for the 1973-74 and 1974-75 academic years. (J-12) Petitioner's salary for 1973-74 and 1974-75 was established according to the lower rates of the non-degree scale.

Petitioner asserts that because the Board did not establish a salary scale entitled "non-degree" for 1972-73 and, instead, established a salary scale entitled "nurses" it violated the provisions of *N.J.S.A.* 18A:29-4.2 and contravenes the prior holding of the Commissioner in *Lenahan, supra.* Petitioner maintains that because the Board did establish a specific non-degree salary scale,

it should have more properly established her salary for 1972-73 according to the higher rates set forth in its bachelor's scale.

The hearing examiner disagrees. In the first instance the Board's teachers' salary policy (J-11) is set forth in the agreement executed between the Board and the Florham Park Education Association on June 25, 1972, five days before the effective date of *N.J.S.A.* 18A:29-4.2. While it is true that that salary policy has a salary scale entitled "nurses" instead of "non-degree," the facts of the matter herein do not establish that the Board designated the lower salary scale as "nurses" for purposes of improper discrimination. The Board has no other teaching staff members in its employ who do not possess baccalaureate degrees other than petitioner and one other school nurse. Consequently, there are no proofs that the Board compensated other teaching staff members without a degree according to higher rates of its bachelor's scale, while compensating petitioner according to its nurses' salary scale for 1972-73.

The hearing examiner recognizes that the Commissioner has held in *Schmidt, supra,* that an objection to the creation of a non-degree nurses' guide, is a valid objection

> "***since any non-degree guide should apply uniformly to all non-degree teaching staff members.***This [the creation of non-degree guides which discriminate against teaching staff members who possess the same credentials] is clearly an inequitable arrangement and it must be set aside.***" (at 23)

And,

> "***[O]nce a board compensates a teaching staff member according to a salary guide which recognizes educational achievement, all teaching staff members similarly situated must be compensated accordingly; *i.e.*, non-degree teachers on the non-degree guide, and degree teachers on the degree guide.***" (at 24)

Such is not the case, *sub judice*. The Board, until 1971-72, had compensated all non-degree teaching staff members according to the rates of its then existing bachelor's degree with provisional certificates salary scale. When the one other teaching staff member acquired a degree, she was placed on the bachelor's scale. Because the Board then altered the salary scale so that its title became "nurses" does not, in the judgment of the hearing examiner, establish discrimination. Aside from the fact that petitioner failed to prove discrimination based upon the Board's failure to establish a precise non-degree salary scale for 1971-72, the Board did create a non-degree salary scale subsequent to the enactment of *N.J.S.A.* 18A:29-4.2.

The hearing examiner finds that petitioner failed in her proofs to establish that the Board violated the provisions of *N.J.S.A.* 18A:29-4.2 or of any of the Commissioner's prior holdings hereinbefore cited with respect to her salary establishment for the 1972-73 or 1973-74 academic years. The hearing examiner recommends that the Commissioner dismiss this portion of the matter.

Next, the hearing examiner will discuss petitioner's complaint that her compensation was illegally reduced for the 1974-75 academic year.

The Superintendent testified that during October 1972, some three months after the effective date of *N.J.S.A.* 18A:29-4.2, the Board directed him to consider options with respect to a reduction in school nurse services. (Tr. III-4) The Superintendent prepared and submitted a report (R-1) dated October 12, 1972 to the Board in which a reduction of school nurse services is recommended. The hearing examiner notices that the report is based on the assumption that "***it would appear that all of our nurses are to be placed on the teachers' [bachelor's degree scale] salary guide since all have proper certification.***" (R-1)

The hearing examiner observes that the Board employs three school nurses including petitioner who has seniority in her employment over the other two. One school nurse possesses a standard school nurse certificate and a baccalaureate degree, while petitioner, as already noted, and the remaining school nurse each possess a standard school nurse certificate. The school nurse with the degree has, consistent with *N.J.S.A.* 18A:29-4.2, been placed on the bachelor's degree scale of the salary guide, while petitioner and the other school nurse continue on the non-degree salary scale.

The Superintendent advised the Board that because each of its three school nurses had to be compensated according to the bachelor's degree scale, the total cost to the Board would be $40,000. He further advised that the expenditure of that amount of money for a school district its size is excessive and recommended that two full-time school nurse positions be abolished and that two part-time positions be created. The Superintendent also advised that the remaining full-time position be kept intact.

The Superintendent recommended to the Board that the school nurse in possession of a baccalaureate degree be retained as the full-time school nurse, even though petitioner was more senior in her employment with the Board. The Superintendent explains:

> "***My rationale for keeping [the school nurse with a baccalaureate] as the full-time nurse over the seniority of [petitioner] is based on preparation and experience for the teaching requirement of the nurse***." (R-1)

The Superintendent testified that he discussed the contents of his report (R-1) to the Board with the three school nurses on October 25, 1972. (Tr. III-6) He also testified that the Board did not accept his recommendation for a reduction in school nurse positions for 1973-74. (Tr. III-7)

The Superintendent testified that during March 1973 the State Department of Education recommended revision in all health education curricula being taught in the public schools. The Morris County Superintendent of Schools distributed a copy of proposed State Board rules and regulations regarding health education curricula on March 16, 1973. (R-2) The proposed

rules would have required, *inter alia,* each board of education to have adopted a comprehensive, sequentially developed health education curriculum for its schools. The proposed rules also would have required the teachers of such programs to possess baccalaureate degrees, with specialization in health education, as requisite for the possession of an appropriate certificate to teach health.

The hearing examiner observes that *N.J.A.C.* 6:11-8.3 requires, *inter alia,* a "***teaching endorsement [on a regular certificate] *** for the corresponding teaching assignment.***" *N.J.A.C.* 6:11-8.4 sets forth a series of teaching field endorsements which may be acquired by a holder of a regular teaching certificate thereby becoming eligible to teach the specified area. *N.J.A.C.* 6:11-8.4(c)5 specifically allows for a teaching field endorsement in the area of health education which may be acquired by a person who meets the requirements set forth in *N.J.A.C.* 6:11-7.25. *N.J.A.C.* 6:11-8.2 provides that a common requirement for a New Jersey teacher's certificate is an approved program which leads to a bachelor's, or higher, degree, with certain exceptions. One of the exceptions until July 1, 1975, was the acquisition of a standard school nurse certificate. *N.J.A.C.* 6:11-12.8 allowed for the acquisition of a standard school nurse certificate without the possession of a baccalaureate degree. Now, *N.J.A.C.* 6:11-12.9 requires a baccalaureate as requisite for the issuance of such a certificate.

The Superintendent testified that he had already been considering revisions to the Board's fine and related arts guide, of which health education was part, at the time the State Department of Education's proposed rules and regulations (R-2) were issued. Thus, the recommendation provided him impetus to create a health education curriculum for consideration by the Board. The Board adopted the Superintendent's proposed health education curriculum (R-3) during June 1973. (Tr. III-9)

The Superintendent testified that he once again recommended to the Board during November 1973 that it reduce the number of school nurse positions for the 1974-75 academic year. (R-5) The Superintendent again recommended the abolition of two of the three full-time school nurse positions, and the creation of two part-time school nurse positions in their stead to accompany the remaining full-time school nurse.

The Superintendent testified that the Board's school budget for 1974-75 contained an amount of money sufficient to support one half of the then existing school nurses in addition to one half of a health education teacher. (Tr. III-22) The Superintendent explained that he advised petitioner, as well as the other two nurses, by letter dated March 13, 1974 that:

> "The Board of Education at its regular monthly meeting did not act on the salaries of school nurses for the 1974-75 school year. The deferment of this action is based upon the need for further study and recommendations from this office regarding nursing services in our school district.
>
> "The Board and I are giving due consideration to our declining enrollments

> and the need for full-time nursing services, particularly, at our elementary school level. A number of possible alternates are being considered at this time. A decision in this regard will be forthcoming prior to the end of the current school year.***" (P-4)

The Superintendent testified that thereafter the other two school nurses, excluding petitioner, did meet and discuss with him ways in which nursing services could be reduced.

The Superintendent testified that he met again with petitioner on June 18, 1974 to ascertain whether she was interested in the full-time position now entitled nurse/health education teacher. The Superintendent provided petitioner with a copy of the proposed curriculum for which the full-time teacher would be responsible. Petitioner explained that she wanted to study the curriculum prior to stating whether she was interested in the full-time position. (Tr. II-17) Petitioner also testified that she was directed to state her intention with respect to the full-time position by June 25, 1974. (Tr. II-17)

The Board, at a special meeting conducted on June 25, 1974, determined for reasons of economy and decreasing pupil enrollment to abolish "***the position of full time school nurse and [to create] *** two (2) part time school nurse positions, and [to create] *** a position of health education teacher/school nurse***." (C-1) The Board also determined that:

> "***the seniority status of all employees affected by the foregoing elimination of the position of full time school nurse shall be determined and each such person shall be notified as to her seniority status***." (C-1)

The Board at the same meeting resolved that the teacher appointed to the full-time position of health education teacher/school nurse must be in possession of a health education teaching certificate. Thereafter, at the same meeting, the Board appointed the school nurse with a baccalaureate degree to the full-time position, and appointed petitioner to one of the two half-time school nurse positions it created for 1974-75. The full-time nurse did not possess certification as a teacher of health education until February 1975, eight months after her appointment. (P-5) Petitioner's salary for 1974-75 was established at $6,285, or one-half the amount she would have received had her employment been continued on a full-time basis. (C-1)

The Superintendent advised petitioner by letter dated June 27, 1974 that because he had not heard from her since their June 18 meeting, *ante,* he

> "***determined that you [petitioner] were not interested in further exploration of this [full-time] position under your seniority status.***" (P-1)

The Superintendent also advised petitioner that her assignment to a part-time school nurse position was taken by the Board

"***in the interest of economy and was in no way reflective of your services or capabilities as a school nurse in this district.***" (P-1)

The Superintendent also advised petitioner that her salary for 1974-75 was established by the Board at the rate of $6,285 plus her regular longevity payment of $950. (P-2; C-1) Petitioner's longevity payments are not in dispute.

Petitioner asserts that within this factual context her reduction in salary for 1974-75 is improper because (1) the Board's special meeting of June 25, 1974 at which it purportedly abolished two full-time school nurse positions was improperly called; (2) her seniority rights were violated in that she was never offered the full-time position of health education teacher/school nurse; (3) she was as certified for the full-time position as was the school nurse who was appointed; and (4) that the Board's action of reducing her employment to one-half time was in retaliation against her for instituting litigation regarding her salary for 1972-73.

The hearing examiner finds no procedural error regarding the Board's special meeting of June 25, 1974. The Board President announced at a regular Board meeting conducted on June 11, 1974, that a special meeting would be held on June 24, 1974. (C-2) An agenda was prepared which included the reduction of nursing services. (C-3) The special meeting was also announced to the public prior to its occurrence by way of a report published in a local newspaper. (C-4)

Petitioner asserts that her tenure and seniority rights were violated because the Board reduced her 1974-75 salary. *N.J.S.A.* 18A:28-9 authorizes boards of education to reduce the number of teaching staff members it employs for reasons of economy, a reduction in pupils, a change in its administrative or supervisory organization, or other good cause. *N.J.S.A.* 18A:28-10 requires that a tenure teaching staff member who shall be dismissed from employment because of such reduction shall have such dismissal based on seniority. *N.J.S.A.* 18A:28-11 requires the board to determine the seniority of persons affected by such reductions and to notify each of the persons so affected of their seniority status. *N.J.S.A.* 18A:28-12 requires that tenure teaching staff members who are dismissed from their employment because of such reduction shall be placed on a preferred eligible list in the order of seniority for reemployment when a vacancy occurs.

The Board did, in effect, abolish two school nurse positions by reducing two of its three full-time school nurse positions to two half-time school nurse positions. It also redesignated the remaining full-time school nurse position as health education teacher/school nurse and determined that the person to fill this position must possess a certificate as a teacher of health education. The hearing examiner observes that petitioner had been invited to express an interest in the full-time position of health education teacher/school nurse. Petitioner elected not to express such an interest. As a result, the Board considered other candidates. That the person who was finally selected and appointed by the Board to the full-time position of health education teacher/school nurse was not

properly certified as a health education teacher at the time of her appointment does not lend weight to petitioner's claim.

A review of the Board's health education curriculum (R-3) shows that the person appointed to teach that curriculum had to be in possession of a health education teaching endorsement which requires, in the first instance, a baccalaureate degree.

The hearing examiner finds that the creation of the position of health education teacher/school nurse by the Board is proper and legal. Petitioner failed to assert her interest in or expectation of appointment to such. The hearing examiner finds no basis upon which to conclude that petitioner is entitled to any relief. It is recommended that the Petition of Appeal be dismissed.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record in the instant matter, including the report of the hearing examiner and the objections filed thereto by petitioner.

Petitioner asserts that by virtue of the Board compensating her for 1972-73 according to the rates set forth in its nurses' salary scale, it violated the provisions of *N.J.S.A.* 18A:29-4.2. This is so, petitioner argues, because the Board was required by the statute to create a non-degree salary scale for its teaching staff members who did not possess a baccalaureate degree. Consequently, petitioner concludes that because the Board did not have a salary scale specifically entitled "non-degree" for 1972-73 it violated the precise provisions of *N.J.S.A.* 18A:29-4.2. It is upon this premise that petitioner anchors her claim for higher compensation for 1972-73.

The Commissioner does not agree with the position advanced by petitioner. *N.J.S.A.* 18A:29-4.2 provides in full as follows:

> "Any teaching staff member employed as a school nurse and holding a standard school nurse certificate shall be paid according to the provisions of the teachers' salary guide in effect in that school district including the full use of the same experience steps and training levels that apply to teachers."

Nothing therein requires a board of education to adopt a salary scale specifically entitled "non-degree" for those school nurses who do not possess a baccalaureate degree.

The Commissioner has previously held that a board may not adopt a non-degree salary scale limited to school nurses when it also employs other teaching staff members who do not possess a baccalaureate degree. *Pearl Schmidt v. Board of Education of the Passaic County Regional High School, Passaic County,* 1975 *S.L.D.* 19 A board that employs several teaching staff members who do not possess baccalaureate degrees must determine each of their

respective compensations in similar, but proper, fashion. *N.J.S.A.* 18A:29-4.2

In the instant matter, petitioner's salary was properly established by the Board for the 1972-73 academic year according to its nurses' salary scale. The Board employed no other teaching staff member who did not possess a baccalaureate degree. To hold in this circumstance that the Board erred by not entitling its nurses' salary scale a non-degree salary scale would be to place form over substance.

The Commissioner adopts as his own the findings of fact and conclusions of law set forth by the hearing examiner. Petitioner has failed to establish that the Board acted improperly or illegally with respect to her salary for 1972-73 or for the reduction of her full-time position as a school nurse to half-time for 1974-75.

Accordingly, the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

July 12, 1977

Ava Salowe and Highland Park Education Association,

Petitioners,

v.

Board of Education of the Borough of Highland Park, Superintendent of Schools, Roy D. Loux and Lawrence P. Snow, Middlesex County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Mandel, Wysoker, Sherman, Glassner, Weingartner & Feingold (Richard H. Greenstein, Esq., of Counsel)

For the Respondents, Campbell & Snedeker (William P. Snedeker, Esq., of Counsel)

The Highland Park Education Association joins its nontenured teacher member Ava Salowe, hereinafter "petitioner," in alleging that refusal by the Board of Education of Highland Park, hereinafter "Board," to reemploy

petitioner for the 1975-76 school year was arbitrary, capricious, contrary to the terms of the negotiated agreement and in bad faith by reason of promises she had received that she would be reemployed. The Board denies that petitioner was promised reemployment or that its determination not to reemploy her was other than a reasoned exercise of its discretionary authority.

A plenary hearing was conducted on September 15, 1976 at the office of the Middlesex County Superintendent of Schools, New Brunswick, by a hearing examiner appointed by the Commissioner of Education. Briefs were subsequently filed by the parties. The hearing examiner report follows setting forth first those uncontroverted facts essential to an understanding of the matter.

Petitioner, who is certified to teach grades K-8, was employed by the Board as a fourth grade teacher during the academic years from January 2, 1973 through June 30, 1975. On April 11, 1975, the Superintendent, pursuant to the Board's authorization (P-21), advised petitioner as follows:

> "At the April 8, 1975 meeting of the Board of Education, the Board took action to terminate your contract effective June 30, 1975. It is unfortunate that you are caught in a time of declining enrollment and little turnover. As your evaluation indicates, your work has been more than satisfactory and should a vacancy occur at your level, we will be most happy to have you return to Highland Park next year.
>
> "Thank you for your many contributions these 3 years in Highland Park. As I indicated to you last week, I would be surprised if we do not have some changes at the elementary level before the end of the year. However, since I am not absolutely sure, this letter becomes a legal necessity. In the meantime I would be most happy to help you secure a position elsewhere if you prefer that course of action." (P-1)

The negotiated agreement then in effect between the Board and the Highland Park Education Association, hereinafter "Association," provided, *inter alia,* that:

> "***By April 1, all teachers, except those hired after January 1, will receive notification of the recommendation of the Superintendent to the Board of Education concerning their contracts and salary status for the ensuing year.***" (P-3)

The Board's policy manual contained the proviso that nontenured teachers in their second or third years of service were to be formally evaluated at least three times "***from April 1 through March 31 the following year.***" (P-2)

Petitioner on April 14 protested the Board's action by stating to the Superintendent that it was her understanding that she would be reemployed in any position for which she was certified. To this the Superintendent responded on April 16 as follows:

> "Thank you for your letter of April 14, 1975. Your understanding is basically correct, however, I did not mean to imply that you would be employed in any position for which you were certified, but rather, in a position similar to the one you are currently working in. That means a position at the approximate grade level that you are currently teaching.
>
> "We have always employed elementary teachers for a specific assignment and not as general elementary teachers. I believe this has been in the best interests of the students and I would expect this policy to continue. I am sorry if there has been some misunderstanding. I would again emphasize that I fully expect some changes that would allow for your reappointment." (P-5)

Additionally, the Superintendent provided petitioner with a highly complimentary recommendation on the basis of her teaching performance at Highland Park. (P-6) This recommendation is generally consistent with petitioner's formal evaluations. (P-7 through P-17) Petitioner's last evaluation by her principal concluded as follows:

> "***It is recommended that a tenure contract be granted contingent on the availability of an appropriate position in the Highland Park Schools." (P-17)

Although vacancies existed between April 1, 1975 and November 18, 1975 in grades lower than fourth, petitioner was neither recommended for nor employed for those teaching vacancies. (J-1) The Board in fact abolished one second grade teaching position because of declining enrollment and reassigned a teacher who had fewer years of service with the Board to the fourth grade teaching position to which petitioner had been assigned in 1974-75. (J-1)

Petitioner testified at the hearing that she had been formally evaluated only twice during the 1974-75 school year. (Tr. 21) She testified further that it was not until approximately April 11 that she was advised verbally by her principal and in writing by the Superintendent that she would not be reemployed in her fourth grade position for the ensuing year. She testified she was advised further that if a vacancy occurred she would be reemployed in consideration of her satisfactory teaching performance. (Tr. 10-11) Petitioner stated that she relied on such encouragement to her detriment and did not make early application for teaching positions elsewhere. (Tr. 12) She further testified that when she applied for a first grade vacancy she was advised by her principal that he would not recommend her appointment to the lower grade. (Tr. 24)

The Brief of Petitioners, hereinafter "BP," sets forth the argument that the Board, because of the Superintendent's assurances made to petitioner, was obligated to offer her a teaching position when one became available. It is argued that failure to do so, when elementary vacancies occurred within the scope of her certification, violated the Board's legal and moral obligation to reemploy her. It is further argued that the Superintendent's assurances, being relied upon by petitioner, worked to her detriment in that she did not apply for

employment elsewhere during the prime employment-seeking period from April through June. (BP, at pp. 5-7)

It is also contended that the Board was obligated to assign petitioner to any position for which she had seniority and was certified. In this regard petitioners cite, *inter alia, Mary Ann Popovich v. Board of Education of the Borough of Wharton, Morris County,* 1975 *S.L.D.* 737; *Arthur L. Page v. Board of Education of the City of Trenton et al., Mercer County,* 1973 *S.L.D.* 704, rem. State Board of Education 1974 *S.L.D.* 1416, decision on remand 1975 *S.L.D.* 644, aff'd State Board 1976 *S.L.D.* 1158 and *Elinor Kuett et al. v. Board of Education of the Town of Westfield, Union County,* 1976 *S.L.D.* 601. Petitioners contend that the Board's failure to act in compliance with promises made by its administrator may be characterized only as arbitrary, capricious, unreasonable and in bad faith. (BP, at pp. 8-12)

Petitioners charge also that the Board gave a false and improper statement of reasons for nonrenewal in an attempt to thwart the intent of the tenure laws by denying petitioner a tenure year contract. In this vein it is argued that replacement of petitioner in her fourth grade position, where she had received good evaluations, by a second grade teacher of lesser seniority, coupled with the failure to provide her with three formal evaluations during 1974-75, may only be construed as acts to deny her a tenured status. (BP, at pp. 13-18)

Petitioners argue further that, although seniority guidelines in *N.J.S.A.* 18A:28-9 *et seq.* and *N.J.A.C.* 6:3-1.10 *et seq.* refer to tenured personnel, the Board is bound by fundamental fairness to apply such guidelines to nontenured personnel. Thus, it is argued that her replacement by a teacher whose second grade position was abolished, and who had less service with the Board, should be set aside. In this regard petitioner cites *Union County Regional High School Board of Education v. Union County Regional High School Teachers Association, Inc.* and *Cranford Board of Education v. Cranford Education Association,* 2 *NJPER* 221 (1976), reversed 145 *N.J. Super.* 435 (*App. Div.* 1976), wherein it was stated by the executive director of PERC that when reductions in force are to be effected involving nontenured teachers that:

> "***Boards have an obligation to negotiate with the respective Associations on the method of selecting specific teachers to be terminated from among this remaining pool of non-tenured teachers.***" (at p. 224)

The hearing examiner recommends for the Commissioner's consideration that which was iterated in the per curiam opinion of the Superior Court of New Jersey reversing this PERC opinion, as follows:

> "Whatever may be the breadth of the authority of P.E.R.C. under *N.J.S.A.* 34:13A-1, *et seq.* it does not extend to a grant of the power to compel a public employer to negotiate upon the subjects here in dispute, which the Legislature has expressly and by clear implication delineated by statute.
>
> "Consequently, where as here local boards of education have determined to reduce their personnel under *N.J.S.A.* 18A:28-9 and to accomplish such

reductions in personnel by the non-renewal of the teaching contracts of a portion of their entire forces of non-tenured teachers, neither P.E.R.C. nor its designee, the executive director, singly or in combination, is empowered to compel the local boards of education to negotiate the criteria or guidelines to govern the boards in making the selection of the specific individuals whose contracts are not to be renewed, or to negotiate for reemployment rights of those teachers selected for non renewal. It should be noted, parenthetically, that the effective bargaining agreements between the school districts and the respective teachers organizations contained no provisions whatever for reductions in force.

"Under the statutory scheme established by the Legislature for the administration and operation of our public school system, *N.J.S.A.* 18A:1-1 *et seq.*, nontenured teachers have no right to the renewal of their contracts, the local boards of education, in turn, are invested with virtually unlimited discretion in such matters, and nontenured teachers whose contracts of employment are not renewed by reason of a reduction in force plainly are denied any reemployment rights whatever, *N.J.S.A.* 18A:28-5, 9, 10, 11 and 12; *Winston v. So. Plainfield Bd. of Ed.*, 125 *N.J. Super.* 131, 143 (App. Div. 1973), aff'd 64 *N.J.* 582 (1974); *Donaldson v. North Wildwood Bd. of Ed.*, 65 *N.J.* 236 (1974).

"In these circumstances, the order appealed from directing the local boards to negotiate the issues of the standards to be utilized in the selection of the nontenured teachers whose contracts were not to be renewed and their reemployment rights, is *ultra vires* P.E.R.C. and therefore invalid.***" (145 *N.J. Super.* at 437-438)

It is also argued, that petitioner's two and one-half years of commendable probationary service entitled her to reemployment, the denial of which must be termed arbitrary, unreasonable and capricious. Accordingly, an order is sought from the Commissioner directing the Board to reinstate petitioner to a teaching position with full back pay and attendant emoluments.

Petitioner's principal, called as a Board witness, stated that he considered petitioner a satisfactory teacher but that he had recommended to the Superintendent that she be reemployed in a fourth, fifth or sixth grade position. (Tr. 43) He testified that, when the Board directed that a teaching position be abolished at his school, he determined that a second grade position should be eliminated but that the nontenured teacher in that position be retained and reassigned to petitioner's fourth grade position because:

"***she was basically a more creative person, who was doing more in the school in terms of drama, plays, and things of this nature; so that her overall value to the school system was greater***." (Tr. 46)

The principal testified further that he considered petitioner's replacement to possess greater flexibility, diagnostic and remediation capabilities and wealth of experience. (Tr. 46-47, 57) He stated that he had verbally advised petitioner

on March 12 that the Superintendent would not recommend her reemployment to the Board. (Tr. 49)

The Superintendent testified that the Board's policy requiring three evaluations of nontenured teachers (P-2) was jointly developed over a two-year period by the Association and the Board. He testified, however, that it was officially adopted in September 1975 with full recognition that its full implementation would transcend two academic years. (Tr. 73, 84) The Superintendent testified that, in his opinion, the formal evaluations received by petitioner during 1974-75 fully satisfied the practice within the district, prior to the adoption of P-2, of providing nontenured teachers at least two formal classroom observations and one summary evaluation. (Tr. 84, 95)

The Superintendent stated that, without being specific as to its meaning, he had informally indicated to petitioner that he "***fully expected that there would be an appropriate opening***" for the 1975-76 school year. The Superintendent also stated that in his opinion the formal evaluations received by petitioner met the applicable requirements of the negotiated agreement.

A member of the Board testified that when the Board directed that the teaching staff be reduced by one, the principal had, on the basis of teacher qualifications, recommended that petitioner not be rehired. The Board member also stated that "***the Board questioned him very closely, and then ***affirmed his recommendation by voting to support it.***" (Tr. 101)

It is argued in the Brief on Behalf of Respondent, hereinafter "BR," that the Board had the statutory right to reduce its teaching staff "***because of reduction of pupils***or for other good cause***." *N.J.S.A.* 18A:29-9; *Board of Education of the Township of Madison v. Madison Township Education Association et al., Middlesex County,* 1974 *S.L.D.* 488 The Board contends that, once this decision was made to reduce its staff, the decision of which teacher should not be reemployed was properly based on careful evaluation of its nontenured teachers and the needs of its school. (BR, at pp. 5-6)

The Board denies that reasons given to petitioner were either false or otherwise improper or illegal. In this regard the Board avers that *N.J.S.A.* 18A:27-3.1 which requires three formal evaluations per year of nontenured teachers first became law on July 1, 1975 with no retrospective application. Without admitting that fewer evaluations were made during 1974-75 than its policy required, the Board contends that, even if such violation did occur, it would not preclude its statutory right to determine which nontenured teachers to reemploy. (BR, at pp. 7-11) In this regard is cited *Moses Cobb v. Board of Education of the City of East Orange, Essex County,* 1975 *S.L.D.* 1047, aff'd State Board of Education 1976 *S.L.D.* 1135, wherein the Commissioner, affirming the right of the East Orange Board not to employ a principal who had not been evaluated in accordance with the negotiated agreement, stated that:

> "***[T]he validity of the Board's actions with respect to petitioner may not be impinged because certain supervisory evaluations concerned with petitioner's work were not made in accordance with a contractual

agreement *** that the Board had negotiated with its staff. The judgment of local boards of education, with respect to the employment and non-reemployment of nontenured teaching staff members, does not depend alone on such evaluations although they may constitute a part, even the principal part, of a total consideration.***" (at 1055)

The Board further argues that the Superintendent's written notice made no categorical assurance that petitioner would be reemployed but, rather, cautioned that a vacancy at her level might not occur and offered her aid in procuring employment elsewhere. (Tr. 49; P-1; BR, at pp. 11-16)

The Board contends that, absent a showing of arbitrariness, capriciousness or any illegality, the Commissioner should not substitute his judgment for that of the Board. *Boult and Harris v. Passaic,* 1939-49 *S.L.D.* 7, 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); *Cobb, supra*

Finally, it is argued that the Board was bound by no seniority system in determining which of its nontenured teachers to retain. The Board contends that only the Legislature has power to extend to nontenured teachers the benefits and protection of seniority which it has conferred upon tenured personnel. Thus, the Board argues that it was free to select the nontenured teachers who, on the basis of its administrators' professional judgment, it believed to be most competent to staff its remaining classes. (BR, at pp. 17-20)

For the foregoing reasons the Board requests that its Motion to Dismiss, held in abeyance for action of the Commissioner, be granted. (Tr. 38-40)

The hearing examiner, having carefully reviewed the documents in evidence, transcript of testimony and Briefs of counsel makes the following findings of fact:

1. Petitioner received notice from the principal on March 12 that the Superintendent would not recommend her for reemployment. This finding is grounded on the testimony of the principal and that of the President of the Association. (Tr. 33-34, 49; P-3)

2. The fact that only two formal observation reports were provided petitioner during 1974-75, did not violate the Board's policy requiring three evaluations "from April 1 through March 31, of the following year." This finding is grounded on the testimony of the Superintendent that that policy was not adopted by the Board until September 1975 when petitioner was no longer a teaching staff member. It is similarly grounded on testimony of the President of the Association that under such circumstances it could not have been retroactively enforceable as a term of existing policy. (Tr. 33-34, 73, 84; P-2)

3. Although petitioner was encouraged by her superiors to anticipate that she would be rehired, such was conditional only and predicated upon development of a vacancy at a grade level for which she was recommended by her supervisors. (P-1; P-5; Tr. 80-81)

4. The hearing examiner finds the record barren of proof that the Board or its agents violated the spirit of the tenure laws by replacing petitioner with a nontenured teacher with less service. Nor is there convincing evidence that the Board resorted to the subterfuge of giving petitioner false reasons as to why she was not rehired. This finding is grounded on the forthright convincing testimony of the principal, the Superintendent and the member of the Board that the decision to retain a second grade teacher and not to rehire petitioner was an attempt to ensure both flexibility and strength in the teaching staff. (Tr. 46-49, 60, 76, 101)

In consideration of the above findings of fact, the hearing examiner recommends that the Commissioner determine that petitioner has failed to prove the Board guilty of bad faith, arbitrariness, capriciousness, violation of statute or noncompliance with Board policy.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record of the instant matter including the exceptions to the report of the hearing examiner filed only by petitioner pursuant to *N.J.A.C.* 6:24-1.17(b). Therein petitioner takes exception to the inclusion of quoted material from petitioner's exhibit (P-5) in the hearing examiner report without a concomitant finding that the Board on occasion hired elementary teachers who over the years served in various elementary grades rather than in a specific and limited grade assignment. (Petitioner's Exceptions, at p. 1)

The Commissioner finds no merit in this stated exception. The Board has statutory discretionary authority to determine who shall teach in its classrooms and has the right to transfer a teacher to teach in a grade other than one(s) in which that teacher has previously taught. Such is precisely what occurred herein. The Board, having determined that the teacher of a second grade class, discontinued because of declining enrollment, had superior qualifications to those exhibited by petitioner, transferred the second grade teacher to a fourth grade assignment and gave timely notice to petitioner that she would not be reemployed. The Commissioner's review of the record reveals the validity of the findings of the hearing examiner which the Commissioner herewith adopts as his own.

That faculty selection is a board prerogative was emphasized by the Court in *Porcelli et al. v. Titus et al.*, 108 *N.J. Super.* 301 (*App. Div.* 1969), *cert.* den. 55 *N.J.* 310 (1970) as follows:

> "***We endorse the principle as did the court in *Kemp v. Beasley,* 389 *F.2d* 168, 189 (8 *Cir.* 1968), that 'faculty selection must remain for the broad and sensitive expertise of the School Board and its officials'***."
> (at 312)

Petitioner's further exception that she was not given the true reason for

her non-reemployment does not withstand careful scrutiny of the record, which bears testimony to the fact that the Board's determination was precipitated by declining pupil enrollment. It is clear that the Board, faced with declining enrollment, chose to reduce its professional elementary teaching staff. When it determined that petitioner was to be discontinued, its notification that she would not be employed was neither evasive, arbitrary, capricious nor unreasonable. (P-1) Under such circumstances it was not incumbent upon the Board, as petitioner suggests, to list as a reason for non-reemployment that it considered another teacher to be superior to her or to allow her opportunity in her informal appearance to argue the merits of her teaching abilities as contrasted to those of the other teacher. This was not the intention of the Court in *Donaldson v. Board of Education of North Wildwood,* 65 *N.J.* 236 (1974), nor is such in the best interest of the public schools and the populace they serve. The Commissioner so holds.

The validity of such determination by boards of education was amply commented upon by the Commissioner in *Robert B. Lee v. Board of Education of the Town of Montclair, Essex County,* 1972 *S.L.D.* 5, as follows:

> "***With respect to such decisions of local boards of education, the Court said in *Thomas v. Morris Township Board of Education,* 89 *N.J. Super.* 327, 332 (*App. Div.* 1965):
>
> > '***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.***'
>
> "Also, in *Kenny v. Board of Education of Montclair,* 1938 *S.L.D.* 647, affirmed State Board of Education 649, 653, the State Board stated:
>
> > '***The School Law vests the management of the public schools in each district in the local boards of education and unless they violate the law or act in bad faith, the exercise of their discretion in the performance of duties imposed upon them is not subject to interference or reversal.***'
>
> "Having found no reason for his intervention in this matter, the Commissioner further finds that petitioner has no inherent right to employment in the Montclair School District. This finding is founded on the opinion of the Court in *Zimmerman v. Board of Education of Newark,* 38 *N.J.* 65 (1962) in which the Court said in quoting *People ex rel. v. Chicago,* 278 *Ill.* 318, *L.R.A.* 1917 *E.* 1069 (*Sup. Ct.* 1917):
>
> > 'A new contract must be made each year with such teachers as [the board] desires to retain in its employ. No person has a right to demand that he or she shall be employed as a teacher.***'
>
> "Accordingly, since the Board in this instance has exercised its right to decline to reemploy, and since there is no credible offer of proof that its

action was for statutorily or constitutionally-proscribed reasons, the action of the Board must be sustained.***" (at 9)

Similarly, in the matter controverted herein, the Commissioner perceives no statutory or constitutional violation, bias, or other flaw or illegality in the Board's exercise of discretion. Its action is entitled to a presumption of correctness.

Petitioner has failed to produce a sufficient quantum of proof in support of her allegations that she received from the Board or its administrators either a promise that she would be reemployed or that the Board's action was in any way improper or illegal. Accordingly, the Board's Motion to Dismiss the Petition of Appeal, is granted.

COMMISSIONER OF EDUCATION

July 27, 1977

Deborah Strauss,

Petitioner,

v.

Board of Education of the Borough of Glen Gardner, Hunterdon County,

Respondent.

COMMISSIONER OF EDUCATION

ORDER

For the Petitioner, Ruhlman and Butrym (Paul T. Koenig, Esq., of Counsel)

For the Respondent, Joseph Novak, Esq.

This matter having been opened before the Commissioner of Education on August 8, 1975 by the filing of a Verified Petition of Appeal wherein petitioner, a nontenured teaching staff member contests the legality of the reasons given for her non-reemployment by the Board of Education of the Borough of Glen Gardner, hereinafter "Board," pursuant to *Donaldson v. Board of Education of North Wildwood,* 65 *N.J.* 236 (1974); and

It having been directed that oral argument be heard as to why the Petition of Appeal should not, because of insufficiency, be dismissed on the Commissioner's own Motion; and

Oral argument having been conducted on October 17, 1975 before a representative of the Commissioner at the State Department of Education; and

It appearing that the single reason given by the Board for nonrenewal of petitioner's contract was as follows:

> "Inability to relate and work cooperatively with the staff in furtherance of the Glen Gardner school and to the detriment of the effectiveness of the educational system." (Exhibit A); and

It appearing that petitioner requested of the Board but was refused more explicit and detailed reasons for her non-reemployment (Exhibit B); and

Petitioner's arguments having been heard and considered wherein it is contended that the reason given is so vague as to be meaningless (Tr. 17) and is therefore violative of petitioner's rights of due process (Tr. 22); and

The Board's arguments having been heard and considered wherein it is maintained that the reason given petitioner for nonrenewal was legal and adequate, and that both an informal appearance and all other elements of due process were provided as required by law (Tr. 9, 11, 15); and

The Commissioner having carefully weighed the arguments of petitioner and the Board within the context of *Donaldson, supra,* wherein it is said that:

> "***If [a teacher] is not reengaged and tenure is thus precluded he is surely interested in knowing why and every human consideration along with all thoughts of elemental fairness and justice suggest that, when he asks, he be told why. Perhaps the statement of reasons will disclose correctible deficiencies and be of service in guiding his future conduct***." (at 245); and

The Commissioner having determined that the single reason given by the Board fails to meet the requirement of *Donaldson, supra,* that reasons given by a board of education for nonrenewal be sufficient to "***disclose correctible deficiencies and be of service in guiding *** future conduct***"; now, therefore

IT IS ORDERED that the Board be required to submit an Answer to the Petition of Appeal within twenty days of receipt of this Order, and that the matter thereafter proceed to a conference of counsel pursuant to *N.J.A.C.* 6:24-1.8.

Entered this 30th day of January 1975.

COMMISSIONER OF EDUCATION

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Ruhlman and Butrym (Paul T. Koenig, Jr., Esq., of Counsel)

For the Respondent, Raymond B. Drake (Joseph S. Novak, Esq., of Counsel)

Petitioner, an elementary teacher who was employed from September 1973 through June 1975 by the Board of Education of Glen Gardner, hereinafter "Board," alleges that the Board's nonrenewal of her teaching contract in April 1975 was in contravention of her constitutional right of free speech and her statutory right to engage in negotiations. She further charges that the Board's actions were arbitrary, unreasonable, and violative of procedural due process rights to which she, as a nontenured teacher, was entitled as enunciated in *Donaldson v. Board of Education of North Wildwood,* 65 *N.J.* 236 (1974). The Board, conversely, maintains that its actions were none other than a legal exercise of its discretionary authority to determine who shall teach in its school.

Oral argument was heard on August 17, 1975 on a Motion by the Commissioner of Education to show cause why the Petition of Appeal should not be dismissed. Thereafter, an interlocutory order of the Commissioner, dated January 30, 1975, held that

> "***[T]he single reason given by the Board fails to meet the requirement of *Donaldson, supra,* that reasons given by a board of education for nonrenewal be sufficient to '***disclose correctible deficiencies and be of service in guiding***future conduct***.'***" (at p.)

The single reason given petitioner by the Board for her nonrenewal was:

> "Inability to relate and work cooperatively with the staff in furtherance of the Glen Gardner School and to the detriment of the effectiveness of the educational system." (J-2)

The Board complied with a directive of the Commissioner to issue more explicit and informative reasons in a statement which is succinctly summarized as follows:

1. Refusal to function professionally in group curriculum efforts.

2. Insufficient participation and input in in-service curriculum workshops.

3. Failure to follow counsel of the principal to correct deficiencies.

4. Uncommunicative attitude toward fellow teachers.

5. Unprovoked verbal attacks on fellow staff members in the presence of pupils.

6. Negative and hostile attitude causing inability of staff to function in a harmonious and unified manner.

7. Attitude and conduct having detrimental impact on effectiveness of fellow staff members' teaching.

8. Numerous and continuing complaints by petitioner to the principal concerning the school and community. (J-1)

A plenary hearing was thereafter conducted at the Glen Gardner School on May 20 and 28, 1976, and at the office of the Hunterdon County Superintendent of Schools, Flemington, on July 26, 1976 by a hearing examiner appointed by the Commissioner. Memoranda were filed by petitioner on December 1, 1976, and by the Board on February 28, 1977. The report of the hearing examiner follows setting forth first those uncontroverted facts which form the contextual background of the dispute:

Petitioner was notified on April 21, 1975, that she would not be reemployed for the ensuing school year. (J-4) When she requested reasons for her nonrenewal, the Board on May 5 issued the aforestated single reason and advised petitioner that an informal appearance would be afforded upon request. (J-2) Petitioner requested but was denied more explicit reasons but was, in the company of advisors and supporters, afforded an opportunity on June 30 to express to the Board those reasons why she felt she should be reemployed. (P-1; Tr. I-182, 192) On July 9 the Board advised petitioner in writing of its unanimous decision not to offer her a renewal contract. (J-3)

Petitioner called as a witness a fellow teacher who had served with her and another teacher as negotiators during the 1974-75 school year. That witness, who in 1974-75 had taught one-half day as a kindergarten teacher, testified that she had never heard petitioner make unprovoked attacks on fellow staff members or exhibit a hostile or negative attitude, albeit some tenseness was engendered among teachers during negotiations. (Tr. I-30, 48, 55) She stated that she had not observed petitioner withdraw from faculty contacts or to be other than cooperative. The teacher also testified that she was herself chairman and chief spokesman of the negotiating team which, with the Board, concluded a negotiated agreement after three negotiating sessions without undue acrimony, impasse or mediation. (Tr. I-25, 30-37, 44, 59-60) The witness also testified that she, a nontenured teacher, was offered an ensuing year contract which she declined because of pregnancy. (Tr. I-45-46)

Petitioner testified that she participated as a negotiator since she was the president of her education association in 1974-75 and that the agreement was reached with the Board prior to her notice of nonrenewal. (Tr. I-74-76, 144) She testified further that she had initially been vocal at faculty meetings but that, when the principal advised her privately that other faculty members did not appreciate her comments, she became upset and spoke infrequently at

subsequent workshops. (Tr. I-80-86, 109, 144, 161) Petitioner testified also that at the principal's direction she had helped a fellow teacher with curriculum development and had never refused to function in a professional manner. (Tr. I-99-101, 105, 197)

Petitioner, denying that she had caused any adverse effect on staff morale, averred that she had not only contributed useful ideas for improvement of the school but also had encouraged faculty luncheons and the establishment in their small ten teacher school of a coffee room where she and other teachers could socialize. (Tr. I-125-128, 133-134, 155, 204)

Petitioner testified that she had had a disagreement with the physical education teacher when he told her before school one day, as he had on other occasions, that he would be unable to take her class. She denied, however, that she spoke harshly or in a loud or devasting manner as reported to her by the principal. (Tr. I-116, 210) Petitioner also related an instance when the nurse had conducted physical examinations of pupils in the teachers' room, as follows:

> "***I was appalled.***[Y]ou don't do something like that where food is prepared and where people eat lunches. I did say something to her about that.*** But I didn't say I wouldn't eat there after that. I certainly did eat there after that." (Tr. I-207)

Finally, petitioner testified that, although it was rumored that she had made critical statements about Board members, she had never done so. (Tr. I-90-92, 131-132)

Testimony elicited from witnesses called by the Board is succinctly summarized as follows:

The third member of the teachers' 1974-75 negotiating team testified that he had observed that petitioner had withdrawn from active participation in the curriculum study workshops after her proposed format was rejected. He stated that he had noticed a similar lack of communication between petitioner and the physical education teacher, and that she had during March of 1975 absented herself from faculty luncheons and the faculty room. He further related that petitioner's verbal participation, as well as his own, at the negotiating table had been minimal. (Tr. I-27, 35, 37, 42, 46, 54, 57)

The physical education teacher related that, when he advised petitioner before school on one occasion in the presence of other faculty members in the faculty room, he would be unable on that day to take her class for physical education:

> "***[S]he actually told me off; demanded to be notified in advance." (Tr. II-65)

He related that on another occasion when he went to petitioner's classroom she told him in the presence of her pupils that "***this was her classroom and I would have to wait until she was ready***." (Tr. II-66)

Another teacher testified that during the 1974-75 year she had observed petitioner become distant, withdrawn and less social. (Tr. II-81-93) She testified that she was concerned about staff morale since petitioner was "upset all the time" and that she sought an explanation from the principal. (Tr. II-98, 105, 109)

The principal testified that he had censured petitioner for ceasing to perform fully in a professional manner after her curriculum format was rejected by faculty vote. (Tr. II-148-150, 154; Tr. III-27, 30, 36) He related further that he had found her submitted curriculum revision to be deficient. He stated that petitioner changed from a pleasant, outgoing faculty member during 1973-74 to one who appeared uncommunicative, frustrated, depressed and failed to respond to greetings in 1974-75. (Tr. III-47, 54, 63, 90) The principal stated that he believed other faculty members were visibly upset by her attitude to the point that both their morale and classroom performance were adversely affected. (Tr. III-63-64, 71, 73, 90) He testified that these observations, rather than any inadequacies of classroom teaching performance, formed the basis for his recommendation to the Board that petitioner not be rehired. (Tr. III-4) He further stated that the Board directed him to give her the opportunity to resign, which option she chose not to take. (Tr. III-5, 7, 39)

A member of the Board corroborated the testimony of the principal that he was directed to give petitioner opportunity to resign. (Tr. III-102) He also testified that the single reason, *ante,* found insufficient by the Commissioner, in his mind, incorporated the several reasons which were later stated in more explicit detail in J-1. (Tr. II-121, 129-130, 138-139)

The then Board President testified that he had believed the single reason given petitioner in J-1 to be in compliance with *Donaldson, supra,* but that when the Commissioner found otherwise he directed that more explicit reasons, as enunciated in J-1, be prepared by the principal and sent to petitioner. (Tr. III-123-125) He testified that:

> "***[I]n no way did I want to jeopardize her as a teacher. I thought that maybe she didn't function well in our system but maybe in another system she could***. [W]ith these things in mind is maybe why some of the things weren't brought out as strong as what they should have been.***" (Tr. III-133)

The then Board President further testified that he was in no way influenced to vote against petitioner's reemployment by anything he had heard or read in the newspapers that she had said about himself or other Board members but that his decision was grounded solely on the principal's recommendation and the expressed concern of certain parents. (Tr. III-119, 135, 146)

It is argued in the Memorandum on Behalf of Petitioner, hereinafter "MP," that the Commissioner in the instant controversy must act as a board of education in determining the sufficiency and validity of those reasons stated by the Board as its basis for nonrenewal iterated in compliance with the

interlocutory order, *ante. Phebe Baker v. Board of Education of the Lenape Regional High School District et al., Burlington County,* 1975 *S.L.D.* 471 Petitioner argues that the record carries, in this instance, no presumption of correctness since the hearing on the expanded statement of reasons is before the Commissioner rather than an informal appearance before the Board. (MP, at pp. 10-15)

Petitioner contends that the testimony of witnesses at the hearing proves conclusively that the Board's action was taken, at least in part, because of her exercise of the constitutionally protected right of free speech and the statutory right to engage in the negotiations process. Petitioner contends that those statements made by her during negotiations were irritating to the principal and played a substantial part in his recommendation of non-reemployment which was accepted by the Board. It is argued further, that the Board's decision, based on his unfavorable recommendation, was tainted and flawed thereby. *Perry v. Sindermann,* 408 *U.S.* 593 (1972); *Gray v. Union County Intermediate Education District,* 520 *F.2d.* 803 (9th Cir. 1975) (MP, at pp. 15-23); *Patricia Meyer v. Board of Education of the Borough of Sayreville, Middlesex County,* 1970 *S.L.D.* 188, rem. State Board of Education 192, decision on remand 1971 *S.L.D.* 140, rev'd State Board 1972 *S.L.D.* 673, aff'd Docket No. A-2466-71 New Jersey Superior Court, Appellate Division, March 29, 1973 (1973 *S.L.D.* 774)

Petitioner argues that the instant controversy differs from *Sallie Gorny v. Board of Education of the City of Northfield et al., Atlantic County,* 1975 *S.L.D.* 669 in that petitioner's speech was clearly within the protection of the First Amendment, whereas Gorney's speech was totally improper and outside such protection. (MP, at p. 23) It is similarly argued that the matter is importantly differentiated from *Donald Banchik v. Board of Education of the City of New Brunswick, Middlesex County,* 1976 *S.L.D.* 78 in that the reasons given petitioner, herein, were not related to the broad and important areas in the scope of her responsibility. (MP, at pp. 23-26)

Petitioner contends that for these reasons the Commissioner should direct the Board to reinstate her to her teaching position with lost salary and attendant emoluments.

Conversely, it is argued in Memorandum on Behalf of Respondent, hereinafter "MR," that the Commissioner is not called upon to substitute his judgment for that of the Board but to decide the matter within the parameters of issues agreed upon at the conference of counsel on April 12, 1977. The Board argues that when petitioner received the detailed statement of reasons she chose, nevertheless, to proceed with her Petition of Appeal which, at her option, must now proceed in the usual manner.

The Board contends that such procedures agreed to by petitioner now bar the Commissioner from viewing the hearing as though he were the Board granting petitioner an "informal appearance." (MR, at pp. 7-9)

The Board asserts that its entire history of conducting negotiations has guaranteed all members of its staff freedom of speech, organization and association. It is argued that the testimony of others who served as nontenured negotiators conclusively proves that the Board has not denied those with satisfactory service and recommendations either renewal contracts or tenure. (MR, at pp. 10-13)

The Board asserts that petitioner's admonishment by the principal to fulfill her professional duties in the curriculum revision workshops was part of his professional duty and cannot be construed to be an abridgment of her freedom of speech. (MR, at pp. 14-20) Accordingly, the Board seeks dismissal of the Petition of Appeal.

The hearing examiner has carefully reviewed the pleadings, testimony and documents entered into evidence at the hearing and makes the following findings of fact and recommendations to the Commissioner:

1. Petitioner's involvement in the negotiations with the Board was minimal since she was not the spokesman for the teacher negotiators. The tenor of negotiations was not heated, nor was the process prolonged. There is insufficient evidence in the record to prove that either the principal or the Board interfered with the negotiations process or took reprisal against petitioner for her negotiations activities. While one may question the wisdom of the principal's relaying to petitioner the expressed dissatisfaction of her fellow teachers over her negotiation activities, the mere relay without elaboration, as testified to by petitioner herself, forms no basis for a conclusion that reprisal followed. Accordingly, it is found that there was no abrogation of petitioner's rights to engage in associational activity. (Tr. I-216-217)

2. The hearing examiner finds the record totally devoid of convincing evidence that petitioner's constitutional right of free speech was abridged at any time by the Board or its principal. Rather, it is concluded that as the result of unpleasant confrontations and in response to reported criticism from her fellow teachers and their rejection of her proposed curriculum format, petitioner voluntarily became less communicative and frequently withheld comments in the curriculum workshop and in her daily contacts with the principal and certain fellow teachers. The hearing examiner finds that petitioner's unsatisfactory recommendations and non-reemployment stemmed from an evaluation of her professional performance and not from reprisal against her exercise of free speech. (Tr. I-161; Tr. III-4) As was stated in *Donaldson, supra*:

> "***The board's determination not to grant tenure need not be grounded on unsatisfactory classroom or professional performance for there are many unrelated but nonetheless equally valid reasons why a board *** may conclude that tenure should not be granted.***" (at 241)

3. The hearing examiner finds, that the Board's failure to initially provide a sufficiently informative statement of reasons, pursuant to *Donaldson, supra*, was the result of nescience rather than intentional noncompliance. This finding is grounded on the forthright testimony of both Board members who testified.

(Tr. II-139; Tr. III-133) The record supports the further conclusions that, as given in compliance with the Commissioner's order, the reasons are in fact a sufficiently detailed and informative elaboration of the single reason found deficient. (J-1)

4. The hearing examiner finds no evidence that the Board acted in an arbitrary, capricious or unreasonable manner, save in the initial refusal, resulting from nescience, to give sufficiently detailed and informative reasons for nonrenewal.

In conformity with the above findings of fact, it is recommended that the Commissioner determine that the Board's decision not to reemploy was none other than a proper exercise of its discretionary authority to determine which nontenured teachers shall continue to teach in its school. *Donaldson, supra* Accordingly, it is recommended that the Board's Motion to Dismiss the Petition of Appeal, made at the conclusion of petitioner's case and held in abeyance, be granted by the Commissioner. (Tr. II-2-19) This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the entire record in the instant matter including the hearing examiner report and the exceptions filed by petitioner pursuant to *N.J.A.C.* 6:24-1.17(b). Therein, petitioner argues that the Board's initial refusal to provide a sufficiently informative statement of reasons in compliance with *Donaldson, supra*, resulted from the Board's inability to state what the true reasons were. A thorough review of the record convinces the Commissioner that the Board was sufficiently informed of petitioner's professional performance and that its initial statement of a single inadequate reason for her non-reemployment was not an intentional or covert act of concealment or bad faith but the nescient result of inadequate comprehension of educational law.

Attention is called in the exceptions to the lack of documentation of the conferences held between the principal and petitioner. In this instance the Commissioner must agree that such an abysmal dearth of recordation of serious personnel conflicts such as those testified to at the hearing is contrary to sound principles of school management. It is precisely such lack of documentation that has, at least in part, prompted the Legislature and the State Board of Education to require a specified number of written evaluations annually of nontenured teachers. *N.J.S.A.* 18A:27-3.1; *N.J.A.C.* 6:3-1.19 Those requirements, however, are by no means comprehensive. Local boards of education and their administrative staffs should routinely reduce to writing and place in personnel files documentation of evaluations, conferences and directives such as those testified to in the instant matter by the principal. *Dorothy Duffy et al. v. Board of Education of the Township of Brick, Ocean County,* 1974 *S.L.D.* 111 It is frequently the very absence of such accurate documentation that results in lengthy and costly litigation of disputes.

Petitioner contends further that the Board's action is flawed for the reason

that it "***acted solely in reliance upon the recommendation of the Principal***." (Petitioner's Exceptions, at p. 2) The record indicates that the Board took cognizance not only of its principal's recommendations but of citizens' comments concerning petitioner's teaching performance. (Tr. III-119, 135, 146) In any event it has been recognized by both the Commissioner and the courts that a board, absent bias or violation of protected rights, may choose to rely, or not to rely, in whole or in part, upon the subjective evaluations and recommendations of its supervisors and administrators. As was stated in *William A. Wassmer et al. v. Board of Education of the Borough of Wharton, Morris County,* 1967 *S.L.D.* 125:

> "***While the Commissioner would expect that all boards of education look to their professional employees for recommendations and guidance in matters in which educational judgments are to be made, the board is not compelled to accept the suggestions or advice it receives, for it has the authority to make the ultimate determination.***" (at 127)

Although the principal's recommendation was subjective, it is not thereby rendered ineffective or inappropriate. It was recognized in *George A. Ruch v. Board of Education of the Greater Egg Harbor Regional High School District,* 1968 *S.L.D.* 7, quoted with favor in *Donaldson, supra,* that:

> "***Supervisory evaluations of classroom teachers are a matter of professional judgment and are necessarily highly subjective.***" (at 10)

It was stated by the Commissioner in *Gorny, supra,* that:

> "***the overall competence and effectiveness of the faculty, in any local school district, is a primary factor *** which directly and positively correlates with the quality of the educational program received by the pupils.***" (at 680)

It was aptly stated by the New Jersey Superior Court in *Porcelli et al. v. Titus et al.,* 108 *N.J. Super.* 301 (*App. Div.* 1969), *cert.* den. 55 *N.J.* 310 (1970) as follows:

> "***We endorse the principle, as did the Court in *Kemp v. Beasley,* 389 *F.2d* 178, 189 (8 Cir. 1968), that 'faculty selection must remain for the broad and sensitive expertise of the School Board and its officials,'***." (108 *N.J. Super.* at 312)

The Board was under no legal obligation to reemploy petitioner. It could not, however, legally act unreasonably in faculty selection. The Commissioner's review of the entire record reveals no quantum of proof that the Board or its administrators resorted to capricious, unreasonable, or statutorily proscribed discriminatory practice in the determination not to reemploy petitioner. Accordingly, there being no proof that the Board abused its discretionary authority, that determination is entitled to a presumption of correctness. *Thomas v. Board of Education of Morris Township,* 89 *N.J. Super.* 327 (*App. Div.* 1965), aff'd 46 *N.J.* 581 (1966) Nor is there proof that the Board violated

petitioner's constitutional rights of free expression. As was stated by the New Jersey Superior Court in *Marilyn Winston et al. v. Board of Education of South Plainfield,* 125 *N.J. Super.* 131 (*App. Div.* 1973), aff'd 64 *N.J.* 582 (1974):

> "***It may be acknowledged that the bare assertion or generalized allegations of infringement of a constitutional right does not create a claim of constitutional dimensions. Cf. *Trap Rock Industries, Inc. v. Kohl,* 63 *N.J.* 1 (1973)***" (125 *N.J. Super.* at 144)

Absent proof that petitioner's constitutional or statutorily protected rights were violated or that the Board abused its discretionary authority in determining not to reemploy petitioner, there is no relief to which petitioner has entitlement. Accordingly, the Board's Motion to Dismiss the Petition of Appeal is granted.

COMMISSIONER OF EDUCATION

July 27, 1977

Berkeley Township Teachers Association and James Dinella,

Petitioners,

v.

Board of Education of the Township of Berkeley, Ocean County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Starkey, White & Kelly (William V. Kelly, Esq., of Counsel)

For the Respondent, Wilbert J. Martin, Jr., Esq.

Petitioner James Dinella, employed by the Berkeley Township Board of Education, hereinafter "Board," since September 1974 as a music teacher, was informed pursuant to the appropriate statute that he would not be granted a renewal of his contract of employment with the Board for the 1976-77 school year. He requested an informal appearance before the Board in accordance with *N.J.S.A.* 18A:27-3.3 and *N.J.A.C.* 6:3.1-20. A meeting was held by the Board to review its prior decision not to renew petitioner's employment for the 1976-77 school year and to accord him an appearance before the Board.

Petitioner appeared at the meeting on June 18, 1976, held as prescribed in *N.J.A.C.* 6:3-1.20 to attempt to convince the members of the Board to offer

reemployment. Also present were witnesses for petitioner and his representative. Present with the Board were two school principals, both of whom were supervisors of petitioner. Objection was voiced on behalf of petitioner about having the two principals present who were not members of the Board. The Board refused to have the meeting without the administrators present and, as a result, the meeting was terminated.

Petitioner Dinella alleges that the action of the Board in refusing to remove the principals resulted in petitioner not being given the informal appearance before the Board as defined in the above-cited statute. The Board alleges that the presence of the principals was in no way improper or prejudicial, and the Board denies that their presence prevented a fair presentation by petitioner.

The matter is presented to the Commissioner of Education for Summary Judgment upon the pleadings, exhibits, Joint Stipulation of Facts and memorandum as submitted. The narrow issue is whether or not administrators and/or supervisors may be present at a nontenure teacher's informal appearance before the Board.

Petitioner relies on *Donaldson v. Board of Education of North Wildwood,* 65 *N.J.* 236 (1974) and *Barbara Hicks v. Board of Education of the Township of Pemberton, Burlington County,* 1975 *S.L.D.* 332 alleging that in *Hicks* it was indicated that the informal appearance is not an adversary proceeding but is to be held to convince board members that they have made an incorrect determination by not offering reemployment. (Petitioners' Statement of Position, at p. 2)

Petitioner further argues that witnesses who may be called on behalf of the nontenured teacher would be other teachers in that school system. The presence of the supervisors and principals of the nontenured teacher would have a "chilling and deleterious effect" on the ability of witnesses called on behalf of the nontenured teacher to speak their mind and that the Board's refusal to dismiss the principals "***was tantamount to not giving any hearing at all***." (Petitioners' Statement of Position, at p. 3)

The Board argues that, if it is to respond in any intelligent way within three days following the appearance of the teacher, as required by *N.J.A.C.* 6:3-1.20(i), questions engendered by the proceeding can only be answered by the administrators who conducted the evaluations. Further, the Board argues that the presence of such administrators is intended only as an aid to the Board in reaching its conclusion. It denies that their presence would stifle witnesses speaking in behalf of the nontenured employee. The Board pleads that it should not be denied the presence of the evaluators to listen and, in turn, to respond to the Board at the end of such an appearance. (Board's Statement of Position, at p. 4)

The controlling statute is *N.J.S.A.* 18A:27-3.3 and the rule of the State Board at *N.J.A.C.* 6:3-1.19. Neither the statute nor the applicable rules prohibit

the Board from permitting the presence of administrative and/or supervisory staff members during the informal appearance of a teaching staff member before the Board. In the judgment of the Commissioner a local board of education has the discretion to permit administrators and supervisory staff members to be present during such a proceeding, with certain restrictions. If a local board determines that it would be useful to have such staff members present, it must be clearly understood that they may not participate in the proceedings in any manner other than as observers. This requirement is necessary because the local board has previously had the opportunity to hear the professional opinions of its Superintendent and members of the administration and supervisory staff when the board considered whether or not to offer reemployment to the affected teaching staff member.

In every instance the local board will review the evaluation reports prepared by administrators and supervisors, as well as the recommendation of the Superintendent. Such evaluations and recommendations constitute the major record of performance considered by the board in its deliberations whether or not to offer reemployment. The informal appearance of the nontenured teaching staff member before the board is precisely for the purpose of dissuading the board from its previous determination.

For these reasons the Commissioner holds that administrative and supervisory staff members may be present at an informal appearance of a teaching staff member before the board, at the board's discretion but may take no part whatsoever in such proceeding.

The Commissioner observes that petitioner, as prescribed by law, was afforded an opportunity for an appearance before the Board although he chose not to participate. For the aforementioned reasons the Commissioner finds no merit in petitioner's Appeal and it is accordingly dismissed.

COMMISSIONER OF EDUCATION

July 27, 1977

Donald R. and Isabel M. Walters, Bruce J. and Rose Marie Nicholson,

Petitioners,

v.

Board of Education of the Township of Mendham, Morris County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Cossman & Levenstein (Peter J. Cossman, Esq., of Counsel)

For the Respondent, Mills, Hock & Murphy (John B. Dangler, Esq., of Counsel)

Petitioners are parents of pupils who attend school in the district operated by the Board of Education of the Township of Mendham, hereinafter "Board." Petitioners allege that the route their children must follow to reach the Board's designated bus stop is so hazardous that it cannot be traversed by children or adults and they are therefore denied convenience of access to the school. Petitioners allege further that the Board has discriminated against them since it has changed bus routes and bus stops for some pupils, but it has consistently denied their requests for changes in the bus stops or routes which would benefit their children. Petitioners allege also that the Board has failed to promulgate a comprehensive and discernible transportation policy which would be equitable to all pupils.

The Board denies petitioners' allegations and asserts that it has met its obligation to provide transportation to all eligible pupils, and that its actions establishing bus stops and routes are proper and consistent with the applicable statutes and prior decisions of the Commissioner of Education and the courts.

Subsequent to the filing of an Amended Petition of Appeal and an Amended Answer, the Board filed a Notice of Motion for Summary Judgment with a Brief in support of its Motion. The Board's Motion was denied by the hearing examiner and extensive and lengthy discovery procedures were initiated. After receipt of Answers to interrogatories and Answers to supplemental interrogatories, petitioners demanded more specific answers which resulted in a hearing examiner's ruling concerning the Board's Answers. (Hearing Examiner's Letter, November 5, 1976) The Board complied with the hearing examiner's directives and four depositions were taken by petitioners. Thereafter, petitioners filed a Cross-Motion for Summary Judgment with supporting Brief. Submitted in evidence were several documents, affidavits, and the transcript of the depositions taken by petitioners. The matter is now ripe for Summary Judgment by the Commissioner.

The following facts are not in dispute. Petitioners' children live remote

from the school and are entitled to bus transportation. To avail themselves of this bus transportation, the children must walk two tenths of a mile to a designated bus stop. The designated bus stop is one and nine tenths of a mile from school. (Amended Petition of Appeal, First Count)

Petitioners allege that they must traverse Old Brookside Road to reach this bus stop and that it is extremely hazardous in that:

***

"(a) There are no sidewalks;
"(b) There are extremely sharp curves:
"(c) The road is very narrow:
"(d) There are no shoulders;
"(e) The speed limit is 35 M.P.H.;
"(f) There is a heavy traffic flow during hours in question." (Amended Petition of Appeal, Second Count)

Finally petitioners allege that the Board's failure to accede to their demands to pick up and discharge their children at their respective driveways is *prima facie*, arbitrary, capricious, and unreasonable. (Amended Petition of Appeal, Third Count)

This is another in a series of appeals regarding pupil transportation in which the Commissioner has been called upon to make a ruling. In a recent ruling, *James P. Beggans, Jr. et al. v. Board of Education of the Town of West Orange, Essex County,* 1974 *S.L.D.* 829, 834, aff'd State Board of Education 1975 *S.L.D.* 1071, aff'd Docket No. A-1928-74 New Jersey Superior Court, Appellate Division, November 6, 1975 (1975 *S.L.D.* 1071), petitioners alleged that the combined distance from their home to school, coupled with the hazardous roads and the hardship of climbing a long, steep incline (elevation 180 feet), in the aggregate, was sufficient reason for the board to provide transportation. In the instant matter, petitioners' allegations of hazard are similar. No distinction needs to be made because Beggans lived less than remote from school since the board in that matter also transported some less than remote pupils. Remote pupils are those who live two miles or more from school if elementary pupils and two and one-half miles or more if secondary school pupils. *N.J.A.C.* 6:21-1.3

From his review of the record herein, the Commissioner determines that the instant matter is *stare decisis.*

In *Read et al. v. Board of Education of the Township of Roxbury,* 1938 *S.L.D.* 763 (1927), the Commissioner said:

> "***Boards of education are not authorized by law to provide for the safety of children in reaching school. While a board should be concerned as to the safety of children and should report to the State Police or local officers reckless use of highways, it is not directly responsible for the danger to pedestrians because of automobile traffic any more than it is responsible for sandy or muddy highways. Highways and street dangers

> demand parental concern and care of children to avoid accidents and also a civic enforcement of traffic laws rather than larger expenditures of public funds to provide transportation.***" (at 765)

This position has been reaffirmed by the Commissioner in many subsequent decisions. See *Trossman v. Board of Education of the Borough of Highland Park,* 1969 *S.L.D.* 61; *Roseman v. Board of Education of the Township of Howell,* 1969 *S.L.D.* 124; *Locker et al. v. Board of Education of the Township of Monroe,* 1969 *S.L.D.* 178; *Frieman et al. v. Board of Education of the Borough of Haworth,* 1970 *S.L.D.* 113; *Tolliver et al. v. Board of Education of the Borough of Metuchen,* 1970 *S.L.D.* 415; *Bocco v. Board of Education of the City of Camden,* 1971 *S.L.D.*, 71; *Concerned Parents of Howell Township School Children v. Board of Education of the Township of Howell,* 1972 *S.L.D.* 600; *Centofanti et al. v. Board of Education of the Township of Wall,* 1975 *S.L.D.* 513; *Baldanza v. Board of Education of Tinton Falls et al.*, 1976 *S.L.D.* 362.

The Commissioner has consistently held that he will not interfere when a Board acts within its discretionary authority. This principle was enunciated in *Boult and Harris v. Board of Education of Passaic,* 1939-49 *S.L.D.* 7, aff'd State Board of Education 15, aff'd 135 *N.J.L.* 329 (*Sup. Ct.* 1947), 136 *N.J.L.* 521 (*E.&A.* 1949) as follows:

> "***[I]t is not a proper exercise of a judicial function for the Commissioner to interfere with local boards in the management of their schools unless they violate the law, act in bad faith (meaning acting dishonestly), or abuse their discretion in a shocking manner. Furthermore, it is not the function of the Commissioner in a judicial decision to substitute his judgment for that of the board members on matters which are by statute delegated to the local boards.***" (at 13)

Petitioners submitted several affidavits and a letter in support of their assertion of discrimination in that the Board has revised bus stops and routes for other children for reasons of safety. As the Commissioner said in *William A. Pepe v. Board of Education of the Township of Livingston, Essex County,* 1969 *S.L.D.* 47:

> "***Boards of education must provide for the transportation of pupils who live remote from school. *N.J.S.A.* 18A:39-1 In their discretion they may provide such services to children who are not remote. *N.J.S.A.* 18A:39-1.1 Such transportation may not be furnished on a discriminatory basis. *Klastorin v. Scotch Plains Board of Education,* 1956-57 *S.L.D.* 85; *Dorski v. East Paterson Board of Education,* 1964 *S.L.D.* 36, affirmed State Board of Education, 39.
>
> ***
>
> "The Board has seen fit to provide school bus service to certain children in petitioner's area. This service is furnished under the special circumstance

provisions of its policy, *i.e.*, the absence of sidewalks on the east side of the street and the unusual hazards resulting from road construction work in the area. The transportation provided is temporary only, and will be withdrawn when the special circumstances no longer exist. *In order to establish unlawful discrimination there must be a showing that one group in entirely the same circumstances as another is given favored treatment.* There is no such showing herein. Petitioner's daughter is the only child attending Collins School who lives on the west side of East Cedar Street. In going to and from school there are sidewalks available to her and she is not required to cross East Cedar Street. Children on the East side, however, do not presently have sidewalks and must cross East Cedar Street to get to Collins School. Such differentiation in conditions furnishes sufficient grounds for separate classifications under which respondent may distinguish services.

> '***a board of education may, in good faith, evaluate conditions in various areas of the school district with regard to conditions warranting transportation. It may then make reasonable classifications for furnishing transportation, taking into account differences in the degree of traffic and other conditions existing in the various sections of the district.' *Schrenk v. Ridgewood Board of Education,* 1960-61 *S.L.D.* 185, 188

"See also *Livingston v. Bernards Township Board of Education,* 1965 *S.L.D.* 29; *Peters et al. v. Washington Township Board of Education,* [1968 *S.L.D.* 42].***" (*Emphasis supplied.*) (at 49-50)

As the Commissioner pointed out in *Beggans, supra,* a local board of education may evaluate conditions involving the safety of school pupils in their journey to and from school. It must make reasonable classifications with respect thereto and all children must then be treated in an equitable manner.

When a local board of education has so acted the Commissioner may not substitute his judgment for that of the Board in the absence of evidence of discrimination or of evidence that the Board's policy is arbitrary, capricious or unreasonable. There is no such evidence herein. Accordingly, the Commissioner will not intervene.

The record shows that much discussion has been held concerning the relative safety of the road and the bus stop in question. These discussions are reflected in the Board minutes, the Superintendent's deposition, the letters in evidence submitted by the Chief of Police, and in the Petition of Appeal. These records reveal that petitioners' many requests for a change in the bus route have been consistently denied by the Board. As has been stated before, the safety of the roads is a function of the municipality. The Commissioner can find no evidence in the record before him to support petitioners' contention that the Board should develop a comprehensible and discernible transportation policy. *East Iselin Association v. Board of Education of the Township of Woodbridge, Middlesex County,* 1969 *S.L.D.* 78, 82-83

For these reasons the Board's Motion for Summary Judgment is granted and petitioners' Motion for Summary Judgment is denied. Accordingly, the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

July 27, 1977

John Melone,

Petitioner,

v.

Board of Education of the Borough of Rutherford, Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Goldberg, Simon & Selikoff (Gerald M. Goldberg, Esq., of Counsel)

For the Respondent, Parisi, Evers & Greenfield (Irving C. Evers, Esq., of Counsel)

Petitioner, a custodian employed by the Board of Education of the Borough of Rutherford, hereinafter "Board," alleges that his dismissal on December 8, 1975, was not connected with his contractual agreement and, in the absence of a formal resolution to terminate his employment, the Board's action was *ultra vires.* He prays for an order reinstating him to his custodian's position together with back pay. The Board holds that his services were properly terminated and that he has no entitlement to restoration to his former position nor any compensation subsequent to his dismissal on December 8, 1975.

The matter is directly before the Commissioner of Education in the form of a Motion to Dismiss entered by the Board and a Cross-Motion entered by petitioner. Briefs, Memorandum of Law and exhibits were filed by the parties. The relevant facts are as follows:

Petitioner was employed under contract as a custodian by Board resolution dated February 10, 1975, commencing February 18, 1975. (Petitioner's Exhibits C, D) Petitioner and the Board entered into a separate contract whereby petitioner was to perform independent work on the high school auditorium seats; such work was not to be performed during his regular working day. Petitioner was notified by letter dated October 9, 1975 that his services as a custodian in the school district would be terminated sixty days from receipt of the letter, effective December 8, 1975. (Petitioner's Exhibit B)

Petitioner argues that the Board's reasons for his termination of employment were not connected with his job description but, rather, his regular employment was terminated as the result of the private service contract between petitioner and the Board. (Petitioner's Exhibit A) In support of his contention petitioner relies upon the Board's notice of termination of October 9, 1975 which stated, *inter alia,* as follows:

> "***The action taken [petitioner's termination of employment] is supported by the refusal on your part to take out and replace seats in the High School Auditorium in a good workmanlike manner, and to make good the defects that have shown up and have been brought to your attention." (Petitioner's Exhibit B)

Petitioner asserts that at no time did the Board state that it was dissatisfied with his services as a custodian. The sole reason for his dismissal was based on an unrelated private contract between petitioner and the Board and, as such, constitutes arbitrary and capricious action by the Board. *Ramsbotham et al. v. Board of Public Works of the City of Paterson,* 2 *N.J.* 131, 135-136 (1949); *Bayshore Sewerage Co. v. Department of Environmental Protection, State of New Jersey,* 122 *N.J. Super.* 184 (*Chan. Div.* 1973), aff'd 131 *N.J. Super.* 37 (*App. Div.* 1974)

Petitioner further asserts that the Board's action to terminate his employment occurred at a work session and, absent a formal resolution adopted by the Board at an open public meeting, its action was, therefore, *ultra vires.* The allegation that the Board did not formally adopt a resolution to dismiss petitioner was grounded upon the Board's answer to petitioner's interrogatories which stated, *inter alia,* that the dismissal of petitioner was recommended at a work session of the Board and that it authorized the district School Business Administrator to terminate his services. (Petitioner's Exhibit E, Interrogatory No. 9, at p. 3)

Petitioner avers that the Board violated the statutory provisions as found in *N.J.S.A.* 18A:10-6 and the determination of the court where it has held:

> "***We know of no prohibition against members of a public body holding a closed conference where no official action is taken. Cf. *Wolf v. Zoning Board of Adjustment,* 79 *N.J. Super.* 546 (*App. Div.* 1963). What is prohibited by our laws is the taking of official action at other than a public meeting. *N.J.S.A.* 10:4-1 *et seq. Schults v. Board of Education, Teaneck,* 86 *N.J. Super.* 29 (1964) at p. 46.***"
>
> (Petitioner's Brief, at p. 5)

In support of his argument that the Board's action to terminate his employment was *ultra vires,* petitioner cited the case of *Carrie Warwick Garrison v. Commercial Township Board of Education, Cumberland County,* 1971 *S.L.D.* 13, wherein the Commissioner held that the Board's unofficial and informal action was an illegal act and did not fulfill the requirements of the applicable statute. Petitioner further relied upon court decisions and decisions of the Commissioner that the Board's delegation of authority to its School Business

Administrator to effectuate his termination of employment and the termination itself were both unlawful acts and must be rescinded.

The Board maintains that its action to dismiss petitioner was proper and procedurally sound wherein it exercised the sixty day termination clause in the contract between petitioner and the Board. (Petitioner's Exhibit D) It does not deny that its decision to dismiss petitioner was based on alleged defective and unsatisfactory work performed by petitioner for which he was paid a total of $1,531.80 over and above his regular salary. (Board's Brief, Exhibit B) It contends that in addition to the payment to petitioner, it was necessary to engage the services of another employee to correct the work of petitioner at an additional cost of $196.46. (Board's Brief, Exhibit A)

The Board asserts that petitioner refused to correct the alleged defective work after it requested that he do so. The Board avers that petitioner was therefore guilty of insubordination, which charge alone was sufficient to terminate him. *In the Matter of the Tenure Hearing of Adam Rogalinski, School District of Bordentown Regional High School, Burlington County,* 1967 *S.L.D.* 110 It contends that it had every right to consider not only the performance of petitioner in accordance with his job description but also his overall performance, including his attitude. *In the Matter of the Tenure Hearing of Elinor Larson, School District of Scotch Plains-Fanwood Regional,* 1975 *S.L.D.* 309; *In the Matter of the Tenure Hearing of Francis M. Starego, Borough of Sayreville, Middlesex County,* 1967 *S.L.D.* 271, aff'd State Board of Education 1968 *S.L.D.* 273; *Claire Haberman v. Board of Education of the Borough of Morris Plains, Morris County,* 1975 *S.L.D.* 848; *Francis Filardo v. Board of Education of the Township of Mahwah, Bergen County,* 1975 *S.L.D.* 830; *Inez Nettles v. Board of Education of the City of Bridgeton,* 1976 *S.L.D.* 555

The Board rejects petitioner's argument that because he was employed by resolution, he can only be terminated by a resolution of the Board. It asserts further that a board of education is under no obligation to take affirmative action not to renew the contract of a teacher as long as the required notice of intention not to renew is given at the proper time. *Moses Cobb v. Board of Education of the City of East Orange, Essex County,* 1975 *S.L.D.* 1047, aff'd State Board of Education 1976 *S.L.D.* 1135 The Board asserts that the Legislature, in *N.J.S.A.* 18A:27-1, expressly provided that the only way of appointing teachers is by a recorded roll call majority vote of the full membership of the board of education. It argues that there is nothing in the statute which requires a similar vote to terminate employment. With regard to the appointment of custodians, the Board asserts that there is no requirement that their appointments be by a vote similar to that required of teaching staff members. Cf. *N.J.S.A.* 18A:16-1

The Board argues that petitioner was a probationary employee and that it did not delegate any of its authority to its School Business Administrator. It asserts that it directed the School Business Administrator to notify petitioner of its decision to terminate his services which action, the Board maintains, it had the right to take both under the law and under the contract between the parties.

Subsequent to the filing of Briefs in the instant matter, petitioner, on January 3, 1977, filed a Letter Memorandum of Law wherein he alleges that when his employment was terminated in the middle of the school year without the benefit of a hearing before the Board, his constitutional rights of due process were violated by the Board. *Eva Cardona v. George Claflen et al. and the New Brunswick Board of Education,* Civil Action No. 75-787, Unreported Opinion of the Hon. George H. Barlow, Judge, U.S.D.C., Dist. of N.J., September 8, 1976

The Board maintains that petitioner did not request a hearing with the Board in accordance with the requirements of *Donaldson v. Board of Education of North Wildwood,* 65 *N.J.* 236 (1974) nor *Barbara Hicks v. Board of Education of the Township of Pemberton, Burlington County,* 1975 *S.L.D.* 332

The Commissioner has carefully considered and weighed the arguments of law of the contending parties to this dispute. He has, additionally, researched the statutes and applicable case law. He observes that petitioner was appointed for a fixed term as provided by *N.J.S.A.* 18A:17-3 and, therefore, did not enjoy the protection of a tenure status. Under such circumstances, he was subject to the contractual conditions entered into between himself and the Board which stated, *inter alia,* as follows:

> "***It is hereby agreed by the parties hereto that this contract may at any time be terminated by either party giving to the other sixty days' notice in writing of intention to terminate the same." (Petitioner's Exhibit D)

The Board did indeed execute its intention to terminate petitioner effective December 8, 1975 through its agent, the district's School Business Administrator. (Petitioner's Exhibit B) The Commissioner rejects the Board's argument that its action taken in a work session to terminate petitioner without a formally adopted resolution was valid and lawful. The statutes imposed the responsibility to the Board Secretary to "***record the minutes of all proceedings of the board***." *N.J.S.A.* 18A:17-7 As the Commissioner held in *Plainfield Courier-News Company. A Corporation of the State of New Jersey v. Board of Education of the Watchung Hills Regional High School District,* 1959-60 *S.L.D.* 151:

> "***In *Levine vs. Board of Education of the City of Bayonne and Joseph A. Sklenar,* 1938 *S.L.D.* 157 at 159, the Commissioner held that the word 'proceedings' means 'actions taken or things done.' If *N.J.S.A.* 18:7-58 is read with 18:7-69, it is clear that the minutes must show actions taken on the appointment, transfer, dismissal or salary fixed.***" (at 153)

In the absence of any proofs that the Board adopted a resolution to dismiss petitioner and that such a resolution is spread upon the minutes of the school district's records, the Commissioner holds that petitioner's termination was defective.

The term for which petitioner was employed was the 1975-76 school year, to June 30, 1976, which has expired. Petitioner urges the Commissioner to order his reemployment by the Board. The Commissioner observes that petitioner

cannot be required to perform further services for the Board, nor can the Board be required to continue to employ petitioner. The authority to employ and dismiss school personnel rests solely in the Board. The Commissioner knows of no authority whereby a board of education can be ordered to employ or to renew the employment of a person whose contractual rights have been satisfied.

The Commissioner finds and determines that petitioner's employment in the Rutherford School System was improperly terminated. Petitioner is, therefore, entitled to compensation for the period from December 9, 1975 to June 30, 1976, during which he was illegally dismissed. The Commissioner directs the Board to pay to petitioner the appropriate amount of salary for such period of time at the next regular payroll period.

In all other respects petitioner's Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

July 29, 1977

Henry Talarsky and the Edison Education Association,

Petitioners,

v.

Edison Township Board of Education, Superintendent of Schools Charles S. Boyle, and Principal Leo Scanlon, Middlesex County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Mandel, Wysoker, Sherman, Glassner, Weingartner & Feingold (Richard H. Greenstein, Esq., of Counsel)

For the Respondents, R. Joseph Ferenczi, Esq.

The Edison Township Education Association, hereinafter "Association," joins its member teacher, Henry Talarsky, hereinafter "petitioner," in alleging that the principal of the Edison High School improperly changed from failing to passing a final grade assigned by petitioner to a pupil and that the change of grade was improperly supported by petitioner's Superintendent and the employing Board of Education of Edison Township, hereinafter "Board."

Respondents, while admitting that the principal changed the failing grade to passing and that the Superintendent and the Board supported that change, assert that such change was in full accord with their authority to review and adjust final grades which are assigned arbitrarily, capriciously and without foundation.

Following a plenary hearing, conducted on April 9 and 22, 1976 at the office of the Somerset County Superintendent of Schools, Somerville, by a hearing examiner appointed by the Commissioner of Education, Briefs were submitted by the parties. Those facts which are undisputed are recited to provide a contextual background for an understanding of the dispute:

Petitioner assigned "S.O.," a twelfth grade pupil in U.S. History II, quarterly marking period grades during the 1974-75 academic year sequentially as follows: D, F, D, D. (P-2) In June 1975, he assigned S.O. a failing final grade of F, which grade was in no way affected by any final examination grade and is the sole grade in dispute by the parties. The principal, after reviewing S.O.'s failing grade with petitioner and with guidance personnel, without petitioner's consent set aside the failing grade, assigned S.O. a passing grade of D and allowed her to graduate with her class.

The Edison faculty's statement of grading procedure, as revised by a faculty committee in August and December 1974, listed numerical equivalents of one for a D and zero for an F. It further specified that the four marking period numerical equivalents should be added and divided by four to determine the numerical equivalent of the final grade. Thus, for S.O. the average of the numerical equivalents of three D's and one F was .75. The statement further provided that, in the event the numerical equivalents were less than a whole number, values less than one half should be dropped, but that for values of one half and three fourths:

> "Teacher discretion shall be the determining factor – i.e., the fraction could be 'rounded off' to the next *highest* whole number or it could be 'dropped,' e.g.,*** an average numerical score of .75 could be rounded off to *1* or *0* -- *depending on teacher judgment.****" (*Emphasis in text.*) (P-1)

This statement, however, was never acted upon nor approved by the Board whose only articulated policy on grading stated, *in toto*:

> "Students shall be graded on the basis of their achievement in the program(s) approved by the Board. They shall be given the opportunity to progress through the educational program at their level of ability. All factors pertinent to achievement shall be considered when assigning grades. The results of standardized tests shall not be used to determine student grades." (J-12)

A summary of relevant testimony elicited on behalf of petitioner follows:

Petitioner testified that when he exercised his discretion in accord with faculty policy he determined that S.O.'s performance and attitude during the

course of her senior year did not warrant a passing grade. (Tr. I-26, 59, 68; Tr. II-25) He stated that when he reviewed her grade at a conference with the principal, S.O., and her parents, he advised them that the quality of her work as reflected in major papers submitted during the last marking period was unsatisfactory, as her work had consistently been throughout the year. (Tr. I-27-28) He testified further that, although at other conferences with the principal, guidance personnel, and his department chairman he had agreed to review and reconsider the matter of S.O.'s final grade, he later informed the principal that the F would stand. (Tr. I-31) Petitioner related that the principal thereafter informed him that he would allow S.O. to graduate, and that this was the first instance in his twelve years of service to the Board when he had been overruled on a failing grade. (Tr. I-71)

Petitioner testified further that he had in certain other instances passed pupils with a final numerical equivalent of .75 but that in such determinations he always considered the abilities of his pupils, as well as their attitude, attendance and efforts in the classroom. (Tr. I-35-37) Petitioner testified that S.O. had been absent a total of thirty-seven days, tardy ten times, and had cut his class twice. (Tr. I-55) Petitioner stated that it is a practice of long standing in Edison High School that grades are revised by principals and guidance personnel but averred that in consideration of the faculty policy statement, *ante,* it was not their prerogative to change a grade without the teacher's consent. (Tr. I-74-75)

A teacher who had served on the faculty committee to revise the faculty grading policy statement in 1974 testified that the school's prior statement had required that teachers convert a numerical equivalent of .75 to the next higher whole number which would convert automatically to a passing grade of D. He stated that the committee, in revising that policy to prevent year-end lethargy in pupil performance, felt that teacher discretion should prevail when determining whether a pupil would pass or fail. (Tr. I-82-84) He testified further that, although it was mentioned several times that approval by a principal should be an adjunct to failing of a pupil with a numerical equivalent of .75, no such requirement was articulated in the faculty statement. (Tr. I-84-85) In regard to the issue of whether a principal could change a teacher's grade, both the teacher and the Association president testified that they believed that, although a principal had authority to review a grade, only the teacher who gave such a grade had authority to change it.

Called as a witness for respondents, the Assistant Superintendent who had also served on the committee to revise the statement of grading procedure, *ante,* testified that the statement was merely one of administrative procedure which did not confer absolute authority upon a teacher. (Tr. I-121-127) He stated that although no policy has been articulated conferring authority on a principal to review and/or revise a teacher's grade, such authority is implicit in the Board's line-staff organizational charts. (R-2; Tr. I-137-138) He averred that review authority was required:

> "***Because in the past, we had several problems.*** As the pressure mounted towards the end of the year in the classrooms, teachers would at

times overreact to a behavior pattern and consequently fail a student [when] ***it really didn't warrant that severe action.***" (Tr. I-139-140)

When asked why such a review by the principal was not incorporated, as it previously had been, in the revision of the statement of grading procedure, he stated:

"***It had been a part of the system for so many years, it had been exercised so many times,***it was not felt that we had to remind teachers every time we write something that their decision, their discretion is subject to review.***" (Tr. I-142)

The Assistant Superintendent also testified that, in his judgment, a sequence of D, F, D, D was an unusual basis for a failing final grade inasmuch as the grade pattern indicated improvement and passing work during two marking periods following a single failure. (Tr. I-146, 149)

The principal of the Board's other high school testified that he had always accepted as an integral part of his duties the obligation to review pupil grades in the interest of fairness and understanding on the part of pupils, community and staff. He stated that he understood he had the authority to change a teacher's grade, but had never found it necessary to do so. He related that in one dispute, when he supported a teacher's assignment of grade, he had himself been overruled when the Superintendent reviewed the facts and changed the controverted grade. (Tr. I-161-163)

Petitioner's principal testified that when he reviewed the matter of S.O.'s grade he based his determination that it must be changed on the following factors:

1. A substitute had been in charge of petitioner's classes, during his illness, for a large portion of the second marking period for which S.O. received an F.

2. S.O. did not fail during the third and fourth marking periods.

3. A large quantity of work was completed by S.O. during the last marking period. (Tr. I-176, 192)

The principal testified further that after conferring with guidance personnel and petitioner's department chairman, he was convinced that it was not only justified that S.O. graduate but that it was also in her best interest that she do so. (Tr. I-183)

Petitioner's department chairman testified that, although he felt that neither the principal nor petitioner had acted arbitrarily, he agreed with the judgment of the principal that changing S.O.'s final grade to a D was reasonable and in her best interests. (Tr. I-196, 198) Petitioner's guidance counselor similarly testified that he agreed that in consideration of the sequence of S.O.'s grades, the action of the principal in changing her grade to passing was appropriate and in the pupil's best interests. (Tr. I-202-208)

S.O. testified that she had never received a final failing grade in any other subject. She related that she had received a failure warning notice from petitioner during the fourth marking period, after which she considered quitting her cooperative office employment job to put added effort into her U.S. History II course work. (Tr. II-6-7) Further testimony of S.O. bears little relevance to the issue of whether the principal exceeded his authority or acted contrary to petitioner's rights in changing her grade.

It is argued in the Brief on Behalf of Petitioners, hereinafter "BP," that the principal's unilateral action in changing S.O.'s grade was unjustified, arbitrary and violative of the established procedure for determining grades. It is contended that the grade given by petitioner properly gave equal weight to *each* marking period in consideration of her performance, attitudes, capabilities and attendance patterns. In this regard petitioners argue that the principal's emphasis on the sequence of grades improperly gave added weight to the last two marking period grades. (BP, at pp. 5-11)

Petitioners concede that the principal, the Superintendent and the Board unquestionably had the right and duty to review the grade, but contend that, in view of the faculty policy statement, they were without authority to alter it without the teacher's consent. (BP, at pp. 11-20; Reply Brief of Petitioners) In this regard it is argued that the daily contacts with a pupil make a classroom teacher best informed of a pupil's attitudes, attendance, abilities, work habits, mastery of subject matter and other course requirements. Petitioners argue that:

> "***If the Principal assumed the unfettered authority to unilaterally change grades, absent a clear showing of discretionary abuse on the part of the teacher, or extenuating circumstances, the classroom teacher would, in effect, lose his fundamental discretionary right to assign the appropriate grade based upon a student's performance and achievement.***"
>
> (BP, at pp. 14-15)

Petitioners buttress their contention that, absent a clear showing of abuse, the discretionary authority for a pupil's grade must reside with the teacher by citing *Sharon Ann Pinkham v. Board of Education of the Borough of South River et al., Middlesex County*, 1974 *S.L.D.* 1103, aff'd in part/rev'd in part State Board of Education 1975 *S.L.D.* 1119, wherein it was stated by the Commissioner that:

> "***It is the teacher alone who may assess the learning which has occurred***." (at 1112)

It is argued further that petitioner was justified in considering S.O.'s absenteeism of thirty-seven days when evaluating her yearly performance. Cited in this regard is *William J. Wheatley et al. v. Board of Education of the City of Burlington, Burlington County*, 1974 *S.L.D.* 851 wherein the Commissioner stated, *inter alia,* that:

> "***Frequent absences of pupils from regular learning experiences disrupt the continuity of the instructional process. The benefit of regular

> classroom instruction is lost and cannot be entirely regained, even by extra after-school instruction.***The school cannot teach pupils who are not present.***" (at 864)

Finally, petitioners assert that the grade of D assigned by the principal should be set aside and the grade of F assigned by petitioner should be reinstated. It is argued that to hold otherwise would "***allow such incursions upon the discretion and judgment of classroom teachers [as] would seriously erode the quality and dignity of teacher certification in New Jersey." (BP, at p. 21)

It is contended in the Brief on Behalf of Respondents, hereinafter "BR," that administrative review of and the right to modify inappropriately assigned grades is a long established prerogative and responsibility in the Edison schools which is in no way modified or nullified by the fact that it is not articulated in the faculty policy statement on grading. (BR, at pp. 3-8) Respondents aver that a board of education may not legally delegate to a teacher *sole and final* discretion to determine a final grade but must exercise its statutory authority and responsibility by providing authoritative administrative review of pupil grades. (BR, at pp. 9-12) *N.J.S.A.* 18A:11-1; *Dunellen Board of Education v. Dunellen Education Association et al.,* 64 *N.J.* 17 (1973); *Porcelli et al. v. Titus et al.*, 108 *N.J. Super.* 301 (1969)

Respondents argue further that, were teachers accorded such absolute authority to assign grades which were not subject to review, it would be a denial of due process rights of pupils within the school environment. In this regard it is noted that even the decision of a school board itself is properly subject to such due process procedures to guarantee fundamental fairness to pupils. *"R.R." v. Board of Education of Shore Regional High School District,* 109 *N.J. Super.* 337 (*Chan. Div.* 1970); *John Scher v. Board of Education of the Borough of West Orange, Essex County,* 1968 *S.L.D.* 92, remanded State Board of Education 97; *Goss v. Lopez,* 419 *U.S.* 565 (1975) (BR, at pp. 13-14)

Finally, respondents assert that not only was the revision of the final grade of F a reasonable exercise of discretion by the principal based upon careful consideration of the relevant facts and the pupil's best interests, but also that the sustaining of that revision by the Superintendent and the Board were similarly reasonable and proper. (BR, at pp. 15-22)

The hearing examiner upon careful consideration of the documentary evidence, testimony at the hearing and demeanor of witnesses sets forth the following additional relevant facts which should be considered by the Commissioner in arriving at a determination of the agreed upon issues:

1. The 1974 faculty policy statement on grading was never adopted or approved by the Board. Board adopted policy is silent as to the specifics of how quarterly grades shall be averaged in arriving at a final grade.

2. It was a practice of long standing in the district that the principals review grades assigned by teachers to pupils. Although in a limited number of

instances after such review pupils' grades have been changed by mutual consent of teachers and principals, it is evident that principals have acted with caution in this regard. There is insufficient evidence to conclude that principals in the Edison schools have, as the result of such reviews, arbitrarily usurped the teachers' prerogatives of assigning pupil grades.

3. The principal's review of the controverted grade was thorough and based, *inter alia*, upon opinions of petitioner, the guidance counselor, the department chairman, the parents and the pupil. There is no evidence to support a conclusion that in this instance the principal bowed to parental pressure.

4. There is insufficient evidence to conclude that either petitioner in the assignment of a failing grade to S.O. or the principal in revising the grade against petitioner's wishes were improperly motivated by anger or bias. Rather, it is found that in a judgmental matter they independently and honestly arrived at divergent conclusions.

The hearing examiner leaves to the Commissioner the determination of whether, within the factual context set forth, the change of grade by the principal and the ratification thereof by the Superintendent and the Board were valid acts.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the entire record of the instant matter including the report of the hearing examiner and the exceptions thereto filed by litigants pursuant to *N.J.A.C.* 6:24-1.17(b). Both petitioners and respondents take exception to the hearing examiner's reference to P-1, *ante*, as "***the Edison faculty's statement of grading procedure***." The Commissioner recognizes that P-1 resulted from cooperative effort by an advisory committee composed of both teachers and administrators whose report was adopted by the Assistant Superintendent, Division of Curriculum and Instruction. Accordingly, it may reasonably be viewed as non-unilateral in origin but promulgated by administrative authority. The remaining exceptions, consisting principally of enunciations of testimony not incorporated in the hearing examiner report, or of conclusions contrary to the findings set forth therein, have been considered but require no further comment. The Commissioner accepts the findings of the hearing examiner and adopts them as his own.

The issue, narrowly stated, is whether, within the factual context herein revealed, the principal, the Superintendent or the Board abused their discretionary authority in changing and supporting the change of S.O.'s final grade in U.S. History II from F, assigned by petitioner, to D.

The Board contends that unwritten policy existed whereby its principal was authorized to exercise his discretion in making such a change. That an unwritten policy of a board may exist in a school district has on numerous occasions been recognized by the Commissioner in his quasi-judicial capacity as a

determiner of disputes arising under school law. *In the Matter of the Tenure Hearing of Michael A. Pitch, Superintendent of Schools, Board of Education of South Bound Brook, Somerset County,* 1974 *S.L.D.* 1176, aff'd State Board of Education 1975 *S.L.D.* 763, remanded New Jersey Superior Court, App. Div., September 11, 1975, decision on remand 1975 *S.L.D.* 764, aff'd Docket No. A-2671-74 New Jersey Superior Court, App. Div., April 2, 1976 (1976 *S.L.D.* 1159). This principle was similarly enunciated in *Bertha A. Gebhart v. Hopewell Township Board of Education,* 1938 *S.L.D.* 570 (1927); aff'd State Board of Education 576 (1928) wherein the Commissioner quoted with favor from Voorhees' "The Law of Public Schools," p. 214, par. 85, as follows:

> "***The power to make rules does not imply that all the rules, orders and regulations for the discipline, government and management of the schools shall be made a matter of record by the school board, or that every act, order or direction affecting the conduct of such schools shall be authorized or confirmed by a formal vote.***No system of rules however carefully prepared can provide for every possible emergency or meet every requirement. In consequence much must necessarily be left to the individual members of the school board, and to the superintendents of and the teachers in the several schools. It follows that any reasonable rule adopted by a superintendent, or a teacher merely, not inconsistent with some statute or some other rule prescribed by higher authority, is binding upon the pupils.***" (at 573)

It may similarly be stated that such rules are also binding upon teachers.

Such unwritten policies, however, predispose school districts to costly litigation since they are more difficult, within the given context of a dispute, to interpret than are written policies of which it was said in *Harry A. Romeo, Jr. v. Board of Education of the Township of Madison, Middlesex County,* 1973 *S.L.D.* 102 that:

> "***In ascertaining the meaning of a policy, just as of a statute, the intention is to be found within the four corners of the document itself. The language employed by the adoption should be given its ordinary and common significance. *Lane v. Holderman,* 23 *N.J.* 304 (1957) Where the wording is clear and explicit on its face, the policy must speak for itself and be construed according to its own terms. *Duke Power Company, Inc. v. Edward J. Patten, Secretary of State et al.,* 20 *N.J.* 42, 49 (1955)***." (at 106)

Herein, the Commissioner, without benefit of clear and explicit language in written form is called upon to determine not only whether an unwritten policy existed authorizing a principal to change an assigned grade, but also whether his action and the action of those who confirmed that change were reasonable. In the first instance the Commissioner determines that there is a preponderance of credible evidence within the record that such an unwritten policy did exist which provided authority for the principal to review petitioner's averaging of S.O.'s sequential grades of D, F, D, D and assigning of a final failing grade of F. Such authority stems not only from the inherent supervisory and

administrative authority of the principal but also from the long standing practice of such review by principals within the Edison district. Such review capacity, were it not coupled with authority to rectify inconsistencies, would be sterile. Nor may the decision of the principal, grounded as it was on thorough investigation including conferences with guidance counselor, parents, pupil and teacher, be voided by disagreement of the teacher, as petitioners suggest.

The record is barren of proof that the principal, in determining to change the averaged grade to D, or the Superintendent and the Board, in affirming that change, either violated their discretionary authority or acted as the result of bias, prejudice or bad faith. Their determination was not without rational basis. The Commissioner so holds. Accordingly, both the Board's unwritten policy, *ante,* and the change of the averaged grade are entitled to a presumption of correctness. As was stated by the State Board of Education in *John A. Kenny et al. v. Board of Education of the Town of Montclair, Essex County,* 1938 *S.L.D.* 647 (1934), aff'd State Board of Education 649:

> "***The School Law vests the management of the public schools in each district in the local boards of education, and unless they violate the law, or act in bad faith, the exercise of their discretion in the performance of the duties imposed upon them is not subject to interference or reversal.***" (at 653)

It is essential that local boards must retain such authority of review to prevent assignment of unreasonable or arbitrary grades. The acts of teachers may neither be insulated from administrative review of their supervisors and administrators nor from quasi-judicial review by the Commissioner or judicial review by the courts.

The Commissioner is further constrained to comment that petitioner's perception of S.O.'s attitude as unsatisfactory as reason for the assigned F borders dangerously close to the improper use of grades as deterrents. This was cautioned against in *Gustave M. Wermuth et al. v. Board of Education of the Township of Livingston et al., Essex County,* 1965 *S.L.D.* 121, as follows:

> "***The use of marks and grades as deterrents or as punishment is likewise usually ineffective in producing the desired results and is educationally not defensible. Whatever system of marks and grades a school may devise will have serious inherent limitations at best, and it must not be further handicapped by attempting to serve disciplinary purposes also.***" (at 128)

In this regard, see also *Dawn Minorics v. Board of Education of the Town of Phillipsburg et al., Warren County,* 1972 *S.L.D.* 86. It is further apparent that, when unsatisfactory attitude had already had its effect upon marking period grades, it should not again be applied to the average of those grades.

Absent a clear showing that the actions of which petitioner complains resulted from bias, bad faith, arbitrariness, statutory violation or were contrary

to the constitutional requirement of a thorough and efficient education, the Commissioner determines that the Petition of Appeal is without merit. Accordingly, it is dismissed.

The Commissioner hastens, however, to caution that local boards must by law make rules and regulations for governmental management of their schools. *N.J.S.A.* 18A:11-1 Accordingly, he directs the Board, and any board of education which has not recently reviewed its grading policies, to do so forthwith and to reduce to writing those important procedural elements upon which they rely to implement this evaluative facet of pupils' educational progress.

COMMISSIONER OF EDUCATION

July 29, 1977

Marilyn Van Hassel,

Petitioner,

v.

Board of Education of the Northern Highlands Regional High School District, Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

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

For the Respondent, Scafuro & Gianni (Albert O. Scafuro, Esq., of Counsel)

Petitioner, a teaching staff member formerly employed by the Board of Education of the Northern Highlands Regional High School District, hereinafter "Board," alleges that the Board failed to offer her reemployment for the 1975-76 academic year for improper reasons and further complains that the Board illegally denied her the opportunity to be heard. The Board denies the allegations and asserts that its determination not to offer petitioner reemployment and its denial of her requested opportunity to be heard were in all respects proper and legal.

The matter is referred directly to the Commissioner of Education on the record, including the pleadings, Briefs of the parties in support of their respective positions, exhibits, and affidavits.

Petitioner was first employed by the Board during January 1973 and assigned to teach mathematics. Petitioner was reemployed by the Board for the 1973-74 and 1974-75 academic years.

The Superintendent of Schools attests (C-4) that subsequent to the defeat of the proposed 1975-76 school budget by the voters, the education committee of the Board authorized him to send the following letter to "all non-tenured and to some tenured teachers" one of whom was petitioner. (C-4, at p. 2) The Superintendent advised petitioner, by letter (C-1) dated March 25, 1975, that:

> "***[T]he town councils [comprising the regional school district] have asked for a cut of $200,000 from the originally proposed budget. The Board *** plans to appeal to the Commissioner. Because of this uncertainty we will not be able to offer you a contract for the 1975-76 school year.
>
> "This means several teaching positions will be eliminated. Because at this time we do not have accurate enrollment figures in our elective courses we cannot determine where these position eliminations will be made. Therefore, I am sending this letter to all non-tenured teachers and some tenured teachers to comply with both our agreement with the NHEA *** and the law***." (C-1)

The President of the Board attests (C-6) that the Board determined at a private meeting conducted on April 9, 1975 not to reemploy petitioner for the 1975-76 academic year. The President explains that this action was based on the recommendation of its education committee that while petitioner was a good teacher, she was less effective than other nontenure teachers. (C-6)

The Superintendent states that the Board also determined at this meeting not to reemploy two other nontenure teachers, not parties to this dispute, for the 1975-76 academic year. (C-4) The Superintendent attests that it was decided not to inform petitioner of the Board's determination not to reemploy her until the results became known of a preliminary hearing with the Bergen County Superintendent of Schools in regard to the Board's school budget appeal. (C-4) The Superintendent states that a preliminary hearing on the school budget appeal was held by the Bergen County Superintendent of Schools on April 23, 1975, and that "a decision was arrived at on the Budget." (C-4)

Thus, the Superintendent notified petitioner by letter (C-7) dated May 5, 1975 of the following:

> "Please consider this an official notification that because of staff reductions necessitated by the budget defeat and cut you will not be reemployed by the Northern Highlands Regional High School District for 1975-76." (C-7)

Notwithstanding the attestation of the Superintendent that the Board's school budget appeal was decided on April 23, 1975, the Commissioner observes from his official records that the matter was not settled until November 17,

1975, when the appeal was withdrawn. The governing bodies agreed to add an additional amount of $33,400 to the original tax certification for school expenses during the 1975-76 school year.

Petitioner, by letter (C-3) dated May 9, 1975, four days after receiving her official notification of non-reemployment, requested the reasons for the Board's action and the opportunity to be heard by the Board on these reasons.

The Board President, by letter (C-2) dated June 2, 1975, advised petitioner of the following:

> "The decision not to re-employ you was made by the Board after the budget defeat and the consequent need to drop one math teacher.
>
> "After consultation with the administration and department chairman you were the person selected by this group to be dropped because it was their opinion that although you are a good teacher you were less effective than any other non-tenured teacher.
>
> "Your request for a hearing is denied. Nothing in the law or in our [agreement] with the teachers [association] mandates such a step." (C-2)

The Board argues in its Brief that petitioner did not make a timely request for an opportunity to be heard on the Board's reasons for her non-reemployment. Therefore, the Board argues that it was not required to grant the requested appearance and cites *Donaldson v. Board of Education of North Wildwood,* 65 *N.J.* 236 (1974); *George Ruch v. Board of Education of the Greater Egg Harbor Regional High School District,* 1968 *S.L.D.* 7, dismissed State Board of Education 11, aff'd New Jersey Superior Court, Appellate Division, 1969 *S.L.D.* 202; *Barbara Hicks v. Board of Education of the Township of Pemberton, Burlington County,* 1975 *S.L.D.* 332; and *Claire Haberman v. Board of Education of the Borough of Morris Plains, Morris County,* 1975 *S.L.D.* 848.

In the Board's view petitioner's request of May 9, 1975 (C-3) for the opportunity to be heard on the reasons for her non-reemployment is not valid because she did not, at that time, have the reasons. The Board argues that petitioner had ten days from the receipt of the Board President's letter (C-2) dated June 2, 1975 to request the opportunity to be heard on the reasons stated therein.

The Commissioner does not agree. Petitioner's letter of May 9, 1975 (C-3) constitutes a legitimate request for an opportunity to be heard by the Board on the reasons why it determined not to reemploy her. Such a request should have been honored by the Board to meet its obligation as stated in *Donaldson, supra,* and *Hicks, supra.*

In addition, other errors were made by the Board with respect to petitioner's non-reemployment. The Superintendent's letter (C-1) dated March 25, 1975 does not constitute notification of non-reemployment as contemplated

by *N.J.S.A.* 18A:27-10. The statute of reference provided in full as follows:

> "On or before April 30 in each year, every board of education in this State shall give to each nontenured teaching staff member continuously employed by it since the preceding September 30 either
>
> "a. A written offer of a contract for employment for the next succeeding year providing for at least the same terms and conditions of employment but with such increases in salary as may be required by law or policies of the board of education, or
>
> "b. A written notice that such employment will not be offered."

In the instant matter, the Board did not conclusively determine petitioner's status with respect to non-reemployment for the 1975-76 academic year until April 9, 1975. Petitioner was not notified of the Board's determination until May 5, 1975, five days beyond the statutory time for such notification. Thus, the Board did not comply with the provisions of *N.J.S.A.* 18A:27-10.

The legislatively mandated relief which is required when a board of education fails to comply with the provisions of *N.J.S.A.* 18A:27-10 is set forth in *N.J.S.A.* 18A:27-11 which provides in full as follows:

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

This relief is conditioned, however, upon the provisions of *N.J.S.A.* 18A:27-12 being met by the affected employee. *N.J.S.A.* 18A:27-12 requires:

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

There is nothing before the Commissioner to establish that petitioner notified the Board by June 1, 1975 of her acceptance of an employment contract for 1975-76. Consequently, the precise relief demanded in *N.J.S.A.* 18A:27-11 may not be granted in the instant matter by virtue of petitioner's own laxity with respect to her responsibility pursuant to *N.J.S.A.* 18A:27-12.

Next, petitioner argues that the Board's reason for her non-reemployment, which was due to the expressed "need to drop one math teacher" (C-2), is false

in that the Board, during the summer of 1975, employed a new person and assigned him to teach mathematics. The Board asserts that of the three nontenure teachers it determined not to reemploy on April 9, 1975, two of them had been assigned to teach mathematics. The Board admits that it employed a mathematics teacher, other than petitioner, during the summer of 1975.

The Commissioner observes that the Board's stated reasons for petitioner's non-reemployment was the need to eliminate a mathematics position and, in addition, because petitioner was less than effective as a teacher. (C-2) Taken together and absent specific proofs to the contrary, the Board made a legitimate determination on April 9, 1975 not to reemploy petitioner. Petitioner and also the other nontenure mathematics teacher were both less than effective, and the Board determined not to reemploy either. That the Board employed another person during the summer is of no moment because until a person acquires tenure status pursuant to *N.J.S.A.* 18A:28-5, no claim to continuing employment may be made.

The Commissioner has reviewed petitioner's argument that the failure of the Board to grant her an informal appearance demands the relief of immediate reinstatement with all back pay she would have received had her employment been continued. The Board, to the contrary, asserts that the only relief, if any, which may be granted petitioner is to now require that it grant petitioner an informal appearance.

In the Commissioner's judgment, it would be futile for petitioner to now appear before the Board in an effort to dissuade it from its prior determination not to reemploy her for 1975-76. The academic year is now past and the membership of the Board itself could have changed as a result of the 1976 annual school election. In *Donaldson, supra,* the Court stated that:

> "***a timely request for informal appearance before the board should ordinarily be granted even though no formal hearing is undertaken.***"
> (65 *N.J.* at 246)

(See also *Hicks, supra,* and *N.J.A.C.* 6:3-1.20.)

The Board has presented no sound reason why it refused to grant petitioner an informal appearance as an opportunity to dissuade the Board members from their prior determination. *N.J.A.C.* 6:3-1.20 While there is no precise legislative relief demanded for failure of a board to grant an informal appearance to a nontenure teacher whose employment has not been renewed, the Commissioner in similar situations in the past has molded his own relief for improper actions of boards of education. (See *Dianne Nashel v. Board of Education of the Town of West New York et al., Hudson County,* 1968 *S.L.D.* 183; *Elizabeth Rockenstein v. Board of Education of the Borough of Jamesburg, Middlesex County,* 1974 *S.L.D.* 260, 1975 *S.L.D.* 191, aff'd State Board of Education June 26, 1975, aff'd Docket Nos. A-3916-74, A-4011-74 New Jersey Superior Court, Appellate Division, July 1, 1976 (1976 *S.L.D.* 1167).)

Accordingly, the Commissioner directs the Board to pay petitioner the equivalent of sixty days' compensation at the rate she would have received during 1975-76, mitigated by any moneys she otherwise earned during that time. This determination does not provide petitioner with additional employment experience with the Board to have accrued a tenure status. In all other respects the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

July 29, 1977
Pending State Board of Education

**In the Matter of the Tenure Hearing of Thomas Healy,
School District of the Borough of Paulsboro, Gloucester County.**

COMMISSIONER OF EDUCATION

DECISION

For the Complainant, Chell and Camp (Eugene P. Chell, Esq., of Counsel)

For the Respondent, Ruhlman and Butrym (Edward J. Butrym, Esq., of Counsel)

The Board of Education of the Borough of Paulsboro, hereinafter "Board," certified charges of conduct unbecoming a teacher and incapacity against respondent, a tenured teaching staff member in its employ, pursuant to the Tenure Employees Hearing Law, *N.J.S.A.* 18A:6-10 *et seq.* In the Board's judgment such charges, if proven true in fact, would be sufficient to warrant respondent's dismissal. Respondent denies all charges against him.

A hearing in this matter was scheduled by a hearing examiner appointed by the Commissioner of Education at the office of the Gloucester County Superintendent of Schools, Sewell, on April 12, 1976. Counsel for both parties, as well as witnesses for the Board, were present at the appointed hour. Counsel for respondent, however, requested a postponement of the hearing due to the absence of respondent. Counsel reported that respondent was too ill to attend the scheduled hearing. Subsequently, on April 28, 1976, a hearing was conducted in the instant matter. The report of the hearing examiner is as follows:

The Superintendent of Schools prepared two separate charges which will be discussed *in pari materia*:

CHARGE NO. 1

"Mr. Healy was guilty of conduct unbecoming a teacher in that he failed to report for teacher orientation Tuesday, September 2, 1975, and further that he failed to report for the commencement of school on September 3, 1975. Moreover, he failed to give his Principal, or any other person in authority, sufficient notice that he did not intend to be present at said orientation, and further, that he would not be available to teach upon the commencement of school on September 3, 1975. Mr. Healy's failure to be in attendance at the commencement of school was particularly unbecoming in that he had been notified by the Principal well in advance of the orientation meeting of the date when his presence would be required in the classroom, and was further notified that as of September 3, 1975, the Principal would rely upon him to teach a full complement of three classes of Language Arts and two classes of English."

CHARGE NO. 2

"That Mr. Healy is incapable of performing his duties as a teacher by reason of physical infirmities, which incapacity is evidenced by the following facts:

A. During the school year 1972-73, Mr. Healy taught intermittently until November 27, 1972, at which time he requested a medical leave of absence. Said medical leave of absence continued unabated until June 30th, 1973, the close of the school year.

B. During the school year 1974-75, he taught until September 5, 1974, at which time he left the school ill. He did not teach again during the school year 1974-75 and was eventually granted a sick leave of absence on October 8, 1974, which sick leave of absence extended until the close of the school year.

C. He failed to report for the commencement of school on September 3, 1975, and notified the Principal by an undated letter, which was received on September 2nd, 1975, 'that he would be unable to return to the job for awhile.' "

In his Answer filed before the Commissioner, respondent denied the charges and entered an alternate prayer for relief in the instant matter as follows:

"***1. Mr. Healy is advised and believes and therefore denies that failing to report on September 2 and September 3 constitutes conduct unbecoming a teacher. He further denies that he gave insufficient notice of intent not to be present on such occasions. On the contrary he avers that he did give adequate and sufficient notice thereof.

"2. Mr. Healy denies that he is incapable of performing his duties as a teacher by reason of physical infirmities. On the contrary Mr. Healy is

advised, believes and avers that he is physically capable of performing his duties as such.

"He further avers that at the direction of the School Board he submitted to an examination by a physician selected by the Board, in April 1975, and as a result thereof he was declared fit, and a report thereof was submitted to the Board thereafter.

"It is admitted that Mr. Healy was absent during the periods alleged, but such past illness is irrelevant in view of the facts stated in the next preceding paragraph.

"Furthermore, if the Board is justified in believing that the teacher, with seventeen years of highly satisfactory service, is not physically capable of performing the duties of a teacher, its recommendation should be retirement due to disability, and not a peremptory dismissal without any showing of a physical incapability.

"Mr. Healy therefore prays that in justice he should be reinstated as a teacher, and be extended the prerogatives normally and customarily extended to teachers with the extent of longevity of tenure that Mr. Healy has accumulated, and had enjoyed for some years past."

Respondent's attendance on file with the Board for the school years 1972-73, 1973-74 and 1974-75 is not in dispute. It is summarized as follows:

1972-73

Respondent taught from the beginning of the school year in September until October 18, 1972, at which time he was continuously absent from duty until he was granted a medical leave of absence from December 21, 1972 until the close of the school year in June 1973. (P-12)

1973-74

Respondent returned to duty in September 1973 and taught for the entire school year with recorded absence of six days in May and two and one half days in June 1974. (P-13)

1974-75

Respondent reported for duty for one and one-half days in September 1974 and was continuously absent until he was granted a medical leave of absence by the Board on October 8, 1974 for the remainder of the 1974-75 school year. (P-11)

With regard to respondent's medical leave of absence for the 1974-75 school year, the Superintendent testified that the Board required respondent to submit to a medical examination prior to his return to duty for the 1975-76 school year. (Tr. 31-32) On April 15, 1975, a physician appointed by the Board examined respondent and subsequently on April 21, 1975, filed a report of the

examination with the Board's Medical Inspector. The physician's report to the Board states, *inter alia,* as follows:

> "***I saw Thomas Healy, a 51-year-old male, in my office on 4/15/75. As I could gain from his history, he had absolutely no urinary tract symptoms or urologic problems until August 22, 1974 at which time he had marked lower abdominal pain. He reported to Lankenau Hospital where a diagnosis of right ureteral calculus was made. He manifested an allergic reaction to the IV pyelogram dye at that time.
>
> "Since that time, perhaps every two to three weeks until two months ago, he experienced episodes of burning sensation and passing 'gravel.' On most of these occasions he was seen at the Lankenau Hospital by the urologists there who are Dr. Peter Kohler and Dr. Charles McKinney.
>
> "At the present time he has had no urologic symptoms for the past two months.***
>
> "My impression is that Mr. Healy had one urinary calculus in August, 1974. Since that time he most likely has had recurrent prostatitis.***
>
> "At the present time he seems to have no urologic problem." (P-14)

The Superintendent testified that the physician's letter indicated that respondent would be able to return to duty for the 1975-76 school year and that he notified respondent's Principal of the contents of the letter. (Tr. 14, 32) He testified that there was no further communication, either verbal or written, between his office and respondent prior to the beginning of the 1975-76 school year. Subsequent to the receipt of the physician's letter (P-14), the Superintendent testified that he had discussed respondent's class schedule with the Principal for the 1975-76 school year. (Tr. 32-33)

The Principal testified that he received a letter from respondent dated May 19, 1975, which stated, *inter alia,* as follows:

> "I have concluded all tests and will be able to be in to see you sometime in the near future.
>
> "Would you be so kind as to send me a tentative schedule for the September opening***." (P-7)

The Principal testified that he answered respondent's request for a tentative schedule on May 27, 1975. (Tr. 12-13; P-8) The Principal's letter also stated that he was pleased to hear that respondent's tests were concluded and that he would return to duty for the 1975-76 school year.

During the month of August 1975, the Principal testified, he mailed a form letter to all staff members to inform them of the date and time to report to school. (Tr. 13-14) The Principal's letter stated that school would begin on Wednesday, September 3, with an orientation day on Friday, August 30, for

students and teachers new to the system. The letter continued to state that all other teachers would have an orientation day on Tuesday, September 2, at 9:00 a.m. in the high school cafeteria. (P-9)

The Superintendent and the Principal testified that neither of them had received any communication from respondent prior to the teacher orientation meeting held on September 2, 1975. The Superintendent testified that when he introduced respondent at the orientation meeting, it was then he became aware that respondent was absent. (Tr. 15-34)

The Superintendent and Principal testified that they retired from the orientation meeting to the Principal's office and placed a telephone call to respondent to inquire about his absence. The Principal testified that respondent stated that he had sent a letter to inform the Principal that he did not intend to return to duty for a while. The Superintendent and Principal testified that respondent's letter arrived subsequent to the Principal's call. (Tr. 25-40)

Respondent's handwritten letter addressed to the Principal was not dated; however, it was date stamped "Sept 2 1975 rec'vd 11 am JEH," and stated as follows:

> "Dr. Marshall Shields of Suite EE 127, 66th St. and City Avenue (Phila. zip code 19151) has just given me some sad news: I'll be unable to return to the job for a while. Dr. Fred Dorey of Woodbury had said in April that I could return but now Dr. Shields states that such is not the case. He will be in contact with you and the Supt.
>
> "Needless to say, this is very disappointing as I firmly believed that I'd be back at work.
>
> "For the time being you may verify his findings by calling his office (telephone MIDWAY 27853).
>
> "I have commenced taking the new medication and treatments and, hopefully, the situation will improve rather than deteriorate.
>
> "I shall be in touch with you, Mr. Wooten and the Board as to any progress." (P-10)

The Superintendent testified that he did not contact respondent or the physician mentioned in respondent's letter subsequent to its receipt. (Tr. 40) He stated that respondent's suspension by the Board was effective September 10, 1975, and subsequently he received a letter from respondent's physician dated September 20, 1975, which stated as follows:

> "***To certify that:
>
> "Mr. Thomas Healy has been under my care since November 1, 1974 for therapy of a depression.

"He is unable to resume his school teaching as of this date. He is improved however, and [h]e can tentatively return to work December 1975." (P-15)

Respondent testified that subsequent to his examination by the Board's appointed physician on April 21, 1975, it was necessary for him to see his personal physicians because of a recurrence of urinary calculi. He stated that he was under his personal physician's care through the summer of 1975. (Tr. 52-53) Respondent stated that he recalled writing to the Principal on May 19, 1975 (P-7), indicating that he would report for duty in September 1975. He indicated that he had his physician's approval to write such a letter. (Tr. 60) It was respondent's testimony that he recalled the receipt of the Principal's correspondence (Tr. 61-62; P-8, P-9), but he did not communicate with the Principal as suggested in the Principal's letter. (P-8) He testified that he had written two letters to the Principal during the summer of 1975, one early in the month of August and the second, which has been marked into evidence as P-10, in the latter part of August 1975. (Tr. 53-55)

Respondent's testimony was confused with respect to the first letter he allegedly wrote to the Principal in August prior to P-10. He stated that he was under medication and that his physician suggested that he visit his brother who lives on Staten Island, New York, to "break it up for a while" and "get out of this environment." (Tr. 54) He asserted that it was during the time he was with his brother on Staten Island that he wrote a letter which stated that it was a distinct possibility that if he did not improve he would not be able to return to duty. (Tr. 54-67)

Respondent was not able to produce a copy of the controverted letter. (Tr. 68-69) The Superintendent and Principal testified that they had no knowledge of such a letter. (Tr. 14-40, 75-76)

With regard to the letter written in the latter part of August (P-10), respondent asserts that this was also written at the suggestion of his physician. (Tr. 55) He stated that his physician would produce an immediate follow-up letter to verify that he would not be able to return to duty. (Tr. 63) His physician subsequently wrote the letter dated September 20, 1975. (P-15) Respondent's testimony was confused with respect to the time when he witnessed his physician write the letter. (Tr. 72-73)

Two additional documents were introduced into evidence which are relevant to the instant matter. The first was addressed to respondent's counsel dated February 6, 1976, and states as follows:

"***Thomas F. Healy has been under my care from 11/1/74 thru 1/26/76.

"His illness is an involutional type depression.

"It was hoped that he would be able to resume his teaching duties in December 1975. His progress has not warranted this and the foreseeable date of return to duty is September 1976.

"His treatment consists of antidepressant medication and biweekly psychotherapy.

"The prognosis is favorable." (P-16)

The second document dated March 6, 1975, addressed to the Board's Medical Inspector from a physician who treated respondent in 1974, is as follows:

"In August 1974, Mr. Healy suffered an attack of urinary calculi, spontaneously passed. Since then he has suffered from recurrent, incapacitating, urinary calculi, associated with chronic cystitis, with frequent, acute exacerbations.

"In my judgment, these attacks were frequent and severe enough as to render him disabled from any productive activity." (P-17)

The Board expected that respondent would return to his teaching duties in September 1975. Respondent had been granted a medical leave of absence for the 1974-75 school year and during that year had been evaluated by a Board appointed physician as having no medical problem which caused him to take the leave. Respondent communicated to the Board that he would be able to return to duty and requested that the Principal forward to him his tentative teaching schedule for the 1975-76 school year. Respondent did not communicate with the Board that he did not intend to return to duty, either in person, by telephone or in writing, prior to the teachers' orientation meeting. There was no evidence produced that respondent had written a letter to the Principal or the Board in early August 1975.

The hearing examiner finds a conflict in the testimony and documents submitted with respect to respondent's illness. The Board granted respondent a medical leave of absence for urologic problems. (P-14, P-17) Subsequent to the expected termination of respondent's medical leave, the Board was informed that respondent was undergoing therapy "of a depression" (P-15) and that his illness "is an involutional type depression." (P-16) Respondent had not communicated with the Board that there was a change or modification with respect to his disability. Respondent had not sought nor was he granted an extension of his medical leave of absence by the Board.

The hearing examiner finds, therefore, that the Board's Charge No. 1 is sustained and that respondent was guilty of failure to inform the Board that he would not return to his assigned duties for the 1975-76 school year.

With respect to Charge No. 2, the hearing examiner finds insufficient proofs that respondent is incapable of performing his duties as a teacher by reason of physical infirmities. In view of respondent's medical history and his prayer for relief as found in his Answer to the Charges the hearing examiner recommends that the Commissioner direct the Board to apply for a disability pension as *In the Matter of the Tenure Hearing of Paula M. Grossman a/k/a Paul*

M. Grossman, School District of the Township of Bernards, Somerset County, 1972 *S.L.D.* 144, wherein the Commissioner said:

> "***Therefore, due to the unusual nature of this matter and because there is no moral turpitude in question, the Commissioner directs the Bernards Township Board of Education to apply to the Teachers' Pension and Annuity Fund, pursuant to procedure outlined in *N.J.S.A.* 18A:66-39 *et seq.*, on behalf of Respondent, for a disability pension.***" (at p. 161)

N.J.S.A. 18A:66-39(b) provides that:

> "On and after June 9, 1971, a member, under 60 years of age, who has 10 or more years of credit for New Jersey service, shall, upon the application of his employer or upon his own application or the application of one acting in his behalf, be retired for ordinary disability by the board of trustees. The physician or physicians designated by the board shall have first made a medical examination of him at his residence or at any other place mutually agreed upon and shall have certified to the board that the member is physically or mentally incapacitated for the performance of duty and should be retired."

The hearing examiner recommends that respondent not be reinstated until the Board's filing of an application for respondent's disability retirement is completed, and a determination is made by the Teachers' Pension and Annuity Fund.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record in the instant matter, including the report of the hearing examiner and the exceptions and objections filed by the parties. Respondent takes exception to that portion of the hearing examiner's report which finds him guilty of failure to inform the Board that he would not return to his assigned duties for the 1975-76 school year. Respondent asserts that the hearing officer failed to take into account that he was entitled to sick leave under *N.J.S.A.* 18A:30-1 *et seq.* and the Board's policy on leave of absence for illness. Respondent states that the timeliness of his notification to the Board was irrelevant since there is no statutory requirement for advance notice for absence due to illness. The Commissioner cannot agree. Without proper notification otherwise, the Board had every reason to believe that respondent would indeed be at his assigned post on the opening day of school. As the Commissioner observed *In the Matter of the Tenure Hearing of William Megnin, School District of the Township of Wayne, Passaic County,* 1973 *S.L.D.* 641:

> "***[T]he Commissioner said *In the Matter of the Tenure Hearing of Jacque L. Sammons,* 1972 *S.L.D.* 302, 321 those employed in the public schools of the State '***are professional employees to whom the people have entrusted the care and custody of tens of thousands of school

children***.' The Commissioner holds that such a professional status requires assiduous attention to the details necessary to warrant the trust. Such attention is shown to be lacking in the instant matter, for it is clear that respondent left his post of responsibility without specific authorization to do so. Further, he failed to return to his duties until almost a week after the date he was due to return. While the cause of the late return is understandable, the absolute *failure of respondent to promptly notify anyone in authority with respect to such cause is, in the Commissioner's opinion, reason for censure.* He so holds.***" (*Emphasis supplied.*) (1973 *S.L.D.* at 646-647)

The Commissioner agrees, in part, with respondent's claim for sick leave entitlement at the commencement of the 1975-76 academic year. In *Marjorie B. Hutchenson v. Board of Education of the Borough of Totowa, Passaic County,* 1971 *S.L.D.* 512, the Commissioner held that the ten days of sick leave provided by *N.J.S.A.* 18A:30-2 accrues to a teaching staff member on September 1. In the instant matter respondent was to report for duty on September 2, 1975 and on September 9, or six working days later, the Board certified charges against him and suspended him from duty without pay as of September 10, 1975. The Commissioner holds, therefore, that Thomas Healy is entitled to six days' compensation from September 2 through September 9, 1975.

Respondent also claims that the Commissioner should require the Board to pay respondent's salary from 120 days subsequent to his suspension from duty in accordance with *N.J.S.A.* 18A:6-14. Respondent recognizes that such claim was not specifically treated in the record of the instant matter.

Respondent was on medical leave of absence, without pay, for the 1974-75 school year. Respondent did not report for the opening of the 1975-76 school year, prior to the Board certifying charges against him on September 10, 1975, nor did respondent reapply for an extension or the continuance of his medical leave of absence, without pay, upon his failure to return to duty. The Commissioner finds that the evidence is clear that respondent's personal physician informed the Board, subsequent to his suspension, that he would not be able to resume his teaching duties until December 1975. (P-15) Further evidence of respondent's incapacity is the physician's letter dated February 6, 1976 which stated that the foreseeable date of respondent's return to duty would have been September 1976. (P-16) In addition, the hearing examiner reported that the first day of hearing in the instant matter was adjourned due to respondent's failure to appear as scheduled because of illness. In the judgment of the Commissioner, all of the evidence clearly shows that respondent was not capable of functioning and fulfilling his necessary obligations as a teaching staff member. The statute, *N.J.S.A.* 18A:6-14, which provides for the resumption of full salary beginning on the one hundred twenty-first day following the employee's suspension, presumes that the employee is capable and able to work. Such a presumption of the suspended employee's ability to work is embodied in the statute, *inter alia,* as follows: "***the board of education shall deduct from said full pay or salary any sums received by such employee *** by way of pay or salary *from any substituted employment assumed during such period of*

suspension. ***" (*Emphasis supplied.*) The Commissioner has ordered capable employees reinstated to their former positions subsequent to the one hundred twenty-first day of their suspension, *pendente lite,* when in his judgment the employees were able to function in their responsibilities. *In the Matter of the Tenure Hearing of Edward F. Vogel, School District of the Township of West Milford, Passaic County,* (ordered April 7, 1976); *In the Matter of the Tenure Hearing of Kathy Windsor, School District of the Township of Washington, Gloucester County,* 1977 *S.L.D.* ___ (decision on Motion, January 11, 1977), aff'd State Board of Education May 4, 1977 The Commissioner observes that there exists no mandatory provision in the statutes for the payment of an employee's salary who had been on medical leave of absence without pay immediately prior to his suspension from a position to which he was unable to return and incapable of maintaining. The Commissioner, therefore, rejects respondent's claim for salary beginning on the 121st day following September 10, 1975.

Respondent is not entitled to compensation for the period he did not work prior to September 2, 1975 and subsequent to September 10, 1975. The Commissioner so holds.

The Commissioner finds that the weight of evidence supports the charges as proffered by the Board. The question remains as to whether the charges demonstrate incapacity, conduct unbecoming a teacher or other just cause warranting dismissal. Such determination of fitness is usually required to be in accord with the principles enunciated by the New Jersey Supreme Court in *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), in which the Court determined that unfitness to hold a post might be shown by one incident, if sufficiently flagrant, or by many incidents. In the instant matter, however, the issue is not fitness in the sense that the individual teacher committed an overt act against a pupil or a school district, but rather that his physical disorders and, subsequently reported "involutional type depression," prevented him from functioning in the classroom setting. In other words, the question is one of incapacity. See *In the Matter of the Tenure Hearing of Paula M. Grossman a/k/a Paul M. Grossman, School District of the Township of Bernards, Somerset County,* 1972 *S.L.D.* 144, aff'd in part/rev'd in part 1973 *S.L.D.* 769, aff'd in part/rev'd and rem. in part 127 *N.J. Super.* 13 (*App. Div.* 1974), *cert.* denied 65 *N.J.* 292 (1974).

The Commissioner recognizes respondent's unblemished record of more than seventeen years with the school district and the evidence that he has sought and received medical attention. In the instant matter the overarching responsibility of the Commissioner and the local Board is to the pupils of the Paulsboro School District. Therefore, the Commissioner agrees with the recommendation of the hearing examiner and directs the Board of Education of the Borough of Paulsboro to apply on behalf of respondent, to the Teachers' Pension and Annuity Fund for a disability pension, pursuant to procedure outlined in *N.J.S.A.* 18A:66-39 *et seq.*

The Commissioner recognizes that the Teachers' Pension and Annuity Fund is an autonomous body and must make an independent finding regarding

this matter; however, the entire record of this proceeding is available to the trustees of the Teachers' Pension and Annuity Fund in its deliberations.

Accordingly, the Commissioner orders and directs that respondent be dismissed as a teacher in the Borough of Paulsboro School System, pursuant to *N.J.S.A.* 18A:6-10 *et seq.*, for reasons of conduct unbecoming a teacher and just cause due to incapacity. The dismissal shall be held in abeyance until final action on the application for disability retirement is taken by the Board of Trustees of the Teachers' Pension and Annuity Fund.

COMMISSIONER OF EDUCATION

July 29, 1977
Pending State Board of Education

James Martin,

Petitioner,

v.

Board of Education of the Northern Highlands Regional School District, Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

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

For the Respondent, Scafuro & Gianni (Albert O. Scafuro, Esq., of Counsel)

Petitioner, a tenured teacher in the employ of the Northern Highlands Regional Board of Education, hereinafter "Board," alleges that the Board's withholding of his employment increment for the 1975-76 school year was in violation of his statutory rights of due process pursuant to *N.J.S.A.* 18A:29-14 which states:

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

education, within 10 days, to give written notice of such action, together with the reasons therefor, to the member concerned. The member may appeal from such action to the Commissioner***."

The Board, conversely, asserts that petitioner's employment increment was legally withheld for good and sufficient reason.

This matter is before the Commissioner in the form of the pleadings, a Motion for Summary Judgment by petitioner, Briefs, and an affidavit of the Superintendent.

A review of relevant facts which are at this juncture uncontested reveals that the Board, at its meeting on March 22, 1975 in private session, discussed personnel matters including petitioner's performance status and unanimously voted to withhold his 1975-76 increment. The Superintendent, on March 31, 1975, notified petitioner in writing as follows:

"Please accept this as official notification that the Board of Education intends to withhold your increment for the 1975-76 school year.

"This action is taken because in the opinion of the Board and the administration your teaching has not been up to the standards expected at Northern Highlands Regional High School."

(Superintendent's Affidavit, Exhibit A)

Thereafter, on August 11, 1975, the Board "***merely affirmed its own decision taken on March 22, 1975 to withhold Mr. Martin's increment." (Superintendent's Affidavit, at p. 2)

Petitioner argues that, even if the Board legally took official action on August 11, pursuant to *N.J.S.A.* 18A:29-14 to withhold his increment, no written notice of reasons for such action was given within a period of ten days thereafter as mandated by the statute. Petitioner, asserting that this failure rendered the Board's withholding of his increment *ultra vires,* relies, *inter alia,* on *Anna Gill v. Board of Education of the City of Clifton, Passaic County,* 1976 *S.L.D.* 661, aff'd State Board of Education 666.

Petitioner prays for relief in the form of an order of the Commissioner directing the Board to compensate him for the full amount of employment and adjustment increments to which he claims entitlement for the 1975-76 school year.

The Board argues that the matter is distinguishable from *Gill, supra,* in that petitioner, unlike Gill, was not only given notice of his shortcomings by his superiors prior to March 22, but was also given reasons in writing on March 31 within ten days after the Board determined on March 22 to withhold his increment. (Respondent's Exhibits A and B; Superintendent's Affidavit) The Board argues that those reasons, both objective and subjective in nature, are reasonable and sufficient to justify withholding his salary increment. *Claire Haberman v. Board of Education of the Borough of Morris Plains, Morris*

County, 1975 *S.L.D.* 848; *Mary Ann McCormack et al. v. Boards of Education of the Northern Highlands Regional High School District or the Borough of Fair Lawn, Bergen County,* 1976 *S.L.D.* 754, aff'd State Board of Education January 5, 1977

The Board opposes petitioner's Motion on grounds that its action carries a presumption of correctness, absent a showing of arbitrariness, capriciousness or unreasonableness. *Thomas v. Board of Education of Morris Township,* 89 *N.J. Super.* 327 (*App. Div.* 1965), aff'd 46 *N.J.* 581 (1966) The Board argues further that such a Motion may be granted only when there is an absence of a genuine issue of material fact. *Judson v. Peoples Bank and Trust Company of Westfield,* 17 *N.J.* 67, 74 (1954) Additionally, the Board contends that matters affecting petitioner's employment were properly decided at a private session on March 22 and later made a matter of official record on August 11 when the Board in public session affirmed its prior decision. (Respondent's Brief, at pp. 1-5) *Ronald Elliot Burgin v. Board of Education of the Borough of Avalon, Cape May County,* 1974 *S.L.D.* 396; *Marilyn Frignoca v. Board of Education of Northern Highlands Regional High School District, Bergen County,* 1975 *S.L.D.* 303

The Commissioner has carefully considered the record, weighed the arguments of law set forth by the litigants, and determines that there are sufficient known facts upon which a determination may be made. No adversary hearing is required.

Petitioner relies upon *Gill, supra,* wherein the Commissioner in granting Gill's Petition of Appeal stated:

> "***Petitioner's salary increment for 1974-75 was effectively withheld from her by action taken by the Board on June 26, 1974. The letter (C-4) sent to her the following day by the School Business Administrator sets forth the action taken but does not set forth 'the reasons therefor.' In fact, there is no evidence before the Commissioner that the Board ever advised petitioner of the reason until it affirmed its own decision on October 16, 1974. In the Commissioner's view, such laxity on the part of the Board is not consistent with the legislative intendment of *N.J.S.A.* 18A:29-14 that the Board advise petitioner within ten days of the action taken and the reasons therefor.
>
> "While there is no question that the Board may withhold salary increments by virtue of its authority at *N.J.S.A.* 18A:29-14, *it must follow the precise mandate set forth.* In the instant matter, the Board failed to do so. Consequently, it is not necessary for the Commissioner to address the validity of the belated reason of absenteeism offered by the Board in support of its controverted action here.***" (*Emphasis supplied.*)
>
> (at 665-666)

In this instance the Board, through its Superintendent, gave a reason for the decision it had made in private session to withhold petitioner's increment. The Board's formal action "affirming" its March 22 decision was not taken until five months had passed. This lapse of five months rendered its act untimely. Nor

was its August 11 formal action followed sequentially, as mandated by *N.J.S.A.* 18A:29-14, by written notice of the reasons for the withholding.

Respondent's untimely delay does not comport with the basic elements of fair play.

It is appropriate to reiterate that which was stated in *Robert Longo v. Board of Education of the City of Absecon, Atlantic County,* 1975 *S.L.D.* 336 wherein the right of a Board to withhold an increment was upheld:

> "***The Commissioner is constrained at this juncture to caution boards of education to be certain, prior to adopting and implementing salary schedules and salary policy regarding withholding of increments that their contemplated action comports with the requirements of the emerging body of statutory and case law.***" (at 342)

A history of salary increment cases decided by the Commissioner to 1973 may be found in *Charles Coniglio v. Board of Education of the Township of Teaneck, Bergen County,* 1973 *S.L.D.* 449. To these must be added more recent cases decided by the New Jersey Superior Court which emphasize the statutory authority of boards of education to withhold increments in accord with the provisions of *N.J.S.A.* 18A:29-14.

In the unreported decision of *Westwood Education Association v. Board of Education of Westwood Regional School District,* Docket No. A-261-73, decided June 21, 1974, the Appellate Division of the Superior Court stated:

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

Similarly, in upholding a board's right to withhold increments for good cause, the Court in *Clifton Teachers v. Clifton Board of Education,* 136 *N.J. Super.* 336 (*App. Div.* 1975) stated the following:

> "***The right to an increment is subject to the express statutory language contained in *N.J.S.A.* 18A:29-14:
>
> 18A:29-14. Withholding increments; causes; notice of appeals

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

"This statute authorizes the board to withhold an increment for good cause and establishes a statutory policy which cannot be frustrated by the mere promulgation of a salary guide as part of the contract between the board and the association. The guide, as such, does not inhibit the board from exercising its power under this statute to deny an increment to a particular teacher because of 'inefficiency or other good cause.' The guide merely means that if good cause does not exist for denial of the increment, the quantum thereof will be paid in accordance with the figures of the guide.

"It is not legally necessary for the collective bargaining agreement to contain an express reservation of the right to withhold an increment for good cause, since that is a right granted by statute and one which must be accepted as underlying every negotiated contract.

"To accept plaintiff's contention would destroy the inherent right of the board to exercise its preeminent function to pass upon the quality of teacher performance – a function which is manifestly a management prerogative beyond the reach of negotiation.***" (at 339)

In regard to statutory interpretation as applies to the instant matter, the Commissioner, in *James McCabe v. Board of Education of the Township of Brick, Ocean County,* 1974 *S.L.D.* 229, aff'd State Board of Education 315, aff'd Docket No. A-3192-73, New Jersey Superior Court, Appellate Division, April 2, 1975 (1975 *S.L.D.* 1073), stated that:

"***In ascertaining the meaning of a statute, the intention is to be found within the four corners of the document itself. The language employed by the adoption should be given its ordinary and common significance. *Lane v. Holderman,* 23 *N.J.* 304 (1957) Where the wording is clear and explicit on its face, the statute must speak for itself and be construed according to its own terms. *Duke Power Company, Inc. v. Edward J. Patten, Secretary of State et al.*, 20 *N.J.* 42, 49 (1955); *Zietko v. New Jersey Manufacturers Casualty Ins. Co.*, 132 *N.J.L.* 206, 211 (*E.&A.* 1944); *Bass v. Allen Home Improvement Co.*, 8 *N.J.* 219, 226 (1951); *Sperry & Hutchinson Co. v. Margetts,* 15 *N.J.* 203, 209 (1954); 2 *Sutherland, Statutes and Statutory Construction* (*3rd ed.* 1943), *section* 4502***" (1974 *S.L.D.* at 312-313)

N.J.S.A. 18A:29-14 clearly requires a roll call majority vote. This may not be an action taken at a closed session although the consideration of increments to be granted or withheld in such a forum is proper and in the best interests of the school and community. As was stated in *M.W., a minor v. Board of Education of the Freehold Regional High School District, Monmouth County,* 1975 *S.L.D.* 120, aff'd State Board of Education 137, concerning another matter requiring a roll call vote:

"***The Commissioner is constrained to comment that holding expulsion hearings at closed sessions of boards of education is in the best interests of minor pupils and their parents and families in that it preserves their rights to privacy. It is also in the best interests of maintaining an orderly proceeding. Likewise, a board may consider its findings in caucus session. It is not proper, however, to reach a final determination by voting to expel or not to expel while in caucus session. To do so reduces to a sham the official legal action of a board which must be taken in public session as required by *N.J.S.A.* 18A:10-6. *American Heating and Ventilating Co. v. Board of Education of the Town of West New York,* 81 *N.J.L.* 423, 79 *A.* 313 (1911)

"As was said by the Court in *Cullum v. Board of Education of North Bergen,* 15 *N.J.* 285 (1954):

> '***The open meeting they held was nothing more than a sham and as Judge Hartshorne suggested in *Grogan v. DeSapio,* 15 *N.J. Super.* 604, 611 (*Law Div.* 1951), it ought to be dealt with 'as if it had never occurred.' The Legislature has unmistakably and wisely provided that meetings of boards of education shall be public***; if a public meeting is to have any meaning or value, final decision must be reserved until fair opportunity to be heard thereat has been afforded. This in no wise precludes advance meeting during which there is free and full discussion, wholly tentative in nature; it does, however, justly preclude private, final action as that taken by the majority in the instant matter.***' (at p. 294)

"Similarly, in the instant matter, the Board's reasoning is flawed wherein it contends that mere approval in public session of the minutes of its previous private sessions makes legal the expulsion of M.W.

"The Board's failure, herein, at any time while in public session to move, second, and vote affirmatively by a majority of members of a quorum present to expel M.W. or to record such action properly in its minutes pursuant to *N.J.S.A.* 18A:17-7 is fatal to the Board's case.***"
(at 132-133)

From the foregoing it must be concluded that, although a board of education may legally consider and discuss in private session the performance of an employee and the matter of awarding or withholding an increment, it must thereafter in timely fashion take formal action to withhold an increment at a public session. It is after that formal action withholding an incremental award that the employee must be notified within ten days of the reasons. *N.J.S.A.* 18A:29-14

In the instant matter, the Board failed to vote in public session in March 1, 1975 and cause that act to be recorded in its official minutes. Such omission, although undoubtedly the result of nescience or inadvertent oversight, could not in fairness be remedied by a formal action five months later and is fatal to the

Board's case. The Commissioner so holds. *M.W., supra: Cullum, supra; Lane, supra; Duke Power, supra*

Accordingly, the Commissioner finds no need to comment upon those further aspects raised by the Board wherein it contends that its decision was reasonable and should be sustained. That its action was contrary to statutory prescription is sufficient. Petitioner's Motion for Summary Judgment is granted and the Board is directed to compensate petitioner in the amount of any increment and adjustment increment to which he was entitled by reason of one additional year of service in accordance with the Board's salary policies for the 1975-76 school year. Thereafter, he shall be paid an annual rate not less than the total amount of his salary for 1975-76 school year including the aforesaid increment(s).

The Commissioner is constrained to make clear that the foregoing determination is based solely on statutory interpretation as applies to the facts of this case and is in no way predicated upon a judgment of whether the Board's assessment of petitioner's shortcomings was reasonable.

COMMISSIONER OF EDUCATION

July 29, 1977
Pending State Board of Education

Christine O'Biso,

Petitioner,

v.

Board of Education of the Borough of Lincoln Park, Morris County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Chamlin, Schottland, Rosen & Cavanagh (Michael D. Schottland, Esq., of Counsel)

For the Respondent, Hoffman, Fiorello and Hallock (Joseph A. Hallock, Esq., of Counsel)

Petitioner, formerly employed as a teacher of art by the Board of Education of the Borough of Lincoln Park, hereinafter "Board," alleges that the Board's action of not reemploying her for the 1975-76 academic year is based on

constitutionally proscribed reasons and demands immediate reinstatement to her former position of employment. The Board denies the allegations and asserts that its determination not to reemploy petitioner for the 1975-76 academic year is in all respects proper and legal.

A hearing was conducted in the matter on March 29, 1976 at the office of the Morris County Superintendent of Schools by a hearing examiner appointed by the Commissioner of Education. The Board moved at the conclusion of petitioner's case to dismiss the matter for failure to establish, *prima facie,* a cause of action upon which relief may be granted. Thereafter, the Board filed a Brief in support of its Motion to Dismiss and petitioner filed a Brief in opposition thereto. The report of the hearing examiner is as follows:

Petitioner was first employed by the Board for the 1974-75 academic year. The President of the Board advised petitioner by letter dated April 30, 1975, in response to her written request, that the Board acted not to reemploy her for 1975-76 for the following reasons:

> ***
>
> "1. Insufficient protection of school property during the past year; in particular, vandalism of the Art Room which took place during your class teaching time.
>
> "2. Unsatisfactory classroom performance during the past year; in particular, failure to maintain proper control and discipline of your pupils.
>
> "3. Inadequate care of school equipment and furnishings during the past year; in particular, failure to maintain a proper appearance in the Art Room in Chapel Hill School.
>
> "4. Conduct unbecoming a professional during the past year; in particular, your efforts to actively enlist the support of your pupils in the cause of your continued employment by the Board of Education.
>
> "5. The doubts expressed by your Building Principals concerning the continuation of your employment by the Board of Education.***" (P-17)

Petitioner testified that she had been assigned to teach grades two through six at the Board's Pinebrook School and grades six through eight at the Chapel Hill School. Petitioner was assigned an art room at the Chapel Hill School, while at Pinebrook she traveled from classroom to classroom to teach art. Petitioner testified that at the beginning of the 1974-75 academic year her pupils at the Chapel Hill School were disruptive and inattentive in her class. Petitioner also testified that her pupils broke the chalkboard, the clock, the leg of a table, and the light switch in the art room while she was present. Petitioner explained the pupils also ripped the classroom drapes, threw shreddi-mix (an art compound) on the ceiling, and defaced the classroom walls. (Tr. 72-73, 111) The pupils engaged in these activities primarily between the opening of school in September until late November when the classroom walls were defaced. (Tr. 111)

Petitioner testified that she became concerned about her employment when she learned the Board had been discussing the topic of vandalism in her art room at either its October or November meeting. Petitioner testified she submitted a progress report of her teaching, of her art room discipline, and of the condition of the art room to the Chapel Hill School principal on November 25, 1974, not because the principal requested such a report, but because of her concern that the Board was discussing the condition of the art room. (Tr. 26) Petitioner states in this report (P-7) that her discipline problems in the first four weeks of school included the following: pupils ignored her when she took attendance; pupils acted in groups to distract her while she worked with other pupils; several pupils tried to close another pupil's head in a vise when that pupil volunteered to assist her in a task; pupils threw shreddi-mix at the ceiling and walls and those responsible climbed out the windows instead of remaining after class to clean up; pupils flew paper airplanes in the classroom, crushed crayons on the floor, sat on window sills, pulled shrubs from outside the windows into the classroom, poked each other with pencils, deliberately spilled water on the floor, broke the glass on the wall clock; one pupil deliberately broke the leg of a table in the classroom and physically threatened her unless she allowed him to leave the class; her money and her lunch were stolen in class; and one pupil attempted to cut another pupil's finger off with a paper cutter. Petitioner also reports that during the first four weeks of school a combination lock was sawed off a closet door; chairs were thrown from one end of the room to the other; pupils wrote on walls, hit her on the head and on the jaw with a metal pointer; several pupils threatened to let the air out of her automobile tires; and, finally, a pupil deliberately spilled a quart of red poster paint on the classroom floor and other pupils began running and skidding into the spilled paint. (P-7) Petitioner concludes this report by asserting that she had made progress in her teaching and in classroom discipline and was receiving compliments from parents about her teaching.

Petitioner testified that when she became concerned about continuing or renewed employment, she began telephoning parents to request them to either call or write letters to the Board for the purpose of telling the Board that they considered her to be an effective teacher. (Tr. 33-34, 82-83)

The hearing examiner observes that two evaluations were prepared upon petitioner's teaching performance between September 27, 1974 and December 6, 1974. The first evaluation (P-2) was prepared by the Chapel Hill School principal while the December evaluation (P-3) was prepared by the principal of Pinebrook School. Petitioner testified that the Chapel Hill principal had agreed that perhaps his evaluation of September 27 was made in haste and that he further agreed to remove that evaluation from her file. Petitioner testified that when she discovered the evaluation was not removed by the beginning of October 1974, she complained to the then Superintendent, since replaced by an acting Superintendent, who himself removed the document (P-2) from her file in her presence. (Tr. 21-22) In both documents, petitioner's lack of discipline and pupil supervision is notable.

Petitioner testified that around Christmas 1974 the chalkboard which had been broken earlier by the pupils became worse until the entire middle section

of the board was gone. Petitioner testified her pupils made candles and sold them in the neighborhood to help defray the cost of replacing the chalkboard. Petitioner testified that when she advised the Board by letter (C-1) dated February 3, 1975 that the pupils had earned fifty dollars for this purpose, she was told by the Board to return the money to the pupils. (Tr. 24)

Petitioner was evaluated again on March 7, 1975 by the Pinebrook School principal. Petitioner's lack of lesson structure and pupil discipline were again addressed. (P-5) The principal of Chapel Hill evaluated petitioner's performance on March 25, 1975, and while some weaknesses are noted, the principal asserts that petitioner made progress during the year. He further stated he would recommend her for employment during 1975-76. (P-6) In fact, both school principals recommended petitioner be reemployed for 1975-76 by memoranda dated March 20, 1975. (P-10-11)

Petitioner testified she conducted an art show on the evening of April 2, 1975 at which the art work of her pupils was shown. The show was conducted on the stage of the gymnasium which was cluttered with gymnasium equipment. Petitioner testified that in order to conduct the art show, she had to move the gymnasium equipment to her classroom which, in turn, cluttered her classroom. (Tr. 31)

Petitioner testified that several Board members who attended the art show visited her art room the same evening and saw the room disorganized as hereinbefore described. (Tr. 32) Petitioner also testified that several parents had expressed their appreciation to her for her effective work after the art show. In response to the parents' queries whether they could do anything for her, she advised them to again write letters or call the Board members on her behalf. (Tr. 33)

Petitioner testified she knew that the Board planned to meet in private session on April 8, 1975 to discuss reemployment of nontenure teachers. (Tr. 89) She further testified that she arranged with the Acting Superintendent to telephone her after the meeting to determine whether the Board was planning to offer her reemployment. (Tr. 81) Petitioner testified that in anticipation of the Board's private session scheduled for April 8, 1975, she submitted an unsolicited memorandum (C-2) to the Acting Superintendent on April 7, 1975 in which she stated what she perceived to be her progress as a teacher during the 1974-75 academic year.

Petitioner testified that subsequent to the conclusion of the Board's private meeting on April 8, 1975, the Acting Superintendent telephoned her at one a.m. on April 9, as previously arranged, and informed her that her employment would probably not be renewed for 1975-76. Petitioner then testified that the Acting Superintendent informed her that the call was official notice she would not be reemployed. (Tr. 35-36)

The hearing examiner observes that the Board had not yet determined whether to continue petitioner's employment. Furthermore, *N.J.S.A.* 18A:27-10 requires written notice of non-reemployment from the Board.

Petitioner reported to school the next day, April 9, 1975, and informed her pupils that she was not to be employed for 1975-76. Petitioner testified that while she did not ask the pupils to do anything themselves, she did ask the pupils at Pinebrook and at Chapel Hill to have their parents again write letters or call Board members on her behalf. (Tr. 38-39, 93) Although petitioner testified she advised pupils not to do anything with respect to her statement to them that she would not be reemployed, the fact is that the pupils were disruptive in school on April 9, 1975. Petitioner testified that pupils were walking out of classes, loitering in the halls, posting signs on school corridors which read "Save Miss O'Biso," and a pupil broke a window. (Tr. 38, 44)

Petitioner testified that the Chapel Hill principal asked her to calm the pupils down. Petitioner testified she went to her classes that day and cautioned pupils that violence would achieve nothing. Rather, if they wished to assist her in her employment, they should have their parents call or write letters to the Board on her behalf. (Tr. 39)

The principal of Chapel Hill recapitulated the events of April 9, 1975 in a memorandum (P-12) to the Acting Superintendent in which he concluded that the pupils were motivated by petitioner to be disruptive. The principal also reversed his earlier recommendation that petitioner be reemployed for 1975-76 to "***I additionally feel that [petitioner's] actions were selfish and not in the best interest of our school and community, and I cannot have people who use this method in my school.***" (P-12) The principal of Pinebrook also filed a report of pupil activities on April 9, 1975 with respect to petitioner informing them the Board fired her and requesting that their parents write letters or call the Board on her behalf. (P-13) Petitioner also prepared a report (C-4) to the Superintendent in which she stated she stopped pupils on the way to school and told them she was not to be reemployed, that she told the same thing to pupils at Chapel Hill and at Pinebrook. In each instance, she was crying as she told the pupils. She denies deliberately using pupils to cause any disruption.

The Acting Superintendent, by letter (P-9) dated April 10, 1975, advised petitioner that the telephone call to her in the early morning of April 9, *ante,* was not official notification of non-reemployment. Petitioner was advised that such determination was solely that of the Board which would make its determination on April 15, 1975. The Acting Superintendent did advise as follows:

> "***I did indicate to you, however, that it appeared to me, that based upon the discussions which took place at the Board Work Meeting on Tuesday, April 8, 1975, there is a substantial risk that a vote upon the question of whether to offer you a contract or not will be decided adversely to you. I did ask you whether you wished, under the circumstances, to indicate in a letter that you would not be available for employment within the district next school year. This request was made out of consideration of professional comity.***" (P-9)

Petitioner was invited to appear before the Board, privately, before the public meeting on April 15, 1975. (P-14) Petitioner testified that she and her

representatives did appear at the private meeting at which she did all the talking. The Board said nothing. (Tr. 46)

The agenda (P-15) for the public meeting of April 15, 1975, contained a proposed resolution by which petitioner and seven other teaching staff members would be offered reemployment for 1975-76. Petitioner testified that she attended the public meeting which was also attended by approximately 200 persons, compared to a normal attendance, in her judgment, of about two or three persons. (Tr. 46-47)

The minutes of the April 15 meeting show that

> "***Considerable discussion took place involving students, parents, teachers and members of the Board of Education concerning the continuation of employment of [petitioner]***. Public sentiment generally favored renewal of contract for this employee.***"
>
> (P-16, at p. 180)

Thereafter, the resolution to reemploy petitioner for 1975-76 was defeated by a vote of six to three. (P-16, at p. 189) Three of the six members who voted not to reemploy petitioner expressed concern over the letters received from parents on behalf of petitioner, appeals from pupils on her behalf and, in general, what may be considered to be the members' perception of public pressure on them to renew petitioner's employment for 1975-76. Two of these three members stated that their decision not to reemploy petitioner was based on the total information in their possession with respect to petitioner's teaching performance and was not based on public pressure. The third member, after expressing his concerns over the "***campaign to save Miss O'Biso***," voted in the negative. (P-16, at p. 188) The other three members who voted negatively had no comments attributed to them in the official minutes prior to casting their votes.

Thereafter, petitioner requested and was given the reasons for her non-reemployment, *ante,* and petitioner was given an informal appearance before the Board on May 29, 1975. The Board advised petitioner thereafter that it had not changed its mind.

Petitioner alleges that her constitutional right to free expression was violated because three Board members, prior to voting in the negative, expressed concern over the pupil and parental pressure to have the Board reemploy her. Petitioner also alleges that the Board improperly considered the evaluation (P-2) of the Chapel Hill principal, dated September 27, 1974, which had been removed from her file. Petitioner asserts that her nonrenewal of employment must be set aside because one of the stated reasons for the action is a charge of conduct unbecoming which demands a plenary hearing before the Commissioner.

The Board moves for dismissal of the matter grounded on petitioner's failure to state a cause of action upon which relief could be granted. The Board argues that the constitutional right to free expression guarantees the right to

speak out on issues of public concern. The Board asserts that, in the instant matter, petitioner's efforts to secure the aid and assistance of her pupils to achieve reemployment was not an issue of public concern; rather, petitioner attempted to use the cloak of constitutional protection to improperly turn her classroom into a forum for her own selfish interest. The Board asserts that petitioner's behavior of soliciting outside support to pressure it into reemploying her, on factors other than its consideration of her teaching performance, is contrary to the harmonious relationships necessary for the successful operation of the educational system. The Board argues that it did not violate petitioner's constitutional right to free expression under these circumstances and cites *Pickering v. Board of Education of the Township High School District 205, Will County, Ill.*, 391 *U.S.* 563, 88 *S.Ct.* 1731, 20 *L.Ed.2d* 811 (1968); *Pietrunti v. Board of Education of the Township of Brick,* 128 *N.J. Super.* 149 (*App. Div.* 1974), *cert.* den. 65 *N.J.* 573 (1974), *cert.* den. 419 *U.S.* 1057 (1974).

The hearing examiner has reviewed the testimony of petitioner, selected portions of depositions submitted by petitioner, and the documentary evidence and finds petitioner did, in fact, fail to state a cause of action upon which relief could be granted. Petitioner's claim of infringement of free expression is found to be without merit. There is no evidence to establish that either the Board or its agents ever directed petitioner to refrain from speaking freely. That she chose the forum of the classroom and school facilities, in addition to the forum of parental pressure, does not constitute the exercise of freedom of speech. Petitioner spoke freely to those who would listen.

It is established that a balance must be struck between a teacher's interest in speaking freely and the interest of the State in promoting efficiency of its educational system. *Winston v. Board of Education of South Plainfield,* 64 *N.J.* 582 (1974) The Board, regardless of its determination with respect to petitioner's reemployment, still had to operate its schools. The efficiency of its schools can only be lessened when pupils become disruptive and attempts are made to bring outside pressure on the Board for selected and biased decisions. The Legislature saw fit to create safeguards for nontenure teachers whose employment is not renewed. *N.J.S.A.* 18A:27-10 *et seq.* The New Jersey Supreme Court addressed procedures for boards to use regarding non-reemployment of teachers. *Donaldson, supra* Petitioner had avenues of relief which she exercised.

The Board did not place an unconstitutional prior restraint on petitioner to speak freely as was the case in *River Dell Education Association v. River Dell Board of Education,* 122 *N.J. Super.* 350 (*Law Div.* 1973). Consequently, petitioner's reliance on that case in opposition to the Motion to Dismiss is misplaced.

The Board had sufficient reason to support its determination not to reemploy petitioner without considering the evaluation of the Chapel Hill principal dated September 27, 1974. Consequently, petitioner's argument that the Board considered that evaluation is without merit.

Petitioner's argument that she is entitled to a plenary hearing on the charge of unbecoming conduct is without merit for such a hearing is reserved for those who have acquired a tenure status. *N.J.S.A.* 18A:6-10; 18A:28-5; *Donaldson, supra*

The hearing examiner finds no basis to petitioner's claim that the Board acted improperly or illegally with respect to her non-reemployment for 1975-76. It is therefore recommended that the Board's Motion to Dismiss be granted and that the Commissioner dismiss the Petition.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record in the instant matter, including the report of the hearing examiner and the objections filed thereto by petitioner.

Petitioner's objections to the hearing examiner's report focus on assertions that her employment was not continued by the Board because of the vocal participation by parents and pupils on her behalf to persuade the Board to continue her employment. Petitioner reasons that, because any communication she may have had with parents or pupils with respect to her non-reemployment is constitutionally protected free speech, the Board may not deny her reemployment for such reasons.

The Commissioner does not agree that petitioner's employment was not continued by the Board in violation of her constitutional rights. It is acknowledged that substantive due process demands that petitioner's employment not be terminated if the reason was the exercise of her constitutional right of free speech. The Board's determination not to continue petitioner in its employ is grounded in the reasons set forth in the letter to her dated April 30, 1975 from the Board President. (P-17, *ante*) Although reason number four takes issue with the fact that petitioner sought to involve her pupils in her efforts to attain reemployment, this does not, under the total circumstances herein, rise to the level of protected free speech.

The Commissioner adopts as his own the findings of fact and conclusions of law set forth by the hearing examiner.

Petitioner has not shown any substantial reason to grant an adversary hearing. *Winston v. Board of Education of South Plainfield,* 125 *N.J. Super.* 131 (*App. Div.* 1973), aff'd 64 *N.J.* 582 (1974)

Accordingly, the Board's Motion to Dismiss is granted. The Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

August 2, 1977

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, August 2, 1977

For the Petitioner-Appellant, Chamlin, Schottland, Rosen & Cavanagh (Michael D. Schottland, Esq., of Counsel)

For the Respondent-Appellee, Hoffman, Fiorello and Hallock (Joseph A. Hallock, Esq., of Counsel)

The State Board of Education affirms the decision of the Commissioner for the reasons expressed therein.

November 9, 1977

Joan White,

Petitioner,

v.

Board of Education of the Township of Galloway, Atlantic County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Goldberg, Simon & Selikoff (Joel S. Selikoff, Esq., of Counsel)

For the Respondent, Murray, Meagher & Granello (Robert J. Hrebek, Esq., of Counsel)

Petitioner was formerly employed as a school secretary by the Board of Education of the Township of Galloway, hereinafter "Board." Petitioner complains that she was denied her rights to due process of law and that the Board subjected her to illegal discrimination with respect to her non-reemployment. Petitioner seeks an order by which the Board would be directed to provide a written statement of reasons for her non-reemployment and a hearing on those reasons before the Commissioner of Education or other impartial party. Petitioner also seeks an order by which the Board would be directed to allow her and her chosen representative to review her complete personnel file. The Board denies the allegations and moves for Summary Judgment on the grounds that petitioner has failed to state a cause of action upon which relief may be granted.

The Motion for Summary Judgment is directly before the Commissioner for adjudication on the record, including the pleadings, affidavits and Briefs of the parties in support of their respective positions.

The facts of the matter are these. Petitioner was employed as a school secretary by the Board for the 1974-75 academic year. Petitioner was verbally informed on May 23, 1975 by the principal of the school to which she was assigned that the Board had determined not to reemploy her for the 1975-76 academic year. The principal also verbally informed petitioner of two reasons why the Board made this determination.

Petitioner, at this same meeting with the principal, requested him to allow her to review the contents of her personnel file which he maintained. The principal informed petitioner he would allow her to review certain documents of her file which he selected, but that she could not review the entire file. Petitioner requested the president of the Galloway Township Education Association to join the meeting in an effort to convince the principal to allow her to review the entire contents of her file.

The principal elected not to allow petitioner to review any portion of her file in the presence of the Association president. The principal attests that he then terminated the meeting. He explains that his refusal to allow petitioner to review any portion of her personnel file in the presence of the Association president was because "***no provision had been made in advance to have a representative present***." (C-1, at p. 2)

Petitioner attests that the Board, by letter dated May 29, 1975, confirmed its determination not to reemploy her. Petitioner, by letter to the Board dated May 31, 1975, requested a written statement of reasons for her non-reemployment and a hearing thereon. The Board Secretary, by letter dated June 3, 1975, advised petitioner that the Board had denied her request for a written statement of reasons and a hearing. (C-2, at pp. 2-3)

A representative of the New Jersey Education Association met with the Board on June 10, 1975 and, on behalf of petitioner, requested a statement of reasons and a hearing. The representative also requested the Board to instruct its principal to allow petitioner to review her entire personnel file in the presence of her chosen representative. These requests were denied by the Board. (C-2, at p. 3)

It is within the context of these circumstances that the Board demands Summary Judgment in its favor and a dismissal of the matter. The Board argues that petitioner has no due process rights to a statement of reasons for her non-reemployment, nor does petitioner have any right to a hearing in regard to her non-reemployment. Finally, the Board asserts that the matter of her claim to a right to review her personnel file in the presence of her chosen representative is not a matter properly cognizable by the Commissioner pursuant to his authority at *N.J.S.A.* 18A:6-9.

Petitioner's reliance on *Barbara Hicks v. Board of Education of the*

Township of Pemberton, Burlington County, 1975 *S.L.D.* 332 and *Mary C. Donaldson v. Board of Education of North Wildwood,* 65 *N.J.* 236 (1974) as the basis of support for her demand for a statement of reasons for her non-reemployment and a subsequent informal appearance before the Board to refute those reasons is misplaced. The requirements for a statement of reasons and a subsequent informal appearance on those reasons before a board of education as set forth in *N.J.S.A.* 18A:27-3.2 and *N.J.A.C.* 6:3-1.20 are limited to those nontenure teaching staff members whose employment is not renewed. A school secretary or clerical employee is not a teaching staff member. *N.J.S.A.* 18A:1-1 Consequently, any rights or privileges emerging from the cited cases do not inure to petitioner. The Commissioner so holds.

Petitioner argues that her personnel file, maintained by the school principal, is a public record. Petitioner asserts that as a party of interest she may demand that the file by subject to inspection and cites *Board of Education of East Brunswick Township et al. v. Township Council of East Brunswick Township et al.,* 48 *N.J.* 94 (1966); *N.J.S.A.* 47:1A-1 *et seq.*; and *Irval Realty v. Board of Public Utilities Comm.,* 61 *N.J.* 366 (1972). Petitioner demands that the Board be directed to allow her to review the entire contents of her personnel file in the presence of her chosen representative.

The Board asserts that petitioner was never precluded from reviewing her personnel file privately and contends that, should her representative be present, the review of the file would tend to become adversary in nature. The Board suggests that petitioner review her personnel file privately and, should she find objectionable material, then discuss that material with her representative.

The Commissioner observes that petitioner's attestation that the principal initially told her she could review only those documents from her file he selected goes unanswered. The principal's affidavit (C-1) makes no mention of why petitioner suddenly interrupted the meeting of May 23, 1975 to seek the assistance of the Association president. Consequently, on the record before him, the Commissioner finds that the principal did prevent petitioner from privately reviewing her entire personnel file on May 23, 1975.

The Commissioner observes that Executive Order No. 11 was signed November 15, 1974, amending Executive Order No. 9, Section 3(b), signed September 30, 1963. Executive Order No. 11 now provides, in pertinent part, that:

> "***Except***when authorized by a person in interest, an instrumentality of government shall not disclose to anyone other than a person duly authorized by this State or the United States to inspect such information in connection with his official duties, personnel***records of an individual***."

Petitioner must be considered a person in interest in the instant matter and the president of the Association is the person authorized by her to review her personnel file with her.

The Commissioner has considered the Board's argument that the matter of petitioner's personnel file is not properly a dispute pursuant to *N.J.S.A.* 18A:6-9. The Commissioner holds to the contrary. A dispute emerging from an action taken by the Board, or any of its administrative or supervisory staff, which results in an alleged deleterious effect upon another is a matter properly before the Commissioner pursuant to *N.J.S.A.* 18A:6-9.

The Commissioner finds and determines that petitioner is not entitled to a statement of reasons or to an informal appearance before the Board on the reasons for her non-reemployment. Summary Judgment is hereby granted the Board in regard to these two counts.

To the extent that petitioner, under the circumstances herein, is entitled to review her entire personnel file and has been prevented from doing so by the principal who maintains the file, the Commissioner directs the Board to instruct its principal to allow petitioner to review her entire personnel file in the presence of a person of her choosing.

There being no further relief that the Commissioner may grant either party, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

August 2, 1977

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, August 2, 1977

For the Petitioner-Appellant, Goldberg, Simon & Selikoff (Joel S. Selikoff, Esq., of Counsel)

For the Respondent-Appellee, Murray, Meagher & Granello (Edward J. Byrne, Esq., of Counsel)

The State Board of Education affirms the Commissioner's decision.

December 7, 1977
Pending New Jersey Superior Court

John Hutzley,

Petitioner,

v.

Board of Education of the Manalapan-Englishtown Regional School District, Monmouth County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Chamlin, Schottland, Rosen & Cavanagh (Michael D. Schottland, Esq., of Counsel)

For the Respondent, Dawes, Gross & Youssouf (Joseph D. Youssouf, Esq., of Counsel)

Petitioner is a teacher who was employed continuously beginning September 1973, but was not reemployed for the 1976-77 academic year. He asserts that the Board of Education of the Manalapan-Englishtown Regional School District, hereinafter "Board," has failed to evaluate him pursuant to statutory prescription, and that the reasons for his non-reemployment were supplied by the Superintendent of Schools and not the Board as the statutes demand.

Petitioner filed a Brief in support of his Motion for Summary Judgment in his favor which was followed by respondent's Brief in opposition to the Motion. Several documents have been submitted in evidence and oral argument was conducted at the State Department of Education, Trenton, on February 14, 1977. The matter is now ripe for Summary Judgment by the Commissioner of Education since the facts are not in dispute. They are set forth as follows:

1. Petitioner was employed for the 1973-74, 1974-75 and 1975-76 academic years and was not reemployed thereafter.

2. During his last year of employment, petitioner was observed on four occasions in the performance of his classroom teaching, namely, November 25, 1975, and March 1, 8, and 15, 1976. (Exhibits H, I, J, K)

3. In April 1976, petitioner received notification that he would not be reemployed.

4. On April 14, 1976, a letter requesting reasons for his non-reemployment was sent to the Board President. (Exhibit A)

5. By letter dated May 20, 1976, the Superintendent acknowledged receipt of his request, advised petitioner that a statement was being formulated and requested that petitioner make a personal request for a statement of reasons.

(The aforementioned request was made on petitioner's behalf by the Manalapan-Englishtown Education Association and was not signed, although the vice president's and petitioner's names were typed thereon.) (Exhibit A)

6. Petitioner made his request in writing on or about June 7, 1976. (Exhibit E)

7. A statement of reasons was sent to petitioner on June 22, 1976. (Exhibit G)

8. An appearance before the Board was scheduled, by agreement, in the fall. (Conference Agreements)

9. The Board thereafter notified petitioner that its decision not to reemploy him was unchanged. (Exhibit M)

The Board states in its Brief that it failed to meet its statutorily imposed duty to evaluate petitioner once in each of three semesters. The Board's concession in that regard is in error since the relevant statute requires only that a teaching staff member be evaluated annually at least three times and at least once in each semester. *N.J.S.A.* 18A:27-3.1 A semester is properly defined as one half of a school year; therefore, it may be seen that two evaluations will occur in one semester unless a school district actually operates on a trimester plan.

The record in this matter reveals that petitioner was observed on four occasions: November 25, 1975, March 1, 8, and 15, 1976. (Exhibits H, I, J, K) Thus the Board has met its duty to observe petitioner and the record shows that its observations were followed by written evaluations and conferences for the November 25, 1975 and March 8 and 15, 1976 evaluations. Also petitioner concedes that a performance review was prepared dated March 26, 1976. See *N.J.S.A.* 18A:27-3.1 and *N.J.A.C.* 6:3-1.19 and 20. (Petitioner's Brief, at pp. 6-7)

Petitioner's assertion that his rights were violated because of the lateness of receipt of a statement of reasons is not supported by the record. Rather, the record discloses that this request was received on April 29, 1976 by the Superintendent who chose not to respond because the letter was neither authorized nor signed by petitioner. (Exhibits A, B) As stated earlier, an appearance was granted petitioner by agreement and the Board did not alter its earlier determination refusing reemployment.

A review of the exhibits in sequence shows that the Board observed its statutory duty and provided a statement of reasons after it was requested to do so personally by petitioner. (Exhibit E)

Initially, the Commissioner determines that the request for a statement of reasons dated April 14, 1976 (Exhibit A), is defective because it is not signed by the teaching staff member. Neither does it appear to be authorized by petitioner since its last sentence states: "The statement should be forwarded to Mr.

Hutzley with a copy for the Association." The relevant statute requires that the statement of reasons should be requested by the teaching staff member. *N.J.S.A.* 18A:27-3.2 Further, it would be improper for the Board to give a statement of reasons to the Association unless requested to do so by petitioner. Because the evidence in this regard does not meet the statutory criteria, the Board had no obligation to respond with reasons to the April 14, 1976 letter. (Exhibit A) That same letter is stamped as being received in the Superintendent's office on April 29, 1976, fifteen days later. No explanation is given for its whereabouts in the interim period of time. Nevertheless, the Superintendent's response to Exhibit A is dated May 20, 1976, three weeks after it was received. (Exhibit B) If the Superintendent doubted the authenticity of the request for a statement of reasons, he should have notified petitioner immediately about his concerns.

When petitioner made his personal request it was followed by a timely statement of reasons. (Exhibits E, G) Petitioner does not aver that he thereafter requested an appearance before the Board as is his entitlement but an appearance was held. (Exhibit M; Conference Agreements)

The Commissioner finds, therefore, that both petitioner and the Board are to be faulted for the tortuous procedure followed in an attempt to comply with statutory prescription.

Petitioner's complaint that the statement of reasons is inadequate because it was drafted by the Superintendent and not the Board, is without merit. In fact, the issue is *stare decisis.* In *Patricia Bolger and Frances Feller v. Board of Education of the Township of Ridgefield Park, Bergen County,* 1975 *S.L.D.* 93, affirmed State Board of Education 98, affirmed Docket No. A-3214-74, N.J. Superior Court, Appellate Division, April 21, 1976 (1976 *S.L.D.* 1122), the Commissioner quoted his earlier decisions in *Thomas Aitken v. Board of Education of the Township of Manalapan, Monmouth County,* 1974 *S.L.D.* 207 and *Ronald Elliott Burgin v. Board of Education of the Borough of Avalon, Cape May County,* 1974 *S.L.D.* 396 as follows:

> "***[I]t is clear that it is the local board of education which must decide the status of its nontenured employees each year, and it must do so on or before April 30, It is equally clear that *subsequent to such decision,* but within the same time parameter, the *decision* must be transmitted by the Board through its administrative agents in 'written form' to such employees.***" (*Emphasis in text.*) (1974 *S.L.D.* at 209)

In *Burgin* the Commissioner determined that *N.J.S.A.* 18A:17-20, read *in pari materia* with *N.J.S.A.* 18A:27-10, clearly permits that written notice can be

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

Petitioner concedes that the Board decided not to reemploy him. (Petitioner's Brief, at p. 5)

In *Bolger and Feller, supra,* the Commissioner commented about timely notice as follows:

> "***The primary purpose of these statutes [*N.J.S.A.* 18A:27-10 *et seq.*] is to provide teachers with timely notice when they are not going to be reemployed so that they may seek employment elsewhere. When local boards of education waited until the months of May or June, or later, to notify teaching staff members that they would not be reemployed, this late action created a hardship for those employees. The new statutes remedied that situation by providing for notice by April 30 of each academic year, sixty days prior to the expiration of standard teacher contracts on June 30.***" (1975 *S.L.D.* at 95)

In the instant matter petitioner received timely notice although some of his evaluations were defective as discussed earlier. In any event, the remedy for defective evaluations cannot be reinstatement which would confer tenure in this instance to a teacher who lacked tenure qualifications.

The Commissioner cautions this Board and all others to adhere to the precise requirements of observations and evaluations of its teaching staff members as set forth in the statutes and the State Board of Education rules. *N.J.S.A.* 18A:27-3.1 *et seq.*; *N.J.A.C.* 6:3-1.19 and 20 See also *Gladys S. Rawicz v. Board of Education of the Township of Piscataway, Middlesex County,* 1973 *S.L.D.* 305, remanded State Board of Education 1244, decision on remand 1246, aff'd State Board April 2, 1975, aff'd Docket No. A-2756-74, N.J. Superior Court, Appellate Division, June 8, 1976 (1976 *S.L.D.* 1163).

The Commissioner determines that there is no relief to which petitioner is entitled. Accordingly, the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

July 29, 1977

Ernest E. Gilbert,

Petitioner,

v.

New Jersey State Board of Examiners,
Bureau of Teacher Education and Academic Credentials,
Division of Field Services, New Jersey Department of Education,

Respondents.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Ernest E. Gilbert, *Pro Se*

For the Respondents, William F. Hyland, Attorney General of New Jersey (Mark Schorr, Esq., Deputy Attorney General)

Petitioner, a teacher of science in the Willingboro Public Schools since January 1973, alleges that the issuance to him by respondents of a comprehensive Teacher of Science certificate in 1973 was not only contrary to his request to be issued a physical science teacher's certificate, but also contrary to the requirements of *N.J.S.A.* 18A:6-38 and *N.J.A.C.* 6:11-6.3(a). He seeks an order of the Commissioner of Education directing that the certificate be rescinded and that a specific subject field certificate to teach only physical science be issued in compliance with his requests which have been denied by respondents.

Respondents maintain that petitioner, in accordance with existing policies and law, has appropriately been issued the broadest certificate for which he is qualified.

The matter is before the Commissioner on a Motion for Summary Judgment by respondents. Briefs were filed, and exhibits and affidavits were received in evidence. The factual context of the dispute is as follows:

N.J.A.C. 6:11-6.3(a) provides, *inter alia,* that the following specific subject field endorsements may be listed on teaching certificates for persons who have completed twenty-four semester hour credits of appropriate academic preparation: biological science, earth science, physical science. *N.J.A.C.* 6:11-6.3(b) provides, *inter alia,* that thirty semester hour credits are required for the issuance of a comprehensive subject field endorsement in science.

Petitioner, who was initially employed to teach chemistry and advanced chemistry, is now assigned to teach courses in life science, chemistry and advanced chemistry. Life science is a unit of biological science. Chemistry is a branch of physical science.

Respondents assert in their Brief that when petitioner applied for a

teaching certificate in 1973 he was issued the broadest certification for which he was qualified in accordance with the policy of the Bureau of Teacher Education and Academic Credentials. This position is enunciated in the affidavit of its Director, as follows:

> "***I have reviewed the Bureau's file on petitioner Ernest E. Gilbert. Through the Bureau, Mr. Gilbert was issued a Teacher of Science-Comprehensive endorsement in July 1973.
>
> "***It is the Bureau's policy to grant to applicants for certification the broadest certificate for which they qualify.***
>
> "***The aforementioned policy affords school districts the greatest flexibility in assignment of teachers and their work assignments.***"
>
> (Affidavit of Fred A. Price)

Respondents argue that, while a teacher's preference for academic assignment should not be ignored, it is not controlling over the numerous factors which local school districts must consider in scheduling the assignment of teachers in an advantageous and economical manner. It is further argued that petitioner has failed to show that discrimination resulted from the Bureau's application of the aforementioned policy. Accordingly, respondents assert that petitioner has failed in his burden of detailing in his Petition how he believes he suffered discrimination by act(s) of respondents. *Rankin v. Sowinski,* 119 *N.J. Super.* 393, 399-400 (*App. Div.* 1972); *In re Masiello,* 25 *N.J.* 590, 599 (1958)

Respondents argue that petitioner's claims that the issuance of the Teacher of Science certificate may have adverse effect upon his seniority, tenure and/or workload is inapplicable since such considerations result from his service in the district which employs him rather than from the issuance of a teaching certificate.

Respondents, arguing that no material fact is unknown which requires a plenary hearing, move for Summary Judgment on grounds that petitioner has failed to state a claim on which relief can be granted. Respondents also raise, *inter alia,* as separate defenses the equitable doctrine of laches and the argument that they are powerless to grant the relief sought by petitioner.

Petitioner argues, conversely that respondents fail to recognize the distinction between a specific subject and a comprehensive subject. Petitioner maintains that a pupil in a comprehensive science course such as general science is not required to have a "hands-on" laboratory experience as opposed to the requirements of a specific science such as chemistry. It is argued that a total of twenty-four credits in physical science is required by State Board of Education rules to teach a subject such as chemistry and that twenty-four additional credits are required in the biological studies to teach in that sector of the sciences. Thus, petitioner concludes that one who has had only a total of thirty credits as required under *N.J.A.C.* 6:11-6.3(b) may not properly be allowed to teach both chemistry (a physical science) and life science (a biological science).

Petitioner argues that such procedure, if sanctioned, is unreasonable, arbitrary and would lower teacher education standards. It is further argued that a teacher who, like himself, applies for and pays for a certificate should be issued only that certificate for which he applies and is eligible. (Brief in Opposition, at p. 2)

Petitioner asserts that, although he himself has completed at least twenty-four credits in physical sciences and another twenty-four in biological sciences, the issuance of a comprehensive science certificate, as contrasted to two separate and clearly defined specific subject field certificates, is demeaning. In this regard he states:

> "***[T]he attainment of the BIOLOGICAL SCIENCE ENDORSEMENT is an option OF THE PETITIONER and not a privilege of the STATE BOARD OF EXAMINERS through an arbitrary interpretation of [*N.J.A.C.*]***." (Brief in Opposition, at p. 4)

Petitioner also argues that his seniority rights are in jeopardy by respondents' interpretation since he is, pursuant to *N.J.A.C.* 6:3-1.10(b), placed in the same category as all other persons with the Teacher of Science certificate but who do not have the specialization which he possesses to teach chemistry and advanced chemistry. Thus, he argues that in the event of a reduction in force he could be replaced by a teacher with greater seniority but without the specialization and skills required to teach those specialized subjects in a thorough and efficient manner.

Petitioner asserts also that the very flexibility afforded by respondents to his administrators has encouraged them to assign him to three subjects requiring daily preparations so arduous that no teacher should be expected to carry such responsibility in a thorough and efficient manner. Petitioner maintains that such assignments, abetted by respondents, are contrary to the concept of teacher accountability and the public interest. (Brief in Opposition, at p. 5) In support of the foregoing assertions, petitioner has entered into the record affidavits of certain fellow teachers who share similar opinions. (Exhibits A-1 through 5)

Petitioner concludes that the Commissioner should order a plenary hearing to establish all of the relevant facts, pursuant to his statutory authority to examine the efficiency of schools. *N.J.S.A.* 18A:4-24; *Booker v. Board of Education of Plainfield,* 45 *N.J.* 161 (1965); *Shepard v. Board of Education of the City of Englewood et al.,* 207 *F.Supp.* 341 (*D.N.J.* 1962) Brief in Opposition, at pp. 5-7)

The Commissioner has carefully reviewed the pleadings, Briefs, exhibits and relevant law as relate to the respective positions of the litigants. Petitioner's prayer for relief for rescission of his Teacher of Science certificate is without merit. This determination is predicated on recognition that he now teaches and has taught in prior years life science which requires either a biological science certificate for which he has not applied or a comprehensive science certificate which he now seeks to have rescinded. To grant rescission of that certificate would, in effect, render his teaching of life science to pupils an *ultra vires* act.

Such action is further estopped by the equitable doctrine of laches. In *Auciello v. Stauffer,* 58 *N.J. Super.* 522, 529 (*App. Div.* 1959), the following was quoted with favor from *Bookman v. R.J. Reynolds Tobacco Co.,* 138 *N.J. Eq.* 312, 406 (*Ch.* 1946):

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

Similarly, Justice Heher said in the case of *Marjon v. Altman,* 120 *N.J.L.* 16 (*Sup. Ct.* 1938):

> "***While laches, in its legal signification, ordinarily connotes delay that works detriment to another, the public interest requires that the protection accorded by statutes of this class be invoked with reasonable promptitude. Inexcusable delay operates as an estoppel against the assertion of the right. It justifies the conclusion of acquiescence in the challenged action. *** *Taylor v. Bayonne,* 57 *N.J.L.* 376; *Glori v. Board of Police Commissioners,* 72 *Id.* 131; *Drill v. Bowden,* 4 *N.J.Mis.R.* 326; *Oliver v. New Jersey State Highway Commission,* 9 *Id.* 186; *McMichael v. South Amboy,* 14 *Id.* 183.***" (120 *N.J.L.* at 18)

Herein petitioner, having been issued a comprehensive science certificate, taught, at the direction of the board and its administrators, pupils in both the physical science and biological science fields. In turn, these pupils were assigned grades and credits upon which they have the right to rely for purposes of employment and entrance to advanced educational opportunities. Their credit and standing in relation to graduation and issuance of a diploma will not be clouded by rescission of petitioner's comprehensive science certificate.

Nor did petitioner, who waited from 1973 until November 1976 to formally file his appeal, act with reasonable promptitude. Petitioner's employer who has allowed him to gain tenure status has every reason to believe that he may legally teach any science subject at the secondary school level. Petitioner is well aware that in his first year of employment the Board made such assignment of classes as those for which he is now responsible. Yet, as a free agent, he willingly carried that schedule. Petitioner may not now, by the relief which he seeks, deprive the Board of the flexibility to utilize him as a teacher in any subject area for which he is qualified by reason of his academic preparation and certification as a teacher of science.

As was said in *Board of Education of the City of Plainfield v. Plainfield Education Association,* 144 *N.J. Super.* 521 (*App. Div.* 1976):

> "***It is elementary that a grant of authority to an administrative agency is to be liberally construed so as to enable the agency to discharge its statutory responsibilities. *In re Promulgation of Rules of Practice,* 132 *N.J. Super.* 45, 48-49 (App. Div. 1974). In short, the authority delegated to an administrative agency should be construed so as to permit the fullest

accomplishment of the legislative intent. *Cammarata v. Essex Cty. Park Comm'n,* 26 *N.J.* 404, 411 (1958). Moreover, when construing a statutory enactment it is fundamental that the general intention of the act controls the interpretation of its parts. *Hackensack Water Co. v. Ruta,* 3 *N.J.* 139, 147 (1949). All statutory provisions are to be related and effect given to each if such be reasonably possible. *Jamouneau v. Harner,* 16 *N.J.* 500, 513 (1954).***" (at 524)

The Commissioner finds as appropriate and reasonable the rule of respondents that the most comprehensive certificate for which a teacher is eligible shall be issued. The Commissioner does not perceive as petitioner suggests any demeaning aspect to that issuance as compared to the issuance of multiple specific subject field certificates.

The Commissioner is aware that teaching staff members who are members of the New Jersey State Board of Examiners provide adequate representation in the formulation of proposed certification rules for adoption by the New Jersey State Board of Education. *N.J.S.A.* 18A:6-34 *et seq.* Respondents' rule is reasonable and within the scope of its original jurisdiction.

Petitioner expresses preference that he have fewer courses to teach than the three he is now teaching. Although his preference is deserving of respect, it is not universal among teachers, many of whom prefer a variety of assignments. Nor does the Commissioner find that teaching such a combination of courses is contrary to the constitutional concept of a thorough and efficient education.

Respondents rely, appropriately, on *Masiello, supra,* wherein it was stated that:

"***[W]ithin the legislative grants of authority the various tribunals 'may mould their own procedures so long as they operate fairly***.' *Laba v. Board of Education of Newark, supra,* 23 *N.J.* at *page* 382.***"
(25 *N.J.* at 601)

The Commissioner determines that respondents' rule, as controverted herein, on the issuance of teaching certificates is not only fair, reasonable and in the best interests of the public school systems of this State but has been fairly applied to petitioner who is qualified for the certificate which he was issued and now holds. Accordingly, respondents' Motion for Summary Judgment is granted. The Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

August 9, 1977

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, August 9, 1977

For the Petitioner-Appellant, Ernest E. Gilbert, *Pro Se.*

For the Respondent-Appellee, William F. Hyland, Attorney General of New Jersey (Mark Schorr, Esq., Deputy Attorney General)

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

December 7, 1977
Pending New Jersey Superior Court

In the Matter of the Application of the Board of Education of the Township of Plumsted, Ocean County, to Abolish the Position of Superintendent of Schools.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Kessler, Tutek & Gottlieb (Henry G. Tutek, Esq., of Counsel)

For the Respondent, William F. Hyland, Attorney General of New Jersey (Mary Catherine Cuff, Deputy Attorney General)

Petitioner, the Board of Education of the Township of Plumsted, hereinafter "Board," resolved on April 13, 1976 that the position of Superintendent of Schools was not necessary and should be abolished effective immediately. Pursuant to the procedural steps to effectuate such abolishment set forth by the Commissioner of Education in *Chester M. Stephens v. Board of Education of the Township of Mount Olive,* 1963 *S.L.D.* 215, the Board requested approval of the abolishment from the County Superintendent and the Commissioner. Subsequently the County Superintendent informed the Board that he would not approve the request and recommended that the Board appoint a person to the then vacant position as soon as possible. The Board appealed this determination to the Commissioner and on August 5, 1976 the Commissioner issued an Order which directed the Board to retain the office of Superintendent intact until such time as the Petition could be considered by the Commissioner on its merits.

The submission is now complete for Summary Judgment by the Commissioner. Briefs have been filed by the Board and by the Attorney General on behalf of the County Superintendent. Brief submission was completed on June 9, 1977. The principal facts on which the arguments rest are not in dispute and may be recited succinctly.

In the years prior to 1965 the Board employed a supervisory principal as its only school administrator but on April 20, 1965 it resolved to abolish this position and to request authorization from the State Board of Education to create the position of Superintendent of Schools. Such authorization is required by law. *N.J.S.A.* 18A:17-15 The Board included the request in the following resolution:

> "Whereas, There has been a growth in the Public School System in the Township of Plumsted, County of Ocean, State of New Jersey; and
>
> "Whereas, The Professional Staff has reached thirty-four employees and the chief school administrator is personally responsible for the supervision of sixty employees; and
>
> "Whereas, The Township of Plumsted has made two separate and distinct additions on the original building in addition to constructing the new building that was occupied on January 4, 1965; now therefore be it
>
> "Resolved, That the Board of Education request the State Board of Education to establish for the Township of Plumsted the position of Superintendent as the title for the chief administrator effective 1 July 1965***." (See Minutes of the Meeting of April 20, 1965.)

At that meeting of the Board, and in subsequent meetings, there was extensive discussion of the need for the establishment of the position of Superintendent and on May 13, 1966 such discussion was joined by the Ocean County Superintendent of Schools. The County Superintendent stressed in his comments on that occasion that there was a need to accompany the request for approval of the Superintendent's position with a record of the employment as well of a non-teaching principal.

Despite the passage of the resolution of April 20, 1965, the request for the establishment of a Superintendent's position was not formally sent to the County Superintendent and the State Board until May 1966. On May 12, 1966, the Board approved a second resolution which incorporated the first three points of its first resolution of 1965, cited *ante,* and requested approval of a superintendency effective July 1, 1966.

Thereafter, the Board also approved the future employment of a non-teaching principal, in addition to a Superintendent, and the County Superintendent addressed a letter to the Commissioner which recommended the establishment of a superintendency for the district. The State Board then received a similar recommendation from the Commissioner and approved on

November 2, 1966 the establishment of a position of Superintendent of Schools for Plumsted Township.

In the interim since that approval, the number of pupils enrolled in the Plumsted Township School has increased. There has been an increase in the number of employees and budgeting appropriations have risen from approximately $520,000 to more than $1,480,000. A condensed summary of the statistics with respect to pupil enrollment and professional teaching staff employment is set forth as follows:

STATISTICAL SUMMARY I

	1965-66	1970-71	1975-76
Aver. Daily Enrollment	748.1	840.5	766
Aver. Daily Attendance	692.8	789.9	715
Teaching Staff Members:			
Classroom Teachers	27	33	33
Other Full Time	5	8	8
Other Part Time	3	3	3

(Petition of Appeal, Exhibit A)

(The County Superintendent avers that since the filing of the instant Petition there has been an increase of eight teaching staff members to conduct required programs in compensatory education.) It may be observed here as a point of reference for arguments recited, *post,* that:

1. Pupil enrollment during the ten-year period has increased but has decreased from the peak enrollment of 1970-71 in the past five years; and

2. The number of teaching staff members has increased during the ten-year period but, except for recent increases attributable to compensatory education, has remained stable for the past five-year period.

A further condensed summary of statistics with respect to (1) the number of classrooms used in the educational program, (1) the number of employees other than teaching staff members, (3) the number of school buses in operation and (4) budget appropriations during the ten-year interim period is set forth as follows:

STATISTICAL SUMMARY II

	1965-66	1970-71	1975-76
Classrooms in Use	33	35	35
Emergency Rooms in Use	-0-	4	3+
Other Employees	17	22+	25+
Buses Scheduled	10	11	11
Current Expense Costs	$433,667	$868,609	$1,425,885
Capital Outlay	-0-	9,182.50	26,962
Debt Service	88,267.50	36,537.50	32,100

(Petition of Appeal, Exhibits B and C)

Such statistics were of primary importance in the Board's determination on April 13, 1976 to request the County Superintendent to permit it to abolish the position of Superintendent. In the Board's view the important points of emphasis are:

1. The declining number of pupils in both enrollment and attendance during the years 1970-75;

2. The stable employment since 1970;

3. The small expansion of classroom facilities which has been required since 1965;

4. The stable transportation provision; and

5. The extent of the budgeting increase in the context of a relatively stable, or even declining, enrollment.

The Board's initial request to the County Superintendent set forth these reasons in detail. The County Superintendent rejected the reasons as an insufficient justification for an abolishment of the Superintendency in Plumsted Township and said in a letter of June 21, 1976 to the Board:

> "In response to your letter of May 9, 1976, I have studied your petition and exhibits.
>
> "I am enclosing a copy of the May 18, 1966 resolution of the Plumsted Board of Education requesting the creation of a superintendency for this district.
>
> "I have compared the reasons for the request in 1966 with the information you provided in exhibits A, B and C, and I find the following:
>
> "The professional staff has increased from thirty-five to forty-three and the total number of employees from fifty-two to seventy.
>
> "The average daily enrollment has increased from 748 pupils to 774 pupils.
>
> "The budget has increased from $433,667 to $1,425,885.
>
> "The Ocean County Planning Board has indicated that Plumsted Township is located in the area of the County which has the greatest potential for future commercial, industrial, and residential development since it contains vast areas of undeveloped land, and is distant from the coastal regions affected by the various environmental acts.
>
> "I would like to also indicate that additions to the Administrative Code in the last year have placed a greater work load and responsibility on the administrative staffs in all school districts and I refer specifically to the

requirements to develop and implement an Affirmative Action Program, develop a master plan of capital construction, rules and regulations to develop a Thorough and Efficient system of public schools, to name just a few.

"I, therefore, find that the need for a superintendent is greater today in Plumsted Township than it was in 1966 when it was created. I cannot recommend the abolishment of this position to the Commissioner of Education.

"Since this position has been vacant since March of 1976, I strongly recommend that the Board of Education fill it as quickly as possible.

"I have indicated to members of your Board of Education that I would, of course, be willing to meet with them to discuss this matter or any other concerns they might have."

Subsequent to this rejection of the Board's request, the County Superintendent recommended that the Commissioner direct the Board to fill the position of Superintendent of Schools pending a consideration of the controversy on its merits. The Commissioner's Order followed. *In the Matter of the Application of Plumsted Township, Ocean County, to Abolish the Position of Superintendent of Schools,* ordered August 5, 1976

The Board urges the Commissioner at this juncture to overrule the determination of the County Superintendent that a need continues to exist in Plumsted Township for the position of Superintendent and it advances a series of arguments in support of its contrary views. The Board maintains that the Commissioner must in his consideration of this controversy "***adopt a broader standard of review***" than that which might be required to review the action of a local board of education wherein the question is one concerned with a substitution of discretion by the Commissioner for that of the local board. In such a matter, the Board argues there is a presumption of validity which attaches to the action of the local board which is not present herein. The Board avers that *Stephens, supra,* mandates an "independent judgment" by the Commissioner in all controversies similar to this and that the decision of the County Superintendent set forth, *ante,* should be afforded no "***greater weight than it possesses by force of its own reasonableness***." (Board's Brief, at p. 5) The Board further disputes the merits of the County Superintendent's conclusion and avers that the growth in pupil population which was envisioned in 1965 has not materialized and may no longer stand as an argument in support of the need for a Superintendent. The Board also avers that a majority of its budget proposals have been defeated in recent years and that, in the context of declining enrollment, "***it seems fair to conclude that cost and the desire to save money was a factor in the Board's petition to abolish the Superintendency.***" (Board's Brief, at p. 12)

The County Superintendent continues his insistence that the superintendency is necessary in Plumsted Township and that his assessments and conclusions were and are reasonable. He avers "***that absent a clear abuse of

discretion or the commission of an arbitrary or unreasonable act, the Commissioner should not disturb the professional judgment of the state officials who possess first-hand knowledge***" of controversies such as the one, *sub judice*. (County Superintendent's Brief, at pp. 6-7) He avers that "***the facts presented in the petition led inexorably to the conclusion that if the position was needed in 1966 when the teaching staff numbered 30 and the total budget was $521,934.00, the position continued to be essential when the professional staff numbered 43 and the total budget is $1,484,947.00.***" (County Superintendent's Brief, at p. 7) The County Superintendent also asserts that recent responsibilities entrusted to local school districts are substantive ones and require more and not less administrative supervision of local school districts.

The Commissioner has reviewed all such arguments in the context of the statistical data, summarized *ante,* and concludes that the position of Superintendent of Schools in Plumsted Township is as much or more of a necessity in 1977 as it was deemed to be after almost one and one-half years of consideration in 1966. The statutory prescription in effect in 1966 clearly stated that the primary criterion for the initial establishment of the position of Superintendent should be just such necessity. *R.S.* 18:7-70 The decision of the Commissioner in *Stephens, supra,* stands for the principle that, once established, the position of Superintendent must be continued unless factual circumstance has been so altered that a diminution of administrative services is clearly warranted. The Commissioner finds no such circumstance herein. The one school building in Plumsted Township still houses a large enrollment in excess of 750 pupils. There are more than 60 employees. These facts alone attest to the absolute requirement that there be at least one full-time administrator, a school principal, to perform multitudinous duties necessary for an orderly day-to-day operation of the school and, additionally, that there be one central office administrator entrusted with duties equally numerous which a school principal or other administrator may not be expected or required to assume. The Commissioner so holds.

This holding is clearly consistent with recent enactments of the Legislature, with rules adopted by the State Board of Education, and with decisions of the courts. In both legislation and court decisions there may be found a firm mandate that today's school pupils shall be closely supervised, their programs of education evaluated, and that they shall be taught by well qualified and competent teachers in schools financed equitably to assure an equal educational opportunity available to all. *Robinson v. Cahill,* 70 *N.J.* 155 (1976); *N.J.S.A.* 18A:7A-1 *et seq.; N.J.A.C.* 6 Constitutional due process is required to be afforded to both pupils and teachers whenever their rights are threatened. *Goss v. Lopez,* 419 *U.S.* 565 (1975); *Donaldson v. Board of Education of North Wildwood,* 65 *N.J.* 236 (1974) Nontenured teachers are required to be observed in the performance of teaching duties "***at least 3 times during each school year***." *N.J.S.A.* 18A:27-3.1 *et seq.* All such mandates require an ever increasing amount of administrative time in all school districts except those wherein there have been a precipitate decrease in the number of pupils enrolled. There is no evidence in the instant matter of such a decrease and no justification for approval of the application which the Board has made.

Accordingly, the Petition is dismissed and the Board is directed to continue the position of Superintendent of Schools as a viable one which is required for the conduct of the educational program in the Township of Plumsted.

COMMISSIONER OF EDUCATION

August 9, 1977

Deal Education Association, Kathleen Chokov and Sandra Layton,

Petitioners,

v.

Board of Education of the Borough of Deal, Monmouth County ,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Morgan and Falvo (Peter S. Falvo, Jr., Esq., of Counsel)

For the Respondent, Mirne, Nowels, Tumen, Magee & Kirschner (Michael B. Kirschner, Esq., of Counsel)

Petitioners Chokov and Layton, nontenure teaching staff members in the employ of the Board of Education of the Borough of Deal, hereinafter "Board," are joined by the Deal Education Association in an avowal that the Board acted in an arbitrary, capricious and unreasonable manner when it terminated their employment in June 1976. They request reinstatement in such employment retroactive to the date of termination.

The Board denies all allegations against it and maintains that its controverted actions with respect to petitioners are legally correct.

A hearing was conducted on November 22, 1976 at the office of the Monmouth County Superintendent of Schools, Freehold, by a hearing examiner appointed by the Commissioner of Education. Prior thereto oral argument on petitioners' Motion for interim relief was conducted at the State Department of Education, Trenton. A decision on the Motion was held in abeyance pending completion of the hearing. Brief submission was completed on March 28, 1977. The report of the hearing examiner is as follows:

The principal facts of the instant controversy are not in contention and may be stated succinctly. Petitioners Chokov and Layton were properly certificated teaching staff members in the employ of the Board who were first informed by the principal in February or March 1976 that their respective positions might be abolished or altered in time requirements effective with the beginning of the 1976-77 academic year. At that time Petitioner Chokov was completing her third year as a teacher of art and Petitioner Layton had been employed for a period of almost two years as a teacher of mathematics.

Subsequently, on March 21, 1976, the Board did in fact resolve by a unanimous vote of the quorum at a special meeting called "***for the purpose of discussing the reduction of the teaching staff for the 1976-77 school year***" (R-1) that petitioners and three other teachers would not be offered new employment contracts and directed the principal to inform them of the action. Thereafter on March 26, 1976, the principal sent the following letter to petitioners:

> "On the 21st day of March, 1976, the Deal Board of Education adopted a resolution authorizing a reduction in the teaching staff for the 1976-77 school year.
>
> "I regret to advise you that your name was on the list of teachers who will not be reemployed for the school year 1976-77. Therefore, we are notifying you that the present 1975-76 school year will be your final year of employment in the Deal School and that employment will not be offered for the 1976-77 school year." (P-2, 3)

The action of the Board to reduce the number of teaching staff members was occasioned by decreasing pupil enrollment and by a budget reduction deemed appropriate by the governing body of the Borough of Deal following a defeat of the Board's budget proposal at the annual referendum. The principal testified that the number of pupils had decreased from approximately 340 pupils enrolled in grades kindergarten through eight in 1971 to 186 at the time of the hearing. (Tr. 33) He also testified that the budget reduction was $100,000. (Tr. 34) Such testimony was not refuted and indeed petitioners testified in effect that they had accepted the reasons for the Board's reduction in force as valid at the time its action was taken, and had not thereafter found reason to question it until June 9, 1976. (Tr. 10, 19)

On June 9, 1976, the Board acted at a regular meeting to employ two teachers other than petitioners to teach art and mathematics for the 1976-77 academic year. (PR-4) Such employment was on a half-time basis for each teacher and the prorated salaries were established respectively at $7,332 and $6,367 per year. The teachers employed for the positions were personally known to the Board as the result of long periods of prior service in the district. (Tr. 54-55) Petitioners had not been offered an opportunity to apply for the positions prior to the time of the Board's action to fill them. Subsequently, they were not afforded other reasons for their non-reemployment for the 1976-77 year.

The principal testified with respect to the Board's apparent decision to abolish each of the positions in its entirety. His testimony was, in effect, that it had been the Board's plan in March to completely abolish the positions but that such plan had been proven to be unworkable. (Tr. 41-56) He testified that a planned distribution of the duties of Petitioner Chokov as art teacher could not be accomplished and that other plans with respect to the duties of Petitioner Layton as a mathematics teacher had been found unsatisfactory. (Tr. 38-39) He further testified that in its decision to recreate the two abolished positions on a half-time basis the Board had made "value judgments" with respect to candidates to be employed to fill them. (Tr. 41) The principal testified that subsequent to the Board's decision there were no new or additional reasons afforded to petitioners for their non-reemployment and that they "***were left with the reason being the reduction in force." (Tr. 59)

The principal issue to be determined from such facts is whether or not the Board's action of June 9, 1976 to employ persons other than petitioners for half-time positions in art and mathematics was an action in good faith in the context of its action of March 21, 1976 to abolish the positions in their entirety as a reduction in force. While agreeing that the question of good faith is the primary issue, the Board also avers that "***it may become necessary to consider what rights nontenured teachers have if they are simply not renewed.***" (Tr. 3)

Petitioners aver that while it is axiomatic that a local board of education may decide to nonrenew the contracts of nontenured teaching staff members for succeeding school years, such decision must be pursuant to the statutory plan and in accordance with decisions of the Commissioner and courts. Petitioners cite in this regard *Donaldson v. Board of Education of North Wildwood,* 65 *N.J.* 236 (1974) and *Barbara Hicks v. Board of Education of the Township of Pemberton, Burlington County,* 1975 *S.L.D.* 332. Petitioners further aver that while a local board of education may, for reasons of economy or other just cause, effect a reduction in force, there was no reduction in fact in the circumstances herein. They contend also that:

> "***Any reduction in force, especially where positions are to be abolished, must be precluded [preceded] by a clearly defined and workable plan which must be known to be able (sic) of implementation before it is acted upon, positions abolished and teaching staff members RIF'd.***" (Petitioners' Brief, at pp. 15-16)

Petitioners cite the transcript in proof of the contention that no such "workable plan" had been formulated prior to the time on March 21, 1976, when the Board resolved to abolish their positions (Tr. 46 *et seq.*), and aver that therefore the purported position abolishments were not in good faith. Petitioners find support for their avowal in the events that followed and maintain that they, and not the teachers employed half-time on June 9, 1976, "***were required to be offered the half-time positions.***" (Petitioners' Brief, at p. 27) Such requirement occurs in petitioners' view because at that juncture "***the proposed RIF had been for all intents and purposes abandoned.***" (Petitioners' Brief, at p. 27) Petitioners find support for their contention that

the Board's controverted actions were a subterfuge by citing the fact that their salaries for the 1976-77 year in half-time employment would have totaled $11,864 whereas the salaries of the teachers actually employed totaled $13,699.

Petitioners claim to reinstatement is accompanied by a claim for retroactive salary benefits, contribution to the Teachers' Pension and Annuity Fund, and all other fringe benefits. In this latter category petitioners aver the Commissioner should restore retroactively the privilege of voluntary enrollment in the Washington National Disability and Life Insurance plan since without such restoration Petitioner Layton will be deprived of a coverage which is necessary to her because of illness. It is not disputed that since October 9, 1976, she has been totally disabled or that in the 1975-76 year she did voluntarily subscribe to the referenced insurance plan. (P-1, P-2)

The Board contends that the claims of Petitioner Layton are moot at least in part because of her disabling illness since October 1976. It further contends that even if this were not so there is no entitlement for a nontenure teacher to be afforded preference when an abolished position is recreated on a part-time basis. The Board avers that it has clearly been established that a local board of education has broad discretion in reduction of force matters and that there is a presumption of validity which attaches to such actions which may not easily be overturned. The Board cites *Werlock v. Board of Education of Woodbridge,* 5 *N.J. Super.* 140 (*App. Div.* 1949); *Downs v. Board of Education of Hoboken,* 12 *N.J. Misc.* 345 (*Sup. Ct.* 1934), aff'd *sub nomine Fletchner v. Board of Education of Hoboken,* 113 *N.J.L.* 401 (*E.&A.* 1934), etc. The Board further avers that the undisputed facts in the instant matter attest to a conclusion that the Board acted in good faith, that it acted properly within its discretion when it abolished petitioners' positions in March 1976 and that there was no obligation in June to offer part-time positions to petitioners. The Board requests dismissal of the Petition of Appeal.

The hearing examiner has examined all such arguments and the total record in this matter and finds no evidence of bad faith in the actions the Board took in 1976 to reduce its expenditures commensurate with a declining pupil population. This pupil population had been in a steady decline for some years and this fact plus a budget defeat caused the Board to schedule a special meeting for March 21, 1976 "***for the purpose of discussing the reduction of the teaching staff for the 1976-77 school year.***" (R-1) Pursuant to this stated purpose the Board acted at that meeting to reduce its teaching staff by five positions and to nonrenew the contracts of five nontenure teachers. Three of these teachers have not contested the action. Petitioners do contest it on the basis of the fact that subsequently, and while petitioners were still actively employed in the district, two other teachers were employed for positions in the 1976-77 year which required the performance of duties similar to theirs.

The hearing examiner cannot find from a juxtaposition of such facts, however, that the Board's action of March 21, 1976, was one taken in bad faith or as a subterfuge. A reduction in total salary costs for the two positions was ultimately effected. The Board was under some stress in March to make firm

decisions with respect to future staffing of its schools. Nontenure teachers had to be notified of the employment status for the ensuing year. *N.J.S.A.* 18A:27-10 The voters had rejected the school budget in the annual referendum. Confronted with such facts the Board's action of March 21, 1976, was a reasoned one which involved a reduction of personnel and a restructuring of staff assignments. The validity of the action as one of good faith emerges from the fact that the principal did then attempt to implement it in its entirety but was not successful.

It was only at that juncture that it became apparent that new staffing arrangements were required. While the tardiness of the discovery that this was so may be faulted it cannot be used to substantiate an argument that the Board acted in bad faith with respect to petitioners. The hearing examiner so finds.

Having so found, it follows that the Board was then free and in fact obligated to pursue other alternatives to explore new courses of action, employ personnel for part-time positions, or experiment with other staffing arrangements. It does not follow that petitioners in June 1976, or in August, were entitled to first refusal or seniority privileges with respect to these alternative possibilities. Such privileges are given by statutory plan to tenured teaching staff members but not to those who are nontenured professional employees of local boards of education. *N.J.S.A.* 18A:28-9

Accordingly, for the reasons hereinbefore stated the hearing examiner recommends that the Petition be dismissed and finds no reason to consider the other arguments with respect to the requested relief.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and the exceptions, and reply thereto, filed respectively by petitioners and the Board. Petitioners aver that the series of events and actions which comprise the record herein stand as convincing evidence that the Board's decision not to renew their contracts was an arbitrary, capricious and unreasonable one contrary to law and administrative procedure. They assert that the principal question is concerned with whether a reduction in force was in fact made by the Board and aver that it was not. They further aver that the two teaching staff members employed by the Board in June 1976 were employed in positions identical to those the Board informed petitioners were abolished and thus that the reasons afforded petitioners in March 1976 were spurious and an evidence of bad faith.

Petitioners also maintain that the Board altered its reasons for not reemploying them but "***never bothered to advise Petitioners that they, in fact, had made other provisions based upon said changed reasons.***" (Petitioners' Exceptions, at p. 2) The Board avers that it is clear from the record that the Board's "***March decision to reduce force was within the Board's authority, wholly warranted by the existing circumstances and thus in total good faith.***" (Board's Reply, at p. 2) The Board further maintains that its June

decision to revise plans was a necessary and proper one and that the real issue in the instant matter emerges from the claim of petitioners to preferential hiring subsequent to the June revision.

The Commissioner cannot agree with this latter statement of the principal issue but determines instead that the real issue is, as petitioners claim, concerned with whether their positions were in fact abolished in good faith by the Board. The Commissioner determines that they were not so abolished and thus that the reasons afforded petitioners for their non-reemployment were spurious and not the true reasons. He further determines that the Board's action of June 9, 1976 to employ persons other than petitioners for positions which petitioners had been told were abolished was patently unfair and contrary to the clear statutory mandate that nontenure teachers must be afforded timely notice of non-reemployment and a statement of the reasons upon request. *N.J.S.A.* 18A:27-3.1 *et seq.*

A concise review of the pertinent facts will attest to the correctness of these determinations.

Petitioners, as nontenured teachers, were entitled to notice by April 30, 1976 of their contractual status for the 1976-77 academic year and they received it in a letter from their principal on March 26, 1976. *N.J.S.A.* 18A:27-10 This letter clearly stated that they would not be reemployed. The reason given for such determination was purportedly a reduction in the teaching staff. (PR-2, 3) Petitioners accepted the reason afforded them as a valid one and no other reason was ever offered. In June 1976, however, without notice to petitioners, the Board reestablished the positions it had abolished in March and appointed persons other than petitioners to fill them. The Commissioner finds no significance in the fact that the positions as reestablished were for less than full-time employment. They required the same certification and the same performance of duties as the positions petitioners had held. They must be similarly recognized. The Commissioner so holds. *Josephine DeSimone v. Board of Education of the Borough of Fairview,* 1966 *S.L.D.* 43 Thus, the reason afforded petitioners in March 1976 for their non-reemployment was invalid and spurious. Their positions were not abolished. Petitioners were not offered them nor even afforded an opportunity to apply. The Board's actions in the period March-June 1976 may be classified as capricious and must be set aside.

Accordingly, the Commissioner holds that petitioners were not afforded the rights to which they were entitled by *N.J.S.A.* 18A:27-3.1 *et seq.* and therefore they were entitled to employment for the 1976-77 year as teaching staff members with the same terms and conditions but with such increases in salary as may be required by law or policies of the board of education as adjusted for the half-time employment. *N.J.S.A.* 18A:27-11 The Commissioner does not construe such phraseology to connote an entitlement to reinstatement on a permanent basis or to the costs of voluntary coverage in a specific, private disability and life insurance plan, as petitioners urge, since alternative coverages were and are available. He does construe the phrase to include all of the salary and fringe benefits provided with Board funds to which petitioners would have

been entitled and he directs the Board to furnish petitioners such emoluments for the 1976-77 academic year.

COMMISSIONER OF EDUCATION

August 11, 1977

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, August 11, 1977

For the Petitioners-Appellees, Morgan and Falvo (Peter S. Falvo, Jr., Esq., of Counsel)

For the Respondent-Appellant, Mirne, Nowels, Tumen, Magee & Kirschner (Michael B. Kirschner, Esq., of Counsel)

The State Board of Education orders that the decision of the Commissioner of Education be stayed pending determination of the matter.

December 7, 1977
Pending

Vickie Donaldson and George Branch,

Petitioners,

v.

Board of Education of the City of Newark, Essex County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Thomas & Williamson (Daniel A. Williamson, Esq., of Counsel)

For the Respondent, Pickett & Jennings (Robert T. Pickett, Esq., of Counsel)

Petitioners, members of the Board of Education of the City of Newark, hereinafter "Board," have advanced a Petition of Appeal which alleges, *inter alia,* that there were violations of the provisions of the Open Public Meetings Act, *N.J.S.A.* 10:4-6 *et seq.,* by the Board at its meeting of June 16, 1977 with respect to the certification of charges against its Executive Superintendent. It is further alleged that the Board at a subsequent meeting of June 23, 1977 did illegally suspend its Executive Superintendent and did immediately thereafter illegally appoint an Acting Executive Superintendent contrary to the provisions of *N.J.S.A.* 18A:17A-2. They request that the Commissioner of Education grant relief, *pendente lite,* by staying these controverted actions of the Board.

An oral argument pursuant to this request for relief, *pendente lite,* was conducted at the State Department of Education, Trenton, on July 11, 1977, and it was stipulated that allegations contained in the Petition with respect to the preferment of charges against the Executive Superintendent and to his suspension were being pursued in Superior Court and were not now before the Commissioner. (Tr. 44-45) It was further stipulated that the only remaining allegation before the Commissioner is that concerned with the propriety of the appointment of an Acting Executive Superintendent in the context of the statute *N.J.S.A.* 18A:17A-2 which provides:

> "No person shall be appointed, or act as, or perform the duties of, executive superintendent, unless he holds an appropriate certificate as prescribed by the State board; provided, however, that in addition to State certification requirements the executive superintendent shall meet additional criteria as shall be determined by the board of education. Such additional criteria for the executive superintendent shall be determined and set forth and the public shall be given notice of such criteria prior to the start of the selection process."

The Board does not deny that at the time of its appointment of an Acting Executive Superintendent on June 23, 1977, the person appointed did not hold

an appropriate certificate for the position. The Board avers, however, that since the time of that appointment an appropriate certificate has been obtained and that any procedural defect would be cured by an action of the Board scheduled for July 13, 1977 to ratify the prior appointment. It further avers that no one in the United States except the incumbent it resolved to suspend on June 23, 1977 possessed the certification to serve as Executive Superintendent and that there was a pressing and immediate need on that date to appoint a person to such position.

The Commissioner has since been apprised of the fact that the Board did meet on July 14, 1977 and did affirm its appointment of an officially certified Acting Executive Superintendent. This affirmance does, in fact, render the Petition of Appeal moot in this respect and there are no legal grounds for intervention. The Commissioner finds no compelling necessity to address this moot issue.

Accordingly, the request of the Petition for relief, *pendente lite,* with respect to the appointment of an Acting Executive Superintendent is dismissed. Other allegations contained in the Petition are properly before a Court of appropriate jurisdiction and need not be considered by the Commissioner. The Petition is hereby dismissed.

COMMISSIONER OF EDUCATION

August 16, 1977

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

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Samuel E. Appel, *Pro Se*

For the Respondent, M. Allan Vogelson, Esq.

Petitioner, a candidate for a seat on the Board of Education of the City of Camden, hereinafter "Board," at the annual school election held March 29, 1977, alleged in a letter of April 1, 1977 to the Commissioner of Education that there were a number of procedural irregularities in the conduct of the election. He requested an inquiry with respect to such alleged irregularities. An inquiry was conducted by a representative of the Commissioner on April 26 and May 10, 1977 at the office of the Camden County Superintendent of Schools, Pennsauken. The report of the Commissioner's representative follows:

At the annual school election in the City of Camden a total of six candidates stood for three full terms of three years each on the Board and at the conclusion of the election tally the announced winners were Candidates Cupparo, Torres and Milliken. Current expense and capital outlay proposals were also announced as approved by the voters.

The accuracy of these tallies is not questioned by Candidate Appel and he does not request that the election be set aside. He did originally request the inquiry to examine a total of six alleged irregularities and subsequently supplemented such request with respect to other allegations concerned with the accuracy of the poll lists. The principal allegations are set forth in their entirety by Candidate Appel, with reference to applicable statutes, as follows:

"***

1. 18A:14-42 – *NO* written notice was mailed to each candidate giving the time and place when the machines could be examined.

2. 18A:14-47 – The day before the election one of the polling places was changed and consolidated with a polling place at least one mile away. Almost all of the 273 registered voters in Ward II – District B knew nothing of this last minute change. This decision violates 18A:14-47 and 18A:14-40.

3. 18A:14-72, 73 – Loitering inside polling places and just outside the door of polling places occurred at Yorkship School, Bonsall School and Sewell School.

   Electioneering, contrary to N.J.S.A. 18A:14-72, 73, 81 took place at Bonsall and Sewell Schools.

4. 18A:14-99 – The Title I instructional assistants were told by an Assistant Superintendent that if they wanted to get a raise they should get out the vote. 'You know who the teachers are voting for.' This meeting took place the day before the election.

5. 18A:14-6 – Too many election officers were appointed at Bonsall – 13B (13 election officers for 12 Copy Register Books): Bonsall – 7-C (6 election officers for 4 Copy Register Books); Lincoln School (7 election officers for 6 Copy Register Books); Hatch School (6 election officers for 4 copy Register Books); Sharp School (8 election officers for 4 Copy Register Books); and Yorkship School (13 election officers for 12 Copy Register Books).

6. 18A:14-20 – The statute was violated at the Parkade Building, the polling place for Ward 2 and at Sewell School, the polling place for Ward 10.***"

Testimony at the hearing was concerned with these allegations. Candidate Appel testified he had received no notice that the voting machines were ready

for inspection but had been told that the notification of such readiness from the County Election Board had been tardy. (Tr. I-8) He testified that the notice of the election had clearly stated that polling places for the second ward would be located in the Powell School and the Parkade Building but that on election day all voting for the second ward was consolidated in the Parkade Building. (Tr. I-9, 21) Candidate Appel testified he had observed electioneering "***right outside the school door***" at the Bonsall School and that persons stationed there were distributing election cards and signs. (Tr. I-12) He testified that there were excessive numbers of election officers at both the Yorkship School and Hatch School. (Tr. I-16) Candidate Appel testified further that at the Parkade Building and the Sewell School there was general "unpreparedness" for the election at the time the polls were scheduled to open, basic furniture was lacking, and election officials "***didn't seem to know what they were doing.***" (Tr. I-17, 24) He testified he had "heard" that the Assistant Superintendent, on the day before the election, had attempted to "***influence people as to the way they should vote.***" (Tr. I-14, 23) He said that the polling place at the Sewell School was dark and crowded and the election process difficult. (Tr. I-25)

The Board Secretary admitted that notice to inspect the voting machines was not afforded candidates but testified that this fact was attributable to a lack of notification of machine readiness by the County Election Board. He testified that it was usual procedure for the County Election Board to notify him of this readiness and for him then to notify the candidates. (Tr. I-31-32) The Board Secretary also admitted that, contrary to the published notice, both the Parkade Building and Powell School polling places had been consolidated into one polling place but he attributed this to an action of the County Election Board without prior notice. (Tr. I-34) He testified that school officials had "***taken every precaution to notify people where they would be voting.***" (Tr. I-34, 36) He said that he did not know of "***any kind of problems***" which the change had caused. (Tr. I-35) He testified the Board had employed election workers in prior years and this year on the basis of a judgment about the "***particular number we felt could do a job.***" (Tr. I-41) He further testified it was difficult to employ election workers at the small wage provided and to schedule training sessions they could attend. (Tr. I-45)

An appointed election official at the Parkade polling place testified there were no tables, chairs or flags when the polls were scheduled to open and that workers had to work from a high window sill. (Tr. I-48-49) She testified that chairs and tables did not finally arrive until approximately 3:30 p.m., one and one-half hours after scheduled poll opening, and then only after the Superintendent had intervened to secure them from the City Hall. (Tr. I-49) She testified that she did not learn until the polls opened that there had been a consolidation of polling places. (Tr. I-50) She said that no one had been denied the right to vote despite the inconvenience. (Tr. I-58) She testified she had not received notice of a training session for election workers and had not attended one. (Tr. I-64) She said that at the time of poll opening there was no poll list available for voter signatures. (Tr. I-66)

A challenger at the Sewell School testified the Judge of Elections there was appointed against her will and "***had a chip on her shoulder.***" (Tr.

I-68) She testified that the polling place was a "horrible" one; dark, crowded, and with an inadequate number of tables. (Tr. I-69-70) She testified persons were stationed at the school door distributing election cards, that the Superintendent had appeared to look at the voting machine and that a school principal was "in and out" a "number of times." (Tr. I-73)

A second challenger testified there was a man loitering about 20 to 25 feet from the polling place and she had "***chased him to 100 feet.***" (Tr. I-82)

A third challenger testified that two persons including the Superintendent had entered the polling place without intention to vote and were in fact loitering. (Tr. I-84) She said the Superintendent had looked inside the voting machine, waved and left. (Tr. I-86)

The Board Secretary, recalled for further testimony, said he had called certain election officials to his office for briefing. (Tr. I-93) He said that there was a shortage of voting machines and that securing an extra one or a replacement was difficult. (Tr. I-95) He testified that school officials had been late in getting to the Parkade Building. (Tr. I-94)

The Superintendent testified he had been going to the polls for twenty years "***just to look at the number of votes***." (Tr. I-104)

A challenger at the Yorkship School testified that he had observed electioneering activities and a number of persons in social conversation near the voting machine, talking, laughing and "***having a good time.***" (Tr. II-5) He testified he had observed a "ward leader" identified only as Mr. Powell, "***hanging out in the polling place for at least an hour***." (Tr. II-7) He testified further that he had seen a councilman at or near the exit door "***for at least a half an hour***" (Tr. II-14) and that a Board member had come to the polling place in the evening and sat near the voting machine. (Tr. II-16)

The representative has examined all such testimony and the record of the hearing and finds that allegations 1, 2, 5 and 6 are true in fact and that allegation 3 may be true in fact. There was no written notice afforded candidates prior to the election that machines were ready to be examined. There was a consolidation of two polling places without prior notice. There was evidence of loitering and/or electioneering at the Yorkship, Bonsall, and Sewell Schools. There were an excess number of persons appointed as election workers. The Parkade Building and the Sewell School were not properly equipped for voting as the polls opened and the Sewell School was inadequate as a polling place.

These findings are clearly grounded on the record as set forth in testimony although there are mitigating factors which must be afforded weight. County Election Board officials did not notify school officials of machine readiness for inspection and their action to consolidate voting registers was apparently a unilateral act without prior consultation. If fact, this lack of prior consultation between school and Election Board officials is of great moment herein and should be the subject of study by the Board. Procedures need to be developed which obviate a repetition of such violations as here occurred.

The Board should also be advised to remedy conditions as reported, *ante,* at the Parkade Building and the Sewell School. Even with the best of workers and properly calibrated machines, the election process may easily be rendered a farce if the lighting is inadequate or if there is a lack of such basic equipment as tables and chairs.

Candidate Appel's supplementary allegations were concerned with the poll lists and a comparison of them with the signature copy registers. The Commissioner's representative's findings with respect to such allegations are not definitive in many respects since verification was rendered difficult by a lack of conformity between poll list ward numbers and those of the Election Board. In fact, in many instances a check proved impossible. The specific findings are that:

1. In the polling list for Ward 10, District B, there is no name or address for voting ballot 407, no address for ballots 413, 414, 074 and 075.

2. In the polling list for Ward 7, District A, there is no signature of a voter on ballots 1, 2, 4, 6, 8, 9, and 10.

3. It was alleged that Jose R. Burgos (ballot 25) and Ruth Rolax (ballot 34) were not registered voters in the copy register book. (Ward 3, District A) The Commissioner's representative found such registrations in the registry book of the County Election Board designated 3-3.

Allegations of a lack of similarity in handwriting between the poll list and the registry book cannot be confirmed. Candidate Appel sets forth the following requests for relief with respect to his allegations:

***

"1 - That simple instructions be prepared with reference to statutes on how to handle loitering; electioneering; rights of challengers (observing voters sign-in, watching the comparisons); duties of the election judge, inspector and tellers; and the duties and responsibilities of the chief election officer. These instructions to be submitted to the Commissioner of Education 90 days in advance of election for his approval/correction.

"2 - That a meeting be held for all election officers; challengers and candidates at least 10 days before the election in order to receive written and verbal instructions on the proper conduct of the school election.

"3 - That the Board Secretary certify to the Commissioner that such a meeting (#2) took place and send copies of all instructions that were delivered at said meeting.

"4 - That the Board Secretary notify candidates where machines can be examined and certify to the Commissioner said notification.

"5 - That the Board Secretary certify to the Commissioner by sending him a copy of: (1) Notice of Election: contents, posting and publication;

(2) Notice to the County Board of Elections on number of machines to be used and the polling places; and (3) Notice to the County Clerk on the preparation of the Signature Copy Registers.

"6 - That the Board Secretary certify to the Commissioner a copy of the appointed Election Officers in such manner to facilitate comparison between the number of clerks and the number of Copy Register Books."

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed and considered the report of his representative and the findings and conclusions contained therein. It is clear from the report that the annual school election in Camden in March 1977 was marked in some instances by confusion, that preparation for it was incomplete and that persons illegally loitered near the polling places, contrary to law. While Candidate Appel does not seek to void the election results, he does seek to ensure that the irregularities and illegalities evidenced herein will not be repeated.

The Commissioner must state for the record again that he abhors all such irregularities as subdivisions of the electoral process which act to thwart the will of the people and he repeats some prior admonitions as a point of reference to the findings herein.

It is axiomatic that a great responsibility rests with school officials for the proper conduct of all elections. Problems such as those recited, *ante,* concerned with a lack of simple furnishings, or with communication with county officials, or with a lack of understanding of the duties which must be performed by election officials in the voting process must be anticipated if they are to be avoided.

As the Commissioner said *In the Matter of the Ballots Cast at the Annual School Election in the Borough of Fort Lee, Bergen County,* 1959-60 *S.L.D.* 120:

"***Boards of Education have a responsibility to see that school elections are conducted in strict compliance with the statute. Informal, loose procedures and the ignoring of statutory provisions have no place and cannot be condoned in the holding of any school election.***" (at 120)

While the statutory provision for an advertised notice of polling places and of machine readiness for inspection were, according to school officials, attributable to County Election Board officials, a more careful preparation and coordination of efforts would have avoided the ensuing problem.

Similarly, a more careful preparation of plans with respect to polling places and the appointment of election officials and their training would have avoided other problems. Such officials also have a great responsibility for the

integrity of elections. They must be familiar with all facets of their duties and responsibilities and the specific statutes which control loitering, electioneering, and other violations. The Commissioner had occasion to address some aspects of the duties required of such election officials *In the Matter of the Annual School Election Held in the Township of Hillsborough, Somerset County*, 1965 *S.L.D.* 74 wherein he said:

> "***The Commissioner must point out that once a school election has been declared open the responsibility for its conduct rests with the election board appointed for that purpose. Local law enforcement officials have the right and duty to preserve order and to exercise authority when there is a violation of the election laws. That authority does not extend, however, to intervention in controversial questions or matters of judgment with respect to the election proceedings. Such decisions lie within the discretionary authority of the officials appointed to conduct the election. This would include what signs or instructions, if any, are permitted.***" (at 76-77)

In the Matter of the Annual School Election Held in the Township of Dover, a Constituent District of the Toms River Regional School District, Ocean County, 1967 *S.L.D.* 52, he said:

> "***It is plainly the duty of election officials to see to it that the election is conducted in an orderly manner, that there is no interference with the voting or canvassing of the votes and that there is no electioneering in the building in which the election is being conducted. *R.S.* 18:7-35, 18:7-40 Such activities fall within the discretion of the election officials who may require unauthorized persons to leave the polling place.***" (at 55)

The Commissioner has also previously expressed his position that partisan politics have no place in school elections. *In the Matter of the Annual School Election Held in the Southern Regional High School District, Ocean County*, 1964 *S.L.D.* 47, 48

In considering the irregularities in the instant matter the Commissioner deems it appropriate to direct the Camden County Superintendent of Schools to confer with the Board of Education of the City of Camden and its secretary, at a time well in advance of the next school election, to review the plans and preparations which the Board has made. It is so directed. The Commissioner further directs that a copy of this report and decision be forwarded to the Camden County prosecutor for possible investigation and prosecution of alleged violations of the statutes with respect to interference with the conduct of school elections *N.J.S.A.* 18A:14-65; loitering, *N.J.S.A.* 18A:14-72; electioneering, *N.J.S.A.* 18A:14-73; and distribution of literature, *N.J.S.A.* 18A:14-81. Such offenses carry penalties of a fine or imprisonment which may not be levied by the Commissioner.

COMMISSIONER OF EDUCATION

August 16, 1977

In the Matter of the Tenure Hearing of Thomas L. Puryear, School District of the City of Newark, Essex County.

COMMISSIONER OF EDUCATION

DECISION

For the Complainant Board, Pickett & Jennings (Robert T. Pickett, Esq., of Counsel)

For the Respondent, Thomas L. Puryear, *Pro Se*

Tenure charges of insubordination and conduct unbecoming a teaching staff member were certified to the Commissioner of Education by the Board of Education of the City of Newark, hereinafter "Board," asserting that the charges would be sufficient if true in fact to warrant respondent's dismissal as a guidance counselor. Procedural matters regarding respondent's eligibility for his salary pursuant to *N.J.S.A.* 18A:6-14, the fact that a hearing in this matter was not commenced within sixty days after the filing of charges as set forth in *N.J.S.A.* 18A:6-16, and the Board's failure to follow the provisions of *N.J.S.A.* 18A:6-11 will be discussed, *post.*

A hearing in this matter was conducted on November 18, 1976 in the office of the Essex County Superintendent of Schools, East Orange, before a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

The Complainant Board filed tenure charges against respondent on March 25, 1976, and was notified by respondent, then represented by an attorney, that the charges were not filed in accordance with the tenure statute, *N.J.S.A.* 18A:6-11. The Board thereafter filed amended charges against respondent on June 18, 1976. Respondent's counsel replied by letter dated June 30, 1976, that the amended charges did not comply with *N.J.S.A.* 18A:6-11 in that the Board did not first submit its evidence under oath to respondent prior to certifying its charges to the Commissioner. The amended charges included "Employee's Statement of Position," Thomas Puryear's response to the Board's charges. Thereafter, the Commissioner was notified by respondent's counsel that he had been released and that respondent would proceed, *pro se.* (Letter of July 12, 1976)

An oral argument between respondent and the Board attorney was held before the hearing examiner on November 3, 1976, and subsequently an agreement was reached regarding respondent's entitlement to his salary pursuant to *N.J.S.A.* 18A:6-14. It was agreed that respondent is entitled to his salary beginning on the 121st day following his suspension on June 18, 1976, continuing until the final resolution of this matter by the Commissioner. The hearing examiner has been notified by Board counsel that respondent is being paid according to the statutory prescription; therefore, the salary matter has been resolved. *N.J.S.A.* 18A:6-14

The oral argument also included respondent's demand for dismissal of all charges and reinstatement in his former position because the Commissioner had not commenced his hearing within sixty days as set forth in *N.J.S.A.* 18A:6-16. The delay in commencing the hearing in this matter was caused by several factors including the unavailability of dates suitable to both counsel, a change of office by Board counsel resulting in delayed communications, requests for postponements and oral argument on legal questions, *ante.*

The hearing examiner cannot conclude that unreasonable delay occurred herein. It is to be noted that *N.J.S.A.* 18A:6-16 was enacted as *L.*1960, *c.*136 § 7 (*N.J.S.A.* 18:3-29). Subsequently, *N.J.S.A.* 18A:6-14 was amended effective February 10, 1972, so as to provide full salary for employees during periods of protracted litigation. As shown earlier respondent has been receiving his full salary pursuant to *N.J.S.A.* 18A:6-14; therefore, the hearing examiner can recommend no further relief in this regard. Nowhere is it suggested that the relief for noncompliance with the sixty day period in which to commence a hearing is dismissal of the charges and reinstatement of the employee. Such a remedy might cause reinstatement of unfit and unworthy persons because of unforeseen and unavoidable circumstances or technical violations.

The hearing examiner recommends, therefore, that respondent's demand for reinstatement for noncompliance with *N.J.S.A.* 18A:6-16 be dismissed.

Finally, as regards the procedural matter, respondent did not press his former counsel's assertion that the charges were not filed after the evidence in support of the charges was submitted under oath. Instead, respondent filed a statement setting forth his position with respect to those charges and agreed to proceed with a plenary hearing on those charges.

The specifics of the charges against respondent are that for a period of time between March and December 1975, respondent accepted his full salary from the Board while serving full time as the director for a private school in the City of Newark. The Board asserts that respondent feigned illness so that he could be absent and attend to his duties at the private school. (Petition of Appeal; Letter of December 9, 1976 from Assistant Executive Superintendent of Schools)

The record reveals that respondent was interviewed in January 1975 for the position of Director at St. Timothy's House, a home for boys in the City of Newark. He was employed there beginning March 3, 1975, after advising the President of the Board of Trustees at St. Timothy's that he would resign his position in Weequahic High School as a guidance counselor. It was explained to respondent that the new position was a full-time position and that he would have to be available twenty-four hours a day. (Tr. 60-63) Respondent accepted and signed the new contract for the position at St. Timothy's. (B-14)

The head guidance counselor testified that during the spring of 1975 he became aware of a pattern of absences by respondent and that he was not doing his assigned work. (Tr. 5-13) The principal testified that he discussed with

respondent his concern about his frequent absences. He testified that respondent told him that he had a Board-approved paternity leave and, on another occasion, told him that he was entering the hospital for extensive tests and did not know when he would return. The principal testified further that respondent advised him again later in the school year that he would be absent for a period of time. (Tr. 35-41) Teachers who are absent for periods of time must document their illnesses, or offer acceptable reasons; nevertheless, the principal testified that respondent has never justified any of his absences as required by the Board. (Tr. 38)

The record shows that respondent was absent in March, April, May, and June for fourteen, eighteen, twenty-one, and nineteen days respectively. (B-3, 4, 5, 6) The hearing examiner points out that twenty to twenty-two days represents the average number of days in a school month, and that some months are shorter because of special vacation periods, such as the Labor Day, Thanksgiving, Christmas, and Easter recesses. It must be concluded, therefore, that respondent was absent most of the possible days school was in session at Weequahic High School in March through June 1975.

Beginning in September 1975 respondent's attendance record appears improved. (B-7, 8, 9, 10) The secretary in charge of teacher attendance testified that for most of the time in September through December, respondent signed in, but he did not sign out as required. (Tr. 25-28) She testified, also, that on many occasions respondent could not be found in the school building. (Tr. 32) The inference is that he signed in and thereafter left the building.

Three special school investigators/attendance officers for the Board testified that they were assigned to verify rumors that respondent was employed at St. Timothy's. (Tr. 50, 54, 58) Each testified that he observed Thomas Puryear bringing groceries into St. Timothy's on October 2, 1975. (Tr. 55-56; B-13)

Respondent admits deceiving the Board and the Trustees at St. Timothy's as charged. (Respondent's Statement of Position, C-1; B-17; Tr. 74-78) He chose not to attend the hearing despite the hearing examiner's urging that he do so. (Tr. 1-4)

In summary the hearing examiner finds and recommends the following:

1. The amended charges in this matter were received by the Commissioner on June 22, 1976. An Answer was received thereafter on July 1, 1976, and a scheduled conference for July 23, 1976, was postponed by mutual agreement of the litigants. (Letter of July 19, 1976) Oral argument on the issue of retroactive salary pursuant to *N.J.S.A.* 18A:6-14 was conducted on November 3, 1976. The salary matter was resolved shortly thereafter, and a conference was held on the same day regarding the tenure charges. The hearing was conducted on November 18, 1976.

The hearing examiner finds in the record that attempts to require a hearing within sixty days were thwarted by circumstances beyond the control of the

Commissioner and that the matter was heard as soon as possible. He finds further that respondent is receiving his full salary, less the first 120 days following his suspension, pursuant to *N.J.S.A.* 18A:6-14. Finally, there is no showing that the remedy for failure to conduct a hearing within sixty days of certification of charges is reinstatement.

The hearing examiner recommends that respondent's Motion to Dismiss the charges and be reinstated in his position be denied.

2. The hearing examiner finds that the Board did not fully comply with the provisions of *N.J.S.A.* 18A:6-11 in that the evidence supporting the charges was never certified under oath and presented to respondent as required by statute. Nevertheless, respondent does not challenge this procedural error, and he filed his statement in response to the Board's charges. He later admitted his complicity as charged. (C-1; Tr. 1-4)

3. The hearing examiner finds that respondent willfully deceived the Board by feigning illness so that he could attend to his duties at St. Timothy's House, and in doing so, he wrongfully avoided his commitment to his pupils in Weequahic High School. He received full salaries from the Board of Education of the City of Newark, and the Board of Trustees of St. Timothy's House, from March through December 1975. (Tr. 66-67; B-15; Letter of December 9, 1976)

The hearing examiner finds that the charges are true in fact. The Commissioner will determine whether they are sufficient to warrant respondent's dismissal or a reduction in his salary and whether he should forfeit his teaching certificate according to the provisions found in *N.J.S.A.* 18A:26-10.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record in the instant matter, including the report, findings, and recommendation of the hearing examiner, and the exceptions filed by the parties.

The Board did not comply fully with *N.J.S.A.* 18A:6-11 in that the evidence supporting the charges was never certified under oath and presented to respondent as the statute requires. A primary purpose of this statutory requirement is to prevent individuals from filing frivolous charges and harassing employees. Such is not the case herein. At the conference between the litigants on November 3, 1976, this matter could have been rectified on respondent's demand. The conference agreements show that respondent argued only for his back pay and his salary entitlement pursuant to *N.J.S.A.* 18A:6-14. He had already filed his statement in response to the Board's charges, admitting that they were in fact true, but expressing his belief that extenuating circumstances in this matter should bar his dismissal as a Board employee. Respondent, in effect, waived his right to have the charges submitted to him under oath, charges he admitted were true in his Employee's Statement of Position. (Attached to Answer to Amended Charges.)

Further review of this procedural irregularity is unjustified and would serve no useful purpose. The record does not disclose any lack of due process afforded respondent, considering especially his early admissions concerning the veracity of the charges.

The Commissioner determines, also, that every reasonable effort was made to begin the hearing within sixty days of the filing of charges as required by *N.J.S.A.* 18A:6-16. As shown, *ante,* unavoidable circumstances prevented this occurrence. Nevertheless, respondent received his back pay and continued to receive his full salary during this litigation pursuant to *N.J.S.A.* 18A:6-14, which requires that he be paid in full, less mitigation of other earnings beginning on the 121st day following the certification of charges.

In this regard, respondent has been caused no harm, and there is no further relief to which he is entitled. Therefore, respondent's Motion to Dismiss the charges and to be reinstated in his position is hereby denied.

Respondent has admitted that the charges filed against him by the Board are true and he further admits deceiving the Board and the Trustees of St. Timothy's House. (Respondent's Statement of Position; C-1; B-17; Tr. 74-78) The Commissioner determines that respondent willfully and fraudulently deceived the Board by feigning illness so that he could attend to his duties at St. Timothy's House. In so doing he wrongfully disregarded his commitment to the Board and to his pupils at Weequahic High School. He received full salaries from the Board of Education of the City of Newark and the Board of Trustees of St. Timothy's from March through December 1975. (Tr. 66-67; B-15; Letter of December 9, 1976)

The Commissioner determines that respondent's conduct in the instant matter constitutes a serious breach of the professional, ethical, and moral standards demanded of teaching staff members. Respondent fraudulently accepted his salary from the Board for services not rendered and for services he did not intend to render. *In the Matter of the Tenure Hearing of Peter J. Deer, Board of Education of Palisades Park,* 1975 *S.L.D.* 752; *In the Matter of the Tenure Hearing of Michael A. Pitch, School District of South Bound Brook,* 1974 *S.L.D.* 1176, aff'd State Board 1975 *S.L.D.* 763, rem. N.J. Superior Court, Appellate Division, September 11, 1975, decision on remand 764, aff'd Docket No. A-2671-74 New Jersey Superior Court, Appellate Division, April 2, 1976 (1976 *S.L.D.* 1159)

The Commissioner addressed a similar issue *In the Matter of the Tenure Hearing of Ronald Puorro, School District of the Township of Hillside,* 1974 *S.L.D.* 755, aff'd State Board of Education 1975 *S.L.D.* 1120 as follows:

> "***[T]he Commissioner finds it reprehensible for any teaching staff member to leave his assigned post of duty, and those pupils entrusted to his care, without a proper authorization.***." (at 761)

As was said *In the Matter of the Tenure Hearing of Joseph A. Maratea, Township*

of Riverside, 1966 *S.L.D.* 77 aff'd State Board of Education 106, aff'd Docket No. A-515-66 New Jersey Superior Court, Appellate Division, December 1, 1967 (1967 *S.L.D.* 351):

> "***The Commissioner is assiduous to protect school personnel in their employment when they are subjected to unfair or improper attacks or when they are unable to perform effectively because of conditions not of their own making or beyond their control. An employee is not entitled to the protection of tenure, however, when, by his own acts or failures, he creates conditions under which the proper operation of the schools is adversely affected. When the responsibility for the conditions unfavorable to the effective operation of the schools rests with the employee then, the Commissioner holds, the protection of tenure is forfeit.***" (at 106)

Similarly, the Commissioner has said *In the Matter of the Tenure Hearing of Ernest Tordo, School District of the Township of Jackson,* 1974 *S.L.D.* 97 that:

> "***Teachers are public employees who hold positions demanding public trust, and in such positions they teach, inform, and mold habits and attitudes, and influence the opinions of their pupils. Pupils learn, therefore, not only what they are taught by the teacher, but what they see, hear, experience, and learn about the teacher. When a teacher deliberately and willfully violates the 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.***"
>
> (at 98-99)

See also *In the Matter of the Tenure Hearing of William Fleming, School District of the Borough of Hawthorne,* 1974 *S.L.D.* 246.

Respondent in fact abandoned those pupils assigned to him by fraudulently absenting himself from his position for nearly eight months. The penalty for such a gross misrepresentation as respondent exhibited in the instant matter is dismissal. Respondent has forfeited his tenure privileges and is hereby dismissed from his position as a teaching staff member in the school district of the City of Newark as of the date of his suspension by the Board.

COMMISSIONER OF EDUCATION

August 16, 1977

Board of Education of the Borough of Spotswood,

Petitioner,

v.

Mayor and Borough Council of the Borough of Spotswood, Middlesex County,

Respondent.

COMMISSIONER OF EDUCATION

ORDER

For the Petitioner, Golden, Shore and Paley (Philip H. Shore, Esq., of Counsel)

For the Respondent, Steven D. Altman, Esq.

This matter has been opened before the Commissioner of Education through the filing of a formal Petition of Appeal by the Board of Education of the Borough of Spotswood, hereinafter "Board," Philip H. Shore, Esq., which challenges the reductions imposed by the Mayor and Council of the Borough of Spotswood, hereinafter "governing body," Steven D. Altman, Esq. The principal facts are these:

At the annual school election held on March 29, 1977, the Board submitted the following proposals for amounts to be raised by local taxation for the 1977-78 school year:

Current Expense	$1,838,443
Capital Outlay	125,000

Both proposals were defeated. Thereafter, the Board and the governing body consulted and the governing body adopted a resolution determining that a lesser amount was necessary to be raised by local taxation as follows:

	Board's Proposal	Governing Body's Resolution	Reduction
Current Expense	$1,838,443	$1,813,443	$25,000
Capital Outlay	125,000	70,000	55,000

Subsequently, the parties entered into a Stipulation of Settlement and Dismissal which provides that the following amounts in current expense and capital outlay be raised by local taxation for the 1977-78 school year:

Current Expense	$1,763,443
Capital Outlay	125,000

The Stipulation of Settlement and Dismissal provides for current expenses to be further reduced by $50,000 for a total reduction of $75,000, and that $55,000

be added to capital outlay from the amounts previously certified to be raised for expenses for the Spotswood School District for the 1977-78 school year.

The Commissioner concurs with the Stipulation of Settlement. The Petition of Appeal is hereby dismissed this 17th day of August 1977.

COMMISSIONER OF EDUCATION

In the Matter of the Tenure Hearing of Basil Fattell, School District of Paterson, Passaic County.

COMMISSIONER OF EDUCATION

DECISION

For the Complainant Board, Robert P. Swartz, Esq.

For the Respondent, Saul Alexander, Esq.

Basil Fattell, hereinafter "respondent," a tenured teaching staff member employed by the City of Paterson Board of Education, hereinafter "Board," is charged with unbecoming conduct and corporal punishment in violation of *N.J.S.A.* 18A:6-1. These charges were prepared by the Assistant Superintendent of Schools and certified by the Board at its regular meeting held February 5, 1976. The charges were forwarded to the Commissioner of Education on February 6, 1976. Respondent was suspended without pay by the Board on February 5, 1976, pending final determination of these charges by the Commissioner.

A conference of counsel was held at the State Department of Education on June 23, 1976, at which time the Board withdrew Charge No. 4 against respondent.

A hearing in the matter was held at the office of the Passaic County Superintendent of Schools, Pompton Lakes, on August 5, 1976, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner follows:

CHARGE NO. 1

"On January 8, 1976, the said Basil Fattell did inflict corporal punishment upon W.C., a student at Public School Number Twenty, by striking the said W.C. in the face without legal justification in violation of N.J.S.A. 18A:6-1." (C-1)

W.C. was not present to testify on the day of the hearing. The Board submitted in evidence a written statement signed by W.C. and witnessed by his principal which is dated January 15, 1976. This statement reads as follows:

> "Last Thursday [January 8, 1976], I was sent out of the gymnasium by the gym teacher who asked me to wait in the hallway. Mr. Fattell came out of his [class] room. He told me to get out of the hallway. He grabbed me by the arm and took me downstairs [to the gymnasium]. I almost fell. When I tried to go back upstairs to tell my teacher, Mr. Fattell kept getting in my way. When he got out of my way, I went upstairs near the library. Mr. Fattell came up behind me. He said something to me and then smacked me in the face. I went straight to the office." (P-4)

The following narrative is provided to clearly identify the areas in which the incidents with respect to this charge and Charge No. 2 occurred. It will also serve to explain the findings of fact pertaining to each of these charges inasmuch as they occurred in sequential order and involved two pupils who were attending physical education class in this area.

Respondent's classroom, in addition to several other classrooms, including the school library, are located on the basement level of the school. The entrance doors to the gymnasium are also located on the basement level. Pupils who attend physical education classes must enter through the gymnasium doors from the hallway on the basement level, walk across a landing in the gymnasium area and descend approximately twelve steps to the sub-basement level to reach the floor where classes are held.

T.C. (the aggrieved pupil in Charge No. 2) and M.H. were produced by the Board to testify with respect to Charge No. 1. Both of these pupils are in fifth grade and are classmates of W.C. These pupils were attending physical education class on the day of the incident. Their class was scheduled just prior to lunch period.

T.C., W.C., and M.H. were required to sit on the steps of the gymnasium that day because they did not have appropriate attire to participate in the physical education activities with their class.

T.C. testified that while he and W.C. were on the steps, W.C. went out into the basement hallway by respondent's classroom, whereupon respondent left his classroom and brought W.C. back to the gymnasium and instructed him to remain there. T.C. said that W.C. became angry and respondent struck W.C. (Tr. 8-9)

M.H.'s testimony differs somewhat from that of T.C.'s. He testified that while all three of them (W.C., T.C. and M.H.) were waiting on the steps, they decided to go to the lavatory on the basement level. It was at that time, according to M.H., that W.C. went by respondent's classroom. M.H. said that respondent left his classroom and reprimanded W.C. for disturbing his class; however, W.C. "***kept going out [into the hallway]***" and then Mr. Fattell grabbed [W.C.] and threw him down the steps.***" (Tr. 78) It was at this

juncture, according to M.H., that W.C. used "swear words" at respondent. These words were subsequently confirmed by M.H. upon cross-examination as follows:

Q. "It was swear words. Pretty bad words, would you say?

A. "Yeah." (Tr. 79-80)

M.H. testified on cross-examination that before respondent allegedly "***threw [W.C.] down the steps***" (Tr. 78) that W.C. had a plastic vacuum cleaner tube in his hands "***and he [W.C.] walked into the gymnasium and said [to respondent] ***mess with me now.***" (Tr. 80-81) In describing how respondent "threw" W.C. down the gymnasium steps, M.H. said, "***He [respondent] walked to [W.C.] with one hand and then he threw him down there [the gymnasium steps] but [W.C.] didn't fall or nothing.***" (Tr. 82) The hearing examiner asked M.H. whether or not W.C. was standing when he reached the bottom of the steps, and M.H. replied, "Yes." (Tr. 83)

Finally, upon cross-examination M.H. gave the following response to counsel's question:

Q. "***All you saw was that Mr. Fattell threw [W.C.] down the stairs. That is what Mr. Fattell did to [W.C.] on that occasion, right***?

Q. "Yes." (Tr. 81)

Respondent denies striking W.C. or throwing him down the gymnasium steps. Respondent testified that while he was teaching his pupils, he heard a disturbance in the hallway, left his classroom and discovered W.C. making noises in the hallway while opening and closing the doors to the gymnasium. At that time respondent asked W.C. in which class he belonged, and W.C. is purported to have replied "right here." (Tr. 95) Upon further inquiry respondent discovered that W.C. was supposed to be in the gymnasium. Respondent asserts he then said to W.C., "***[W]ell then, go downstairs to the gym, please. You're disturbing my class.***" (Tr. 95) Respondent maintains that he directed W.C. to go down to the gymnasium several more times and that W.C. refused. W.C., according to respondent, said that he wasn't going anywhere because respondent wasn't his teacher, so therefore he could not tell W.C. what to do. (Tr. 96)

Respondent maintains that when he took W.C. by the arm to take him down the gymnasium steps, W.C. began using profane and obscene language and broke away from him. Respondent claims he again took W.C. by the arm and attempted to walk him down the steps when he broke away a second time, ran out into the hallway by the library and picked up a vacuum cleaner handle in his hands. Respondent testified that W.C. then said to him, "***[N]ow, mess with me.***" (Tr. 98) Respondent avers that he "***walked over and took the vacuum cleaner handle out of [W.C.'s] hand and brought him down to the gym***." (Tr. 98) Thereafter, respondent testified, he sent a note to the school principal stating that W.C. had used "foul language" (Tr. 99) and requested that something be done about it.

Two other teaching staff members also testified on respondent's behalf at the hearing. One of the teachers was present in the hallway where the incident occurred and his testimony is essentially the same as respondent's with respect to the incident that occurred between respondent and W.C. in the hallway. (Tr. 108-122)

The second teaching staff member was W.C.'s physical education teacher who also confirmed the manner in which respondent claims he attempted to walk W.C. down the steps of the gymnasium. This teacher testified that respondent had a "firm" (Tr. 126) hold on W.C.'s arm on the two occasions he attempted to get W.C. down the gym steps. He testified that when W.C. broke away from respondent on these occasions both respondent and W.C. had partially descended these steps. (Tr. 126) The physical education teacher testified that he did not see respondent strike W.C. during this incident. (Tr. 125) Moreover, this teacher testified that respondent did not appear to be angry with W.C. during this incident, but was upset because W.C. was not listening to him nor paying attention. (Tr. 127) The gym teacher also described some of the language used by W.C. during the incident as "vulgar and obscene." (Tr. 125)

Finally, the physical education teacher testified that it is the policy of the school that boys and girls who are not prepared for physical education classes do not partake in class activities. (Tr. 123) Therefore W.C. was supposed to sit on the steps in the confines of the gymnasium (Tr. 123) at the teacher's direction. (Tr. 123)

The school principal testified that W.C. went to his office after the incident and was crying at the time. The principal avers that he discussed the matter with W.C. and subsequently with respondent. He also acknowledged that he received the written note respondent had sent to him about the incident and the fact that respondent denied striking W.C. The principal submitted this information, as well as information pertaining to Charge No. 2, in a written report to the Assistant Superintendent of Schools on January 9, 1976.

Having observed the demeanor of the witnesses as they testified, the hearing examiner finds that respondent did not strike W.C. on January 8, 1976, as charged, in violation of *N.J.S.A.* 18A:6-1. Therefore, he recommends that Charge No. 1 be dismissed.

CHARGE NO. 2

"On January 8, 1976, the said Basil Fattell did inflict corporal punishment upon T.C., a student at Public School Number Twenty, by striking him and squeezing his face without legal justification in violation of N.J.S.A. 18A:6-1." (C-1)

This charge by the Board of corporal punishment upon T.C. was triggered in part by the series of events previously addressed in Charge No. 1. Accordingly, the hearing examiner will report T.C.'s testimony which is relevant to Charge No. 2, in which T.C. is the aggrieved pupil. His testimony continues:

"***Well, I was on the stairs, and then I came back down to look at the boys play gym. They were playing basketball, and then Mr. Fattell came down the stairs, and then he pressed his fist against my face, and he stuck his finger in my gum.***" (Tr. 15)

As respondent did this, T.C. alleges that he received a mark on his gum and that "***[i]t was bleeding a little***" causing him to cry. (Tr. 17) Upon further questioning with respect to this incident, T.C. testified that respondent "***put his right hand [fingers] on my gum ***and*** used his left hand***" to press his fist against T.C.'s face. (Tr. 30-31) T.C. denied that he said or did anything to respondent while they were on the steps which subsequently caused the incident while he was standing on the floor of the gymnasium. (Tr. 21-22) Just prior to the time when respondent allegedly took hold of T.C.'s face, T.C. recalled that respondent said "something" to him. (Tr. 22) T.C. claimed that he tried to release himself from respondent's hold on his face by moving his head back and forth. (Tr. 23)

The hearing examiner observes that T.C.'s testimony shows this incident to have occurred just before his lunch period and that T.C. continued to attend all of his classes for the rest of the school day. Thereafter, T.C. related the incident to his mother upon his return home from school. (Tr. 27)

T.C. was accompanied by his mother when he returned to school on January 9, 1976. He and his mother discussed the incident with the school principal who noticed a cut on T.C.'s gum at that time. (Tr. 51, 53)

The principal referred T.C. to the school nurse on January 9, 1976, for further examination. (Tr. 58) He also testified that to his knowledge T.C. did not require medical treatment from a physician. (Tr. 60) During his discussion of the incident with T.C., the principal asked him if there were any other pupils who witnessed the incident of the previous day. T.C. said there were, and the principal after filing his report dated January 9, 1976 with the Assistant Superintendent of Schools, subsequently obtained written statements from T.C. and the other pupil witnesses. (Tr. 51) The written statements were obtained from these pupils on or about January 13, 1976.

According to the principal's testimony, his letter to the Assistant Superintendent dated January 9, 1976, shows that he "***spoke to Mr. Fattell later, and he denied everything.***" (Tr. 65)

Three fifth grade pupils in T.C.'s class who claimed to have witnessed the incident between T.C. and respondent and who signed written statements to this effect testified at the hearing. Their testimony is at variance to some degree with that of T.C.'s with respect to what they observed.

D.Y. testified that "***[T.C.] walked up the stairs, and Mr. Fattell told [T.C.] to go back down, and [T.C.] went back up the steps, and Mr. Fattell [slapped] him in his gum. His gum started bleeding.***" (Tr. 34)

Upon cross-examination, D.Y. gave the following responses:

Q. "Well, if [T.C.] was doing what Mr. Fattell asked him to do, are you telling us now that despite that, Mr. Fattell did what you just told us?

A. "Yes. [T.C.] had come back up the steps then he went down, and then he came back up.

Q. "[T.C.] had gone down, and then after [T.C.] had gone downstairs, [T.C.] changed his mind and started coming back up again, is that correct?

A. "Yes." (Tr. 36)

D.Y. testified that he related this incident to the principal a few days after it happened and signed a statement dated January 13, 1976 for the principal that respondent slapped T.C. in the face. He could not remember why he hadn't told the principal that respondent caused T.C.'s gum to bleed. (Tr. 38-39)

K.H., another pupil witness, testified that while respondent was involved with W.C. (the pupil named in Charge No. 1) on the gym steps, "***[T.C.] started going up the steps, but Mr. Fattell didn't want him up there, so [T.C.] kept on going [up the steps]. Then he went back beside the gym teacher.***" (Tr. 42)

K.H. testified that respondent came down the gym steps and "***started pinching [T.C.'s] teeth.***" (Tr. 43)

R.W., another fifth grade pupil in T.C.'s class, stated that she was sitting on the steps just prior to the incident and saw "***[T.C.] following these other boys around in the hall.***" (Tr. 46) She testified that she saw respondent "***bringing [T.C.] to [the physical education teacher]***" and that he had hold of T.C. "by the neck." (Tr. 46) R.W. concluded her testimony by stating that T.C. was attempting to free himself from respondent's hold; however, she did not recall seeing respondent place his hands on T.C.'s face at that time. (Tr. 46)

Respondent testified that during the incident with W.C. (Charge No. 1) on the steps he told "***[T.C.] and a bunch of the other boys to go down to the bottom of the steps where they belonged. They were jeering and heckling and yelling and screaming while [respondent] was attempting to bring [W.C.] downstairs.*** [T]he only boy who didn't go downstairs*** was [T.C.]***." (Tr. 132) Respondent testified that when he finally was able to get W.C. downstairs, he motioned for T.C. to come to him while he was standing by the physical education teacher. (Tr. 132, 139) Respondent testified that he then asked T.C. why he did not do what he was told when he was asked by respondent to get off the steps. Respondent asserts that T.C. did "***not answer [him]***[or] face [him].***" (Tr. 132) Respondent also stated that

T.C. "***began to whistle, so [respondent] turned [T.C.'s] head.***" (Tr. 132-133)

Respondent testified as follows with respect to the manner in which he held T.C.'s face:

> "I put my hand on his chin and turned it towards myself. [T.C.] didn't fight it***at that time, and then I began to speak to him again***. [T.C.] asked me to take my God d___ hands off of him, that I'm not his father and he [didn't] have to listen to me, and so I still had him, had my hand on his chin and he squirmed around and tried to fight away. And, yes, *** I do remember my hand going across his lips." (Tr. 133)

Respondent denies placing his fingers in T.C.'s mouth although his fingers were on T.C.'s face and "***must have touched his nose as well***." (Tr. 134) During this incident respondent denies that he placed two hands on T.C.'s face, but rather that he used his right hand which was placed under T.C.'s chin with his thumb extended to one side of the cheek and three fingers extended around the other side of T.C.'s cheek, holding him firmly. (Tr. 140, 142) Respondent also admits that he applied some pressure to T.C.'s face while holding it in this position (Tr. 142) which may have appeared as though he was pinching it. (Tr. 137) Respondent denies that he caused or observed any injury to T.C. as a result of this incident and, more specifically, that he did not observe T.C.'s mouth bleeding at this time. (Tr. 136)

Respondent avers that his action regarding T.C. was not committed in a moment of anger, but rather because of the circumstances and T.C.'s behavior toward him. (Tr. 140-141)

The testimony of the physical education teacher essentially corroborates respondent's testimony with respect to this charge. (Tr. 144-147) The Assistant Superintendent testified that he received the principal's letter of January 9, 1976, regarding the incidents giving rise to Charges Nos. 1 and 2. Thereafter he telephoned the principal to discuss the matter and subsequently visited Public School Number 20 on January 13, 1976. The Assistant Superintendent avers that he spoke to all of the pupils who had knowledge about these incidents except W.C. who was absent from school that day. (Tr. 85) Subsequent to this investigation, the Assistant Superintendent testified, he served notice to respondent that he was suspended and that he intended to certify the above charges to the Board.

Such notification to respondent was in written form (P-3) dated January 19, 1976.

The hearing examiner finds that the credible testimony regarding this charge does not support that part of the allegation against respondent which charges him with slapping T.C. The hearing examiner further finds and determines that the manner in which T.C.'s face was held by respondent does indicate that his face was "squeezed" as alleged by the Board. Although the hearing examiner finds no specific reference contained in the Board's charges

regarding the cut T.C. sustained on his gum, the testimony adduced in this regard is insufficient to establish that the injury occurred as a result of the incident complained of herein. In reaching this conclusion the hearing examiner has weighed the credible testimony of the witnesses and finds that the failure of T.C. to immediately report the injury of his physical education teacher or the principal on the day that it occurred, mitigates against such finding of fact. The hearing examiner refers his findings with respect to Charge No. 2 to the Commissioner for his determination.

CHARGE NO. 3

> "On January 8, 1976, the said Basil Fattell did force a student at Public School Number Twenty to leave the school building without authority and contrary to the provisions of N.J.S.A. 18A:37-4 and the Rules and Regulations of the Board of Education of the City of Paterson."

The hearing examiner recommends that the Board's Charge No. 3 against respondent be dismissed for lack of evidence and failure to prosecute at the time of the hearing.

Charge No. 4 against respondent was withdrawn by the Board prior to the date of the hearing and is therefore not a proper subject for determination herein.

CHARGE NO. 5

> "That as a result of the aforesaid conduct by the said Basil Fattell, it is stated that he is unable to conduct himself in a manner becoming a member of the teaching staff of the City of Paterson."

This charge is essentially a repetition of that set forth heretofore and should be considered *in pari materia* with Charges Nos. 1 and 2 which alone were prosecuted by the Board and require a determination.

The hearing examiner, in consideration of the above findings, recommends that the Commissioner determine that the partial substantiation of Charges No. 2 and No. 3 are insufficient to warrant dismissal pursuant to *N.J.S.A.* 18A:6-10 *et seq.* As was stated by the Commissioner *In the Matter of the Tenure Hearing of Genevieve Rinaldi, School District of the City of Orange, Essex County,* 1976 *S.L.D.* 344:

> "***Without question, respondent's suspension of service has itself been a painful ordeal. See *In The Matter of the Tenure Hearing of William H. Kittell, School District of the Borough of Little Silver, Monmouth County,* 1972 *S.L.D.* 535, 542.***" (at 355)

The hearing examiner leaves to the Commissioner the further consideration of whether such limited finding merits a penalty.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has carefully reviewed the record including the findings and recommendations of the hearing examiner. The Commissioner observes that this report is not challenged by the filing of exceptions or objections thereto pursuant to *N.J.A.C.* 6:24-1.17(b).

The Commissioner concurs with the findings and recommendations of the hearing examiner with respect to Charges Nos. 1 and 3, and these charges are hereby dismissed.

What remains for the Commissioner's determination are the allegations of corporal punishment set forth in Charge No. 2 and whether or not this charge is sufficient, if true in fact, to sustain the Board's allegation of conduct unbecoming a teacher as indicated in Charge No. 5. In this regard the Commissioner has reviewed the findings and recommendations of the hearing examiner in light of his previous rulings on similar tenure charges filed against teaching staff members by local boards of education.

The Commissioner held *In the Matter of the Tenure Hearing of David Fulcomer,* 1961-62 *S.L.D.* 160:

> "***'***that testimony of children, especially of those ten years of age, against a teacher, whose duty it is to discipline them, must be examined with extreme care. It is dangerous to use such testimony against a teacher; it is likewise dangerous not to use it. The necessities of the situation sometimes make it necessary to use the testimony of school children. If such testimony were not admissible, the children would be at a teacher's mercy because there is no way to prove certain charges except by the testimony of children.' *Palmer v. Board of Education of Audubon,* 1939-49 *S.L.D.* 183, 188.***" (at 160-161)

Additionally, the Commissioner observes that pupils are required to submit to the authority of teachers and that this discretionary authority given to teachers to control pupil behavior is set forth in *N.J.S.A.* 18A:37-1 which reads as follows:

> "Pupils in the public schools shall comply with the rules established in pursuance of law for the government of such schools, pursue the prescribed course of study and submit to the authority of the teachers and others in authority over them."

It is clear to the Commissioner from the testimony of the facts related to Charge No. 2 that the pupil in question openly defied respondent's attempts to control a situation involving another pupil and by doing so frustrated and thwarted respondent's efforts to bring order to an incident which occurred outside his classroom and in the school gymnasium during the period of time controverted herein.

In the Matter of the Tenure Hearing of Thomas Appleby, School District of Vineland, 1969 *S.L.D.* 159, the Commissioner said:

"***While the Commissioner understands the exasperations and frustrations that often accompany the teacher's functions, he cannot condone resort to force and fear as appropriate procedures in dealing with pupils, even those whose recalcitrance appears to be open defiance. The Commissioner finds in the century-old statute prohibiting corporal punishment (*N.J.S.A.* 18A:6-1) an underlying philosophy that an individual has a right not only to freedom from bodily harm but also freedom from offensive bodily touching even though there be no actual physical harm. *In the Matter of the Tenure Hearing of Frederick L. Ostergren,* 1966 *S.L.D.* 185, 186 The Commissioner said further, *In the Matter of the Tenure Hearing of David Fulcomer:*

> '***that such a philosophy with its prohibition of the use of corporal punishment or physical enforcement does not leave a teacher helpless to control his pupils. Competent teachers never find it necessary to resort to physical force or violence to maintain discipline or compel obedience. If all other means fail, there is always a resort to removal from the classroom or school through suspension or expulsion. The Commissioner cannot find any justification for, nor can he condone the use of physical force by a teacher to maintain discipline or to punish infractions.***' [1961-62 *S.L.D.* 162] ***" (at 172-173)

In examining the record herein the Commissioner has been mindful of the penalties imposed in other similar matters brought before him.

In *Ostergren, supra,* the Commissioner also ruled concerning the significant differences in cases involving the specific circumstances surrounding the corporal punishment of pupils as follows:

> "***The circumstances under which the episode occurred, its provocation, the nature of the incident itself, the age of the pupil, the teacher's record, his attitude and the prognosis for his continued effective performance and usefulness in the school system, varied materially in these cases. In the Commissioner's opinion each such matter must be judged in the light of all of the circumstances. The kind and degree of penalty will necessarily vary also according to the particular problem.***" (1966 *S.L.D.* at 188)

Given all of the facts and circumstances in the instant matter, the Commissioner finds that respondent used poor judgment in placing his hand on T.C.'s face and squeezing it in an effort to control his unruly behavior and to gain his attention to respondent's reasons for reprimanding him. The Commissioner observes that the testimony pertaining to this incident does not support that portion of Charge No. 2 which alleges that respondent slapped T.C.

The Commissioner does not condone respondent's action in this specific instance and cautions him against the use of physical force in the future when confronted with similar situations involving pupils, even those whose recalcitrance appears to be open defiance of his authority.

Such prohibition of the use of physical force as the Commissioner stated in *Appleby, supra,* does not leave a teacher helpless to control such pupils, but rather requires that other alternatives be employed which are equally, or more, effective in the long run in controlling the behavior of such pupils. The Commissioner is mindful that practical and effective ways of dealing with pupil discipline and behavior cannot be effectively achieved and implemented unless there is a clear understanding by pupils that the consequences of unacceptable conduct will not go unnoticed and that the Board, in cooperation with its administrative staff and teachers, has a well defined policy which sets forth the precise steps that will be taken to hold pupils accountable for their behavior.

The Commissioner concludes after a careful study of this matter that respondent's actions, although regrettable, in this instance cannot be construed as an act of corporal punishment. Moreover, in the Commissioner's judgment respondent has suffered mental anguish, a hearing which could have resulted in the loss of his livelihood, damage to his professional reputation, and he will be required to exert himself to reestablish his reputation and standing because of his error.

In conclusion, the Commissioner determines that summary dismissal of respondent or a reduction in his salary for this single incident is not warranted.

Accordingly, the Commissioner directs that Basil Fattell be reinstated as a teacher in the School District of the City of Paterson and that he be reimbursed for all back pay, privileges and compensation due him, offset by mitigation of his earnings during his suspension.

COMMISSIONER OF EDUCATION

September 1, 1977

Eileen Shahbazian, Joseph Wisniewski, Marilyn Lewis, and Grace Hirt,

Petitioners,

v.

Board of Education of the Township of Weehawken, Hudson County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Goldberg, Simon & Selikoff (Theodore M. Simon, Esq., of Counsel)

For the Respondent, Le Roy D. Safro, Esq.

Petitioners are teachers employed by the Board of Education of the Township of Weehawken, hereinafter "Board," who seek longevity pay for their teaching experience which they allege is provided for in the Board's salary policy. The Board contends that all teachers in the school district are being properly compensated pursuant to the terms set forth in its salary policy which is embodied in its negotiated agreement, hereinafter "Agreement," with the Weehawken Education Association.

A hearing in this matter was held on July 22, 1975 in the office of the Union County Superintendent of Schools, Westfield, before a hearing examiner appointed by the Commissioner of Education. Briefs, affidavits and exhibits are part of this record. The report of the hearing examiner follows:

Petitioners Hirt, Lewis, and Wisniewski seek longevity pay, asserting that their several years of teaching experience in other districts, prior to their employment by the Board, should be counted. Petitioner Shahbazian asserts that her initial employment by the Board was on February 1, 1964; therefore, she is eligible for longevity payments on February 1, according to the longevity intervals specified in the Agreement.

The Board asserts that its longevity policy provides for years of service in Weehawken, not elsewhere, and that its policy and past practice in determining longevity does not provide longevity payments in the middle of any academic year. According to the Board, eligible persons begin receiving longevity payments, pursuant to the policy, at the beginning of the next academic year. Thus, the dispute herein is focused on the interpretation of several Board salary policies embodied in the Agreements to be discussed, *post*.

Counsel for petitioners attended the hearing without any witnesses and sought a ruling to have the Board proceed by establishing its affirmative defenses to petitioners' Petition of Appeal. The hearing examiner ruled that petitioners were obliged to first establish their case. When they were unable to do so, the

Board advanced a Motion to Dismiss on the grounds of laches and that the Commissioner lacked jurisdiction.

The hearing examiner finds that boards of education clearly have the statutory authority to establish salary policies pursuant to *N.J.S.A.* 18A:29-4.1 which reads as follows:

> "A board of education of any district may adopt a salary policy, including salary schedules for all full-time teaching staff members which shall not be less than those required by law. Such policy and schedules shall be binding upon the adopting board and upon all future boards in the same district for a period of two years from the effective date of such policy but shall not prohibit the payment of salaries higher than those required by such policy or schedules nor the subsequent adoption of policies or schedules providing for higher salaries, increments or adjustments. Every school budget adopted, certified or approved by the board, the voters of the district, the board of school estimate, the governing body of the municipality or municipalities, or the commissioner, as the case may be, shall contain such amounts as may be necessary to fully implement such policy and schedules for that budget year."

This is a matter arising under the school laws and is properly under the jurisdiction of the Commissioner. *N.J.S.A.* 18A:6-9 The hearing examiner recommends, therefore, that the Board's argument that the Commissioner lacks jurisdiction be rejected. Nor can the hearing examiner find that petitioners are guilty of laches in perfecting their appeal for longevity pay. The Board established no bases for its Motion, and at the time of the filing of the several Petitions of Appeal, which were consolidated by conference agreements of November 21, 1974, petitioners were employed by the Board and believed they were entitled to longevity pay. The hearing examiner recommends also that the Commissioner reject the Board's argument and determine that the appeals are timely.

Since the 1961 school year, the Board's salary guides and its salary policies have been reduced to writing. The 1961 salary policy contained no mention of longevity pay. (See Salary Guide for Teachers, Schedule A.) From 1966-67 through 1969-70 the Salary Guides provided for longevity pay and the salary policies defined longevity as follows:

> "20 Years' Service – $400 Increment
> "30 Years' Service – $500 Increment
>
> *"20-YEAR INCREMENT*
>
> "Any teacher who has 20 years or more of continuous *service in the Weehawken School System* will be granted a $400 *service increment* upon the recommendation of the Superintendent of Schools.
>
> *"30-YEAR INCREMENT*
>
> "Any teacher who has 30 years or more of continuous *service in the*

Weehawken School System will be granted a $500 *service increment* upon the recommendation of the Superintendent of Schools." (*Emphasis added.*) (Salary Guide for Teachers, Schedule B, at pp. 2-3)

The Salary Guide for Teachers for the 1970-71 school year provided for a ten year longevity increment of $200 in addition to the twenty and thirty year increments provided in prior years; however, no such limiting language was provided in the Guide as is found in Schedule B, *ante.* Instead, the proposed salary policy for the 1970-71 school year reads as follows:

***

"B.

"1. Each teacher shall be placed on his proper step of the Salary Schedule as of the beginning of the 1970-72 school year.

"2. Amended in part to read as follows, and ratified:

"Full credit up to the maximum step of any salary level on the agreed Teacher Salary Schedule for 1970-71, shall be given for previous outside teaching experience in a duly accredited school upon initial employment in accordance with the provisions of 'Schedule A.' As of the beginning of the 1970-71 school year, the aforementioned credit shall be given to any presently employed teacher who has not heretofore received it. Additional credit, not to exceed four (4) years for military service and time spent on a Fulbright Scholarship shall be given upon initial employment as of the beginning of the 1970-71 school year. The aforementioned credit shall be given to any presently employed teacher who has not heretofore received it.

"C. Teacher with previous teaching experience in the Weehawken School District shall, upon returning to the system, receive full credit on the Salary Schedule for all outside teaching experience, in a school recognized and accredited by the New Jersey Department of Education, full time military experience and on a Fulbright Scholarship, up to a maximum as set forth in Section B above. Such teachers who have not been engaged in other teaching or the other activities indicated above shall, upon returning to the system, be restored to the next position on the Salary Schedule above that at which they left.***" (Petitioners' Affidavit, Exhibit B-3, Article VII, at p. 10)

Further, salary policies for the years 1971-72, 1972-73, 1973-74, and 1974-75 contain very similar language. (See Petitioners' Affidavit, Exhibits C-2 and D-2.)

Petitioners assert that the limiting language, *"service in the Weehawken School System,"* found in the 1966 through 1969 Agreements was deliberately deleted from the later policies, therefore their total years of experience both inside and outside Weehawken must be counted in determining longevity. Further, petitioners argue that it was the "posture" of the Association when

negotiating the salary guides subsequent to the 1969-70 Salary Guide, that all teaching staff members should receive full credit as to all compensation policies and guides for prior teaching service in other districts. Regarding Petitioner Shahbazian's claim for longevity pay beginning in midyear (February 1), petitioners assert that it is Board policy to change a teacher's salary level (*i.e.*, bachelor's to master's, etc.) in midyear; therefore, it would be inconsistent not to pay longevity in midyear. Further, petitioners argue that teachers employed at midyear are granted half-step increments in September of the next year. (Petitioners' Affidavit, at pp. 2-3, 5)

There is no evidence offered by petitioners that a salary policy containing the language in Exhibit B-3, *ante*, was ever adopted by the Board. Submitted instead is an affidavit signed by two officers of the Weehawken Education Association with portions of attached salary policies for several past years. Significantly, the attachments for the 1970-71 school year are not signed by anyone; nor is there evidence that the referred to language concerning longevity payments was adopted by the Board for that year. If such a salary policy existed for the 1970-71 school year, it is inconceivable that the Association would not have a full, completed copy of the signed, negotiated agreement with the Board containing that language on which it now relies.

The Board asserts that no employee has ever received longevity payment for service to any employer other than the Weehawken Board of Education. Nor has it paid increments to any of its employees in midyear except once in 1941 and that midyear payment was made in error. (Acting Superintendent's Affidavit, at p. 2)

In support of its argument, the Board asserts that its negotiations with the Association in the spring of 1970 came to an impasse and that matter was thereafter submitted to mediation and a fact-finder. Utilizing the procedures required by the Public Employment Relations Commission, the fact-finder determined that there should be no change in the longevity system then in force and effect. The Agreement then in effect required service in Weehawken as a prerequisite for longevity payments. (See Schedule B, *ante.*) The fact-finder's report is reproduced here in part as follows:

> "***The ASSOCIATION's proposal is indicated in APPENDIX C. It is not deemed appropriate for adoption because at almost every step and level of qualification it represents a salary higher than that paid in any of the 14 districts examined. In addition, the raising of the total longevity increments to $1,600.00 (a raise of 45% over the existing highest rate in the area) does not seem appropriate. The cost of the ASSOCIATION's proposal over the BOARD's proposal represents an estimated cost of at least $133,000.00 on the basis of teachers now in the system and exclusive of the extra cost of the recommended changes in longevity pay.
>
> *"Recommendations*
>
> "On the basis of findings it is recommended that the pay schedule noted in APPENDIX E be adopted for inclusion in the 1970-71 contract, and that

no change be made in the present system of longevity payments.***"
(Respondent's Schedule C, at p. 39)

Additionally, the Board relies on Appendix C, attached to the fact-finder's report, which is the Association's proposal for the salary guide it wanted adopted. The Appendix contains provisions for longevity pay and it seeks to add three more categories of longevity, specifically, longevity for 15, 25 and 35 years' *service*. The Board argues that it can be readily seen that the Association at no time adopted a "posture" that the limiting language of *service in Weehawken* has ever been considered or it would have, at the very least, become a topic to be addressed by the fact-finder. Further, the fact-finder clearly stated in his report that there should be no change "*in the present system of longevity payments.*" (Schedule C, *ante*)

In the hearing examiner's judgment, the report of the fact-finder is reasonable and equitable. That report was made after several hearings in which the fact-finder heard the specific positions of both parties. (Respondent's Brief, at p. 2; Schedule C) Conversely, the matter herein is being considered on Briefs, affidavits and exhibits because petitioners chose not to attend the hearing to present the best evidence in support of their position. Neither petitioners' arguments nor their exhibits offer convincing proof that the Board is failing to carry out the terms of its salary policy. The 1969-70 salary policy provided for longevity pay for service in Weehawken and the fact-finder determined that there should be no change in that system for longevity pay. The hearing examiner agrees with this finding and recommends that the Commissioner concur.

Petitioner Shahbazian's claim for longevity to be paid in midyear has no precedent, nor is it supported by any document or evidence. Petitioners argue that the Board provides for advancement on the salary guide for those persons who receive advanced degrees in midyear, and that persons hired in February receive half an increment in September of the next school year. (Petitioners' Affidavit, at pp. 4-5) Even assuming this to be an uncontradicted fact, it does not automatically follow that longevity pay must be paid by the Board in midyear. It appears to the hearing examiner that, absent a showing that the Board is violating the law, discriminating against its employees, acting dishonestly, or failing to abide by the terms of its negotiated salary policy, there is no cause for action by the Commissioner. Therefore, the tradition of setting the beginning of each school year as the time of commencing longevity pay is a proper determination to be made by the Board pursuant to its statutory and discretionary authority. *N.J.S.A.* 18A:11-1; *N.J.S.A.* 18A:29-1.4 (See also Superintendent's Affidavit.) The hearing examiner recommends, therefore, that Petitioner Shahbazian's claim be denied and that the entire Petition of Appeal be dismissed.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record in the instant matter including

the report of the hearing examiner and the Exceptions and/or Reply thereto filed respectively by petitioner and the Board. Petitioners demand that only the Commissioner "***or whoever will ultimately sign the decision in the case at bar***" review the Exceptions and attest to such fact. Petitioners also aver that the report of the hearing examiner was based on conflicting affidavits which may not serve as the proper basis of the findings contained therein and was "***entirely contrary to the understanding that the existence of the Board's practice and policy regarding longevity pay was to be the subject of the hearing***." (Petitioners' Exceptions, at p. 1) Moreover, petitioners aver that it was their understanding at the conference of counsel that the Board would proceed first at the hearing to establish the policies it followed with respect to longevity pay, that the hearing would then be adjourned and that thereafter petitioners would have an opportunity to produce witnesses in reply. Petitioners aver that the procedures which were followed and the rulings which were made by the hearing examiner constitute a denial of their right to a hearing and, further, that the hearing examiner improperly refused to consider the 1970-71 negotiated agreement (Petitioners' Exhibit B-3) "***since a full signed copy of the contract was not annexed to the LaFronz-Levitt affidavit***." (Petitioners' Exceptions, at p. 7) They maintain that they should have been afforded an opportunity to submit such a signed contract. They further maintain that the cited fact-finder's report "***is obviously hearsay***" and may not be considered in a proceeding before the Commissioner. (*Id.*, at p. 8) Petitioners request reversal of the findings of the hearing examiner or, in the alternative, a rehearing of the matter.

The Board maintains that the hearing was properly scheduled and acknowledged by the parties and that petitioners were required to initially proceed to establish their case. The Board further maintains that its own witnesses were present and prepared to testify at the hearing but were not called "***since the petitioner[s] elected not to present any testimony***." (Board's Reply, at p. 1) The Board argues "***that the Commissioner need not have considered the affidavits at all in view of the petitioners' obstinate refusal to put in their case.***" (at p. 1)

The Commissioner finds no reason for the demand that only the Commissioner review the Exceptions and attest to this fact. The ultimate determination in all cases before the Commissioner is that of the Commissioner and he makes it in each case with all reports and Exceptions at hand for review. Such review is required by law and is in conformity with it. *N.J.S.A.* 52:14B-10(c); *N.J.A.C.* 6:24-1.17

The record of the conference in this matter is barren of any recorded understanding that, contrary to usual procedure, the Board was to be required to present at a hearing its evidence prior to petitioners' presentation. It was not so required. Petitioners had first to present *prima facie* creditable evidence that the Board had proceeded improperly or illegally before a defense was required. No such creditable evidence was in fact produced by petitioners at the hearing and no defense was required of the Board since its actions as an elected body representative of the will of the people has a presumption of correctness.

Thomas v. Morris Township Board of Education, 89 *N.J. Super.* 327 (*App. Div.* 1965), aff'd 46 *N.J.* 581 (1966); *Boult & Harris v. Passaic Board of Education,* 1939-49 *S.L.D.* 7, 13, aff'd State Board of Education 15, aff'd 135 *N.J.L.* 329 (*Sup. Ct.* 1947), 136 *N.J.L.* 521 (*E.&A.* 1948) The Commissioner so holds.

In the context of this holding, the Board's attestations, which are a part of the record herein, are presumed to be correct and there is no relief the Commissioner may afford petitioners. They were offered a full plenary hearing to develop their claim, failed to produce a single witness in support thereof and may not claim surprise or misunderstanding as an excuse. It is axiomatic that petitioners are required to bear the burden of proof in all such matters. As the Court said in *Quinlan v. Board of Education of North Bergen,* 73 *N.J. Super.* 40, 49 (*App. Div.* 1962):

> "***The rule applicable required the plaintiff to carry the burden of proof of such facts as were necessary to entitle her to the relief prayed for. *Kopera v. West Orange Bd. of Education,* 60 *N.J. Super.* 288, 297 (*App. Div.* 1960); 42 *Am. Jur., Public Administrative Law,* § 131, *p.* 466 (1942); *cf. Chirichella v. Dept. of Civil Service,* 31 *N.J. Super.* 404, 409-410 (*App. Div.* 1954). This duty of persuasion upon the whole case never shifts, *Hughes v. Atlantic City,* § *S.R.R. Co. R.R. Co.,* 85 *N.J.L.* 212, 216 (*E.&A.* 1914), although in another sense of the duty of going forward with evidence may shift as one side or the other satisfies the judge that the evidence suffices to make out a *prima facie* case in his favor. *Id.;* 9 *Wigmore, Evidence* (3*d ed.* 1940), § 2487, *p.* 278; 20 *Am. Jur., Evidence,* § 133, *p.* 136 (1939).***"

Further delay and/or additional expense to the Board and the State may not be countenanced or ordered by the Commissioner.

Accordingly, the Petitions of Appeal are hereby dismissed.

COMMISSIONER OF EDUCATION

September 2, 1977

Board of Education of the Borough of Bradley Beach,

Petitioner,

v.

Board of Education of the City of Asbury Park and Board of Education of the Township of Neptune, Monmouth County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Norton & Kalac (Peter P. Kalac, Esq., of Counsel)

For the Respondent Asbury Park Board of Education, McOmber & McOmber (Richard D. McOmber, Esq., of Counsel)

For the Respondent Neptune Township Board of Education, Laird & Wilson (Andrew J. Wilson, Esq., of Counsel)

Petitioner, the Board of Education of the Borough of Bradley Beach, hereinafter "Bradley Beach Board," filed a Petition of Appeal with the Commissioner of Education in September 1975 which requested a modification of the sending-receiving relationships in effect for the education of its high school pupils in the City of Asbury Park and the Township of Neptune. The Petition specifically requested a modification in a traditional allotment of ninety-three percent of high school pupils assigned to attend high school in Asbury Park from Bradley Beach "***to provide that more high school pupils may attend Neptune High School, commencing September, 1976.***" The Petition was premised on a series of past and projected pupil tuition rates charged, or to be charged, by the Asbury Park and Neptune Township Boards of Education which appeared to indicate that savings could be effected in tuition costs assessed against the Bradley Beach Board if the request were granted.

The Petition was held in abeyance pending a decision of the Commissioner *In the Matter of the Application of the Board of Education of the Borough of Avon-by-the-Sea for the Termination of the Sending-Receiving Relationship with the School District of Asbury Park,* 1976 *S.L.D.* 465, since the reason advanced in Avon's application for an alteration in the sending-receiving relationship, namely, a differential in assessed tuition costs, was the same as that advanced by the Bradley Beach Board.

The Commissioner's decision in *Avon-by-the-Sea, supra,* was handed down on April 29, 1976 and the application of the Avon Board was rejected. The principal reason for rejection as set forth therein was that a cost differential in assessed tuition rates was not the "good and sufficient reason" required by the pertinent statute (*N.J.S.A.* 18A:38-13) as a necessary prerequisite to termination of a sending-receiving relationship. The Commissioner's decision in *Avon-by-the-Sea* was appealed to the State Board of Education and was affirmed on

September 8, 1976. It was subsequently appealed to the Appellate Division of the Superior Court and has been affirmed by the Court. (Superior Court Docket No. A-546-76, decided June 3, 1977) In its decision the Appellate Division Court affirmed dismissal of the petition of the Avon Board essentially for the reasons set forth by the hearing examiner and adopted by the Commissioner and the State Board. Such reasons are equally applicable to the Application of the Bradley Beach Board.

Accordingly, the instant Application has been rendered *stare decisis* by the decisions in *Avon-by-the-Sea, supra,* and the Petition is dismissed.

COMMISSIONER OF EDUCATION

September 2, 1977

In the Matter of the Tenure Hearing of Samuel Ivens,
School District of Toms River Regional, Ocean County.

COMMISSIONER OF EDUCATION

DECISION

For the Complainant Board, Hiering, Grasso, Gelzer and Kelaher (Milton K. Gelzer, Esq., of Counsel)

For the Respondent, Gerald Simpson, Esq.,

Charges of assault and battery upon three pupils and corporal punishment were certified to the Commissioner of Education against Samuel Ivens, a tenure teacher employed for eight years by the Board of Education of the Toms River Regional School District, hereinafter "Board." The Board suspended respondent with pay on April 20, 1976, and certified that the charges would be sufficient, if true, in fact, to warrant dismissal or reduction in salary.

A hearing was held on the charges in the office of the Ocean County Superintendent of Schools, Toms River, on January 18, 1977 by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

The charges herein are essentially three in number and are set forth with the evidence adduced at the hearing pertinent to each charge.

CHARGE NO. 1

"On February 26, 1976 Samuel Ivens, a tenure member of the teaching staff employed for 8 years by the Board of Education of the Toms River

> Schools did in violation of N.J.S.A. 18A:6-1 commit an assault and battery upon one [D.G.], a student at the East Dover Elementary School by throwing a pad off the desk of said [D.G.] and by picking up the desk and throwing it at [him]. The said Samuel Ivens did further inflict corporal punishment upon the said [D.G.]."

D.G., a twelve year old pupil in the seventh grade, testified that respondent threw a pad of paper off D.G.'s desk and then "picked up the desk [and] [h]it [him] in the head and the stomach with it." (Tr. 36-38) He testified further that respondent "hit me into the closet" (Tr. 46) and "[t]hen he started beating up on me before I could even get out of the closet." (Tr. 47-48). There was no other testimony produced by the Board with respect to this charge.

Respondent testified that there was a book on D.G.'s desk and he slapped the book for emphasis and it fell to the floor. Respondent further testified that D.G. had been seated in the chair, separate from the desk, and when he (respondent) pushed on the desk, it and the chair fell over but D.G. had extricated himself before this happened. (Tr. 181-182) Respondent also testified that he then asked D.G. to get his coat and nudged him with his stomach in the direction of the cloakroom. Respondent testified further that while in the cloakroom D.G. shouted in a loud voice "stop punching me." Respondent denied, however, any physical contact with D.G. other than the intermediate contact when he had nudged him with his stomach, though at the time of the alleged outcry, "stop punching me," D.G. started to weep. (Tr. 184-185)

D.G. also testified concerning an alleged incident which occurred when he was boarding the school bus subsequent to the close of school. D.G. testified, "Mr. Ivens cut across the field to come after me *** threw me up against the bus and started punching me and he threw me down and picked me up and shoved me on to my bus.***" (Tr. 15)

> Q. "When you say threw you down, do you mean actually picked you up and threw you on the ground?"
>
> A. "[He] [g]rabbed my shoulders and threw me down." (Tr. 18)

A teacher employed by the Board and assigned to duty in the area of the school buses, testified that he witnessed the entire incident and that respondent's only contact with D.G. was to place his hands on D.G.'s shoulders to turn him toward the bus. (Tr. 129)

The mother of D.G. testified that when he returned home that afternoon she observed that he had several lumps on his head, fresh black and blue marks on his legs and some scratches on his cheek. Her testimony with respect to the specific causes of these marks was not definitive.

It is clear from the testimony and other evidence that respondent had physical contact with D.G. on the two occasions described. The hearing examiner so finds. Respondent admits nudging D.G. with his stomach and

uncontroverted testimony shows that respondent did place his hands on D.G.'s shoulders while directing him to the school bus.

The hearing examiner further finds that the testimony of respondent, corroborated by the teacher on duty, refutes the testimony of D.G. as to the severity of contact which occurred as D.G. was boarding the bus. Physical contact was made by the teacher in both of the referenced incidents but the hearing examiner finds that even though the contact may have been ill-advised, it was not of a punitive nature and may not be characterized as an assault which constitutes corporal punishment.

CHARGE NO. 2

> "On February 26, 1976 Samuel Ivens, a tenure member of the teaching staff employed for 8 years by the Board of Education of the Toms River Schools did in violation of N.J.S 18A:6-1 commit an assault and battery upon one [S.W.], a student at the East Dover Elementary School by punching the said [S.W] with his fist and did challenge the said [S.W.] to a fight."

D.G. testified with respect to this incident. He said that respondent threw S.W. down, beat him and jumped on top of him. (Tr. 12-13) On cross-examination D.G. modified his testimony to say that respondent removed his coat, threw S.W. to the ground and then jumped around him. (Tr. 34-35)

The supervisor of instruction at East Dover Elementary School who witnessed this incident with S.W. from the entrance to the back playground observed respondent scolding his class as the pupils stood in line awaiting return to the classroom from the playground. He testified that respondent had removed his coat and threw it so that it landed on the shoulder of the second boy in line. The supervisor also testified that he saw respondent clench his fist but saw no physical contact between respondent and S.W. The supervisor also testified that S.W. was never prone on the ground. (Tr. 85-87)

The hearing examiner observes that D.G.'s testimony is contradictory in describing the incident with S.W. Testimony from the supervisor contradicts D.G.'s description of the incident between respondent and S.W. There was no other credible evidence with respect to this incident. Lacking such credible evidence that respondent contacted S.W. physically, and particularly in the context of the conflicting testimony of D.G., the hearing examiner recommends that the Commissioner dismiss Charge No. 2.

CHARGE NO. 3

> "On February 26, 1976 Samuel Ivens, a tenure member of the teaching staff employed for 8 years by the Board of Education of the Toms River Schools did in violation of N.J.S. 18A:6-1 commit an assault and battery upon one [D.C.], a student at the East Dover Elementary School while walking down the hall he did shake the said [D.C.] back and forth indicating to her she was not walking properly, and did physically assault the said [D.C.] by forcefully pushing a book into her stomach."

Evidence produced with respect to this incident was testimony elicited from D.G. who had been the only pupil to testify with respect to Charges Nos. 1 and 2. D.G. testified that he saw the teacher punch D.C. "in the gut" and that the girl tried to block the blow with her notebooks. (Tr. 15)

Two school employees, a secretary and a teacher aide at the East Dover School testified at the hearing that they had heard respondent shout in the hall and saw him as he grasped the shoulders of D.C. with both of his hands and shook her. Their respective judgments differed as to the intensity of the action shaking D.C.

Respondent testified that while he escorted his class to the end of the hall, D.C. made loud noises and was out of line. He said he put his hands on her shoulders, faced her properly in line and gave her a "slight shake." (Tr. 187) Shortly thereafter, respondent alleges D.C. was again out of line and waved a book. Respondent said he told her to reenter the line which she did, and at the same time "***I did take the book from her right hand and put it into her left hand because stragglers were coming through and I didn't want her waving the book there to hit anybody***." (Tr. 188)

The hearing examiner observes that respondent admits that he placed his hands on D.C.'s shoulders with one move to put her in line and one "slight shake" to impress upon her his direction that she was to stay there. A school secretary and classroom aide testified that they could not definitively classify the severity of the action to shake D.C. (Tr. 77, 82) No evidence was brought forth concerning the alleged blow to the stomach other than the contradictory testimony of D.G. and respondent.

The librarian at East Dover School, an employee of the Board for a number of years also testified with respect to this charge. She described an incident with D.C. in which D.C. alleged to have been slapped by respondent and the librarian called her a liar. (Tr. 148) She questioned the honesty of D.C. and D.G. (Tr. 150) and described the following incident while on playground duty:

> "***and I did have some of the children come up and say, when I was outside, we got rid of Mr. Ivens. Now, if you ask me which children it is I couldn't say it was one of these, but at least five of the children came up and said, say, did you hear we got rid of Mr. Ivens.
>
> Q. "Was it said with sadness or what was the spirit in which it was said?"
>
> A. "This is in my judgment, but they seemed to be pretty proud of themselves." (Tr. 152)

An art teacher at East Dover School, testified that she had difficulty with half a dozen of these children including D.G., D.C., and S.W. (Tr. 155) She characterized D.G. as "***a leader in the kind of disruptive behavior that would make it difficult to teach any lesson***." (Tr. 157)

The hearing examiner in summary recommends that the Commissioner consider the shaking of D.C. by respondent to be a form of corporal punishment as charged.

Additionally, the Board directed the teacher as follows:

> "***By reason of the foregoing the Board of Education of the Toms River Schools under the provision of N.J.S. 18A:16-2 requires the said Samuel Ivens to undergo individual psychiatric examination by reason of the fact that said Samuel Ivens shows evidence of deviation of normal mental health." (Statement of Charges)

As a result of this directive, respondent visited Joseph R. Fontanella, M.D., whose report of April 19, 1976, is set down in pertinent part with respect to such possible deviation as follows:

> "I examined Mr. Ivens on April 8, 1976 at your request. He is a non-self disclosing person and so I had to extend the interview into a second time period.***
>
> "To specifically answer the question raised by you in your letter of March 30, 1976, I do not find Mr. Ivens to be suffering from a harmful significant deviation from mental health which would affect his 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 hearing examiner sets down for consideration by the Commissioner the following findings and recommendations:

Charge No. 1: Physical contact was made by respondent with the pupil on both occasions described, though not of a punitive nature. The determination of punishment, if any, is left to the Commissioner.

Charge No. 2: Lacking credible evidence of physical contact between the pupil and respondent, the hearing examiner recommends that the Commissioner dismiss this charge.

Charge No. 3: In summary the hearing examiner finds that the charge is true in fact. Respondent did in fact shake her and did forcefully push a book into her stomach. The hearing examiner leaves to the judgment of the Commissioner a determination concerned with whether such a finding is one which constitutes corporal punishment.

The hearing examiner observes that respondent, as directed, did submit to a psychiatric examination and that such examination showed no significant deviation from normal mental health. Accordingly, this factor requires no action by the Commissioner.

To further assist the Commissioner in reaching his decision, the hearing

examiner observes these facts: Respondent admits to poor judgment and intemperate action for which he apologizes and accepts responsibility. (Tr. 210) Counsel for the Board states "***I don't want to see Mr. Ivens fired. His record does not warrant that***" (Tr. 253) and "[t]he Board of Education does not want [him] to lose his job***but something has to be done so that when a teacher does use corporal punishment and does use his hands that it shan't happen again.***" (Tr. 255) Respondent was suspended with pay by the Board pending a determination of these charges by the Commissioner.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and the objections, exceptions and replies pertinent thereto, which have been filed by the parties pursuant to *N.J.A.C.* 6:24-1.17(b).

He observes that the exceptions of the Board are centered largely on the following legal definition of assault and battery:

> "***The mere placing of a person in fear of bodily harm constitutes an assault and the actual touching *after* such placement in fear constitutes a battery.***" (*Emphasis in text.*) (Board's Exceptions, at p. 1)

The concern of the Commissioner in such matters is centered on whether the intent of the teacher in the circumstances of an incident of alleged corporal punishment is to inflict pain and suffering on a pupil with possible resulting physical harm. The Board cites *In the Matter of the Tenure Hearing of Louis A. Garibaldi, Jr., School District of Toms River,* 1972 *S.L.D.* 611 as an example of the need for self-restraint and acceptance of responsibility on the part of a teacher. The Commissioner agrees. He observes that the Board does not seek the termination of respondent's employment; however it seeks to impress on him and others that the use of corporal punishment will not be tolerated. (Board's Exceptions, at p. 3)

Respondent in pleading that no acts of corporal punishment or improper conduct were proved cites *In the Matter of the Tenure Hearing of Walter Kizer, School District of the Borough of Haledon,* 1974 *S.L.D.* 505 and *In the Matter of the Tenure Hearing of Victor Lomakin, School District of South Orange-Maplewood,* 1971 *S.L.D.* 331.

The Commissioner now turns to the findings and recommendations of the hearing examiner.

Charge No. 1: The Commissioner observes that physical contact was made by respondent on both occasions described and agrees with the finding of the hearing examiner that the contact was not of a punitive nature. The record clearly shows that the actions of the teacher caused D.G. to weep. The Commissioner deplores the lack of self-control exhibited by the teacher in this instance and finds such conduct unbecoming a teacher.

Charge No. 2: The Commissioner agrees with the findings of the hearing examiner and accordingly this charge is dismissed.

Charge No. 3: Respondent did in fact shake the pupil and forcefully pushed a book into her stomach. The Commissioner finds that such action constitutes corporal punishment but under the circumstances does not warrant respondent's dismissal. The Commissioner takes note of respondent's pleadings that all the charges in question encompassed less than one hour in one afternoon in the more than twenty-four years of his unblemished record as a teacher.

The Commissioner observes, however, that this very record of excellent service over a long period of time only emphasizes the impropriety of the actions of the teacher.

The Commissioner has consistently recognized the heavy responsibility carried by teachers as professional employees in the educational process and the discharge of their duties in according the children in the schools of our state a thorough and efficient education. He is constrained to repeat his previous statement *In the Matter of the Tenure Hearing of Jacque L. Sammons, School District of Black Horse Pike Regional,* 1972 *S.L.D.* 302 wherein he said:

> "***[Teachers] are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment. As one of the most dominant and influential forces in the lives of the children, who are compelled to attend the public schools, the teacher is an enormous force for improving the public weal.***" (at 321)

Similarly, it was said *In the Matter of the Tenure Hearing of Ernest Tordo, School District of the Township of Jackson,* 1974 *S.L.D.* 97 that:

> "***Teachers are public employees who hold positions demanding public trust, and in such positions they teach, inform and mold habits and attitudes, and influence the opinions of their pupils. Pupils learn, therefore, not only what they are taught by the teacher, but what they see, hear, experience, and learn about the teacher. When a teacher deliberately and willfully *** violates the public trust placed in him, he must expect dismissal or other severe penalty as set by the Commissioner.***" (at 98-99)

The Commissioner views respondent's unbecoming conduct, in the instant matter, within the context of an otherwise unblemished record of twenty-four years' service to the Board. The Commissioner determines that dismissal would be unduly harsh and is not warranted in this instance. Accordingly, it is ordered that respondent be reinstated to his teaching position forthwith, at the same

annual salary he was paid during the time of his suspension, without benefit of any adjustment and increment which might have otherwise pertained.

COMMISSIONER OF EDUCATION

September 2, 1977

In the Matter of the Tenure Hearing of Michael E. Secula, School District of West Morris Regional, Morris County.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Alten W. Read, Esq.

For the Respondent, McGovern & Roseman (William J. McGovern, Esq., of Counsel)

The Board of Education of the West Morris Regional School District, hereinafter "Board," certified to the Commissioner of Education six charges of inefficiency against respondent, a teacher of mathematics with a tenure status. The Board simultaneously suspended respondent from his teaching duties, without pay, pending a determination of the charges. Respondent denies the charges and asserts that they are the product of personal bias and hostility manifested against him by the chairperson of the mathematics department.

Twenty-nine days of hearings were conducted in this matter, concluding on August 12, 1976, at the offices of the Morris County Superintendent of Schools and the Middlesex County Superintendent of Schools, and at the State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner. Thereafter, the parties filed written summations of the testimony adduced and evidence submitted in support of their respective positions. The report of the hearing examiner is as follows:

The completion of proceedings in this matter has been delayed because of several adjournments which were granted at the request of the parties. A one-year adjournment was occasioned by the unsuccessful efforts of the principal parties to reach a mutually agreeable settlement of the matter. Other adjournments were granted because of the unavailability of witnesses, conflicting court dates of respective counsel which took precedence, and the engagement of substitute counsel by respondent midway during the proceedings.

The Board withheld respondent's employment increment for the 1972-73 academic year. Respondent, in a separate action, challenged the propriety of that action of the Board. It was agreed that such matter be held in abeyance pending a determination of the certified tenure charges.

Respondent was initially employed by the Board for the 1959-60 academic year and assigned to teach mathematics in the high school. At the time the Board certified the instant charges, respondent was assigned to teach algebra, advanced algebra and trigonometry.

The Board asserts that respondent's performance as a teaching staff member in its employ is inefficient because he:

> "1. failed to demonstrate an understanding and application of mathematical concepts taught in Algebra I, Algebra II and Advanced Algebra and Trigonometry.
>
> "2. failed to instruct [his] classes using accurate and factual data in the subject matter taught.
>
> "3. failed to demonstrate efficient and orderly classroom and management procedures, and expectations consistent with school regulations.
>
> "4. failed to articulate consistently and accurately [his] lesson plans with the department chairman in conference as well as written form.
>
> "5. failed to implement the recommendations of [his] supervisors to improve classroom performance, and
>
> "6. failed to seek means to upgrade [his] professional development through utilization of the reading of professional journals, attending professional mathematics meetings-conventions and using self-evaluation techniques.***" (Statement of Charges)

Extensive testimony was elicited by the Board in support of the charges from the principal (Tr. VII; Tr. IX), two vice-principals (Tr. V; Tr. VI), and the mathematics department chairperson. (Tr. I; Tr. II; Tr. III; Tr. IV) Numerous exhibits were also submitted by the Board in support of the charges. (P-7 through P-20; P-22; P-24 through P-33; P-35 through P-40) These exhibits include detailed written evaluations of respondent's teaching performance as observed by each of the Board's witnesses, *ante,* on various occasions during the 1972-73 academic year. Respondent was successful in his argument to preclude the Board from relying on written evaluations of his teaching performance by the department chairperson and the principal between December 21, 1970 and March 22, 1972. The exhibits considered evidential also include respondent's written responses to the evaluations in support of the charges, memoranda exchanged between the principal parties, respondent's lesson plan book for the 1972-73 academic year, and other documents.

As was previously stated, the Board withheld respondent's salary increment for the 1972-73 academic year for asserted poor teaching performance. Subsequent to the beginning of the 1972-73 academic year, respondent's teaching performance was observed and evaluated intensively by the department chairperson, the principal, and the two vice-principals. Respondent was observed by the department chairperson on October 19 and 20, 1972, and his performance was evaluated in a composite report. (P-7) The department chairperson observed his performance again on November 7, 8, 9, and 10, 1972, and prepared a composite written evaluation. (P-8) The principal also observed respondent's performance with the department chairperson on November 7, 1972 and he prepared his own evaluation report. (P-9) One of the two vice-principals observed respondent's performance on November 9, 1972, independent of the department chairperson, and prepared a written evaluation report. (P-10) The department chairperson observed respondent on January 24, 25 and 26, 1973, and prepared a detailed written evaluation report. (P-11)

Each of the written evaluations between October 19, 1972 and January 26, 1973 sets forth assertions by the evaluators which, if true, would support the charges herein.

The principal and department chairperson jointly filed a "Personnel Recommendations for 1973-74" form with the Superintendent of Schools in regard to respondent. (P-35) The department chairperson asserts that her evaluations of respondent's teaching performance during October and November 1972 (P-7, P-8) and January 1973 (P-11) show that his performance continued to be incompetent, he had not sought assistance to improve his performance, he failed to plan his lessons thoroughly, he lacked a thorough understanding of the subject matter he was teaching, and he failed to follow proper classroom procedures and administrative rules. Although the department chairperson does acknowledge that respondent had been following her recommendations with respect to written lesson plans, she asserts that his total performance as a teacher did not show improvement. The department chairperson recommended to the Superintendent that respondent's employment be terminated.

The principal's recommendation to the Superintendent with respect to respondent for 1973-74, asserted that respondent continued to demonstrate incompetency and inefficiency as a classroom teacher from the time the principal had recommended the withholding of respondent's increment for 1972-73. The principal then stated that respondent was inefficient in six specific areas and recommended that the Superintendent so notify respondent and allow him ninety days to correct the alleged inefficiencies. (P-35)

The Superintendent notified respondent by letter (C-1) dated February 27, 1973 of the six alleged areas of inefficiencies, which are precisely the same inefficiencies certified by the Board to the Commissioner. The Superintendent also advised respondent that unless the inefficiencies were corrected within ninety days from that date he would recommend that the Board certify such charges to the Commissioner.

Thereafter, the department chairperson observed respondent on March 9,

12, and 13, 1973, and prepared an evaluation of his performance. (P-12) The vice-principal, who earlier prepared an evaluation on respondent's performance, (P-10, *ante*) observed respondent on March 26, 1973, and prepared a written evaluation. (P-13) The department chairperson again observed and evaluated respondent's performance on March 28, 1973. (P-14) The principal did likewise on April 16, 1973 (P-15A) and the department chairperson again observed and evaluated respondent on May 8 and 9, 1973. (P-16)

Another vice-principal observed and evaluated respondent's performance on May 25 and 29, 1973 (P-17) and the principal observed respondent on June 7, 1973 and prepared the final evaluation of his teaching performance. (P-18)

Thus, between the date of February 27, 1973, when the Superintendent advised respondent of the alleged inefficiencies against him, and May 29, 1973, or approximately ninety days thereafter, respondent was formally evaluated by his supervisors on ten separate days. The principal conducted an eleventh formal observation on June 7, 1973.

The hearing examiner will now discuss the proofs offered by the Board in support of charges one through five as a composite charge. Charge six will be considered individually. Such a treatment of the extensive testimony and documents submitted by the parties in the matter is consistent with the Commissioner's observation *In the Matter of the Tenure Hearing of Francis M. Starego, Borough of Sayreville, Middlesex County,* 1967 *S.L.D.* 271, aff'd State Board of Education 1968 *S.L.D.* 273, where, in pertinent part, it is stated:

> "***Each of the school administrators testified as to detailed observations which had been made of the teacher's [Starego] performance in the classroom over most of the span of his employment. The Commissioner finds no necessity to attempt to analyze and evaluate each of the incidents or instances related. Evaluation of a teacher's competency is generally a matter of total impression resulting from a synthesis of observations made over a period of time.***" (1967 *S.L.D.* at 272)

In the instant matter, the principal, two vice-principals, and the department chairperson, hereinafter "supervisors," unless otherwise specifically stated, each testified with respect to his/her observations and evaluations of respondent's teaching performance, as well as providing detailed written evaluations. Such written evaluations were prepared prior to respondent being advised by the Superintendent on February 27, 1973 of his alleged inefficiencies, as well as subsequent to that date, during the ninety day period allowed respondent to correct his deficiencies.

Prior to notifying respondent of his alleged inefficiencies, his supervisors critically evaluated his performance on five occasions and prepared five separate detailed evaluations for October 19 and 20, 1972 (P-7), November 7, 8, 9, and 10, 1972 (P-8), November 7, 1972 (P-9), November 9, 1972 (P-10), and January 24, 25 and 26, 1973. (P-11) Each evaluation was discussed with respondent in conference. The individual and collective testimony of the supervisors, as well as their separate evaluations, show that respondent's classroom presentation of the

application of the binomial theorem to binomial expansion was faulty, as was his presentation of binomial expansion when the coefficients and exponents of the terms of the equation are other than one. Respondent's presentation with respect to pascal's triangle was historically inaccurate, as was his explanation of the device being a method of binomial expansion as opposed to its use as a memory device. The testimony shows that respondent improperly presented solution sets for algebraic equations, that on two separate occasions it was necessary for respondent to call on the department chairperson to correctly explain to the pupils the application of solution sets for algebraic inequalities and for the definition of absolute value, that the supervisors had consistently advised respondent to develop detailed lesson plans prior to his respective classes so that he would have a more effective command of the material that he was to present, that respondent had failed to follow routine administrative policy with respect to pupil dismissal and pupil absences, that respondent's presentation of material was too slow for the ability of pupils with whom he worked, and that contrary to suggestion respondent's presentation during classes varied from his written plans for the specific day.

Respondent, in those instances where he filed a written reply to the evaluations, asserted that his lesson plans were adequate, that he found it necessary to adjust the plans after each class, that his presentation of material was geared to the ability of his pupils, that he called on the department chairperson during class only to confirm his explanation of solution sets to the pupils, and that it was he who defined absolute value to the pupils. Finally, respondent asserted that the department chairperson never offered him any assistance to improve his performance.

Subsequent to the receipt of the Superintendent's notice of inefficiency (C-1) dated February 27, 1973 *ante,* respondent, by memorandum (P-25) dated March 3, 1973, requested the department chairperson to provide him

> "***with specific and detailed written recommendations, procedures and a list of materials to be utilized in achieving your [the chairperson's] concept of efficiency, and the six (6) points [the charges herein] enumerated in [the Superintendent's] letter dated 2/27/73.
>
> "I will expect a written response within ten (10) days of receipt of this letter." (P-25)

The department chairperson, by memorandum dated March 7, 1973, advised respondent:

> "***Since specific and detailed written recommendations, procedures, and list of materials with respect [to his request] have been repeatedly enumerated, as well as verbally discussed with you, the following is simply a re-statement of my past efforts to assist you in correcting your inefficiencies as a classroom teacher. I refer you to the following documents, replete with constructive recommendations for improvement. You have the original copies."

> [Here follows a reference list to written evaluations from December 21, 1970 to January 26, 1973 including those evaluations hereinbefore discussed. (P-7 through P-11) Respondent is also directed to review memoranda from the principal, vice-principal, and her in regard to pupils, plan book, attendance procedure, his notice of the withholding of his salary increment, pupil passes, absentee slips and the need for him to use outside references other than regular textbooks.]

The department chairperson closes the memorandum by stating:

> "If you wish to re-discuss any of the specific and detailed recommendations, procedures, and list of materials to be utilized, included in the aforementioned documents, please arrange to see me for a conference." (P-26)

Subsequent to the receipt of this memorandum, respondent advised the department chairperson that her response to his request (P-25) was "***totally inadequate and in no way fulfills my request***" and

> "***I am again requesting that you fulfill my request for specific detailed procedures, methods, materials and references to meet my obligations as an efficient classroom teacher.
>
> "I consider your reply [P-26] and documents referred to as generalizations lacking the true form of pertinent recommendations to follow in order to remedy the alleged inefficiencies." (P-27)

The principal, in response to respondent's rejection of the department chairperson's recommendation to review his prior evaluations and communications directed to him by his supervisors, provided respondent with what the hearing examiner finds to be a detailed and comprehensive nine page report (P-28) dated March 14, 1973 with respect to how his performance might be improved and how it was expected to improve. The hearing examiner also notices that the principal's report is based substantially on respondent's prior written evaluations which respondent was directed to review with the department chairperson. Respondent's assertion that such advice was inadequate is not, in the judgment of the hearing examiner, based on fact. A review of the evaluation reports of his teaching since only October 1972 shows specific recommendations for improvement.

Respondent's teaching performance was observed by his supervisors on eleven occasions between February 27 and June 7, 1973. The supervisors prepared seven separate evaluations of their observations, which are dated March 9, 12 and 13, 1973 (P-12), March 26, 1973 (P-13), March 28, 1973 (P-14), April 16, 1973 (P-15A), May 8 and 9, 1973 (P-16), May 25 and 29, 1973 (P-17), and June 7, 1973. (P-18) The recommendations for respondent to improve his performance set forth in these evaluations include efforts on his part to know his subject matter more thoroughly to avoid errors in his classroom presentation (P-12; P-14; P-16), to meet with his department chairperson for advice and

counsel (P-12; P-13; P-14; P-16), to develop unit and daily lesson plans (P-12; P-13; P-14; P-15A; P-16), to present the specific lesson planned for a specific day (P-12; P-13; P-15A; P-17), to use references for source material other than the textbook (P-13; P-15A), to use proper and correct mathematical language in his presentations (P-14; P-18), to follow administrative policies with respect to attendance records (P-15A), to use self-help techniques such as audio and videotape recordings of his presentations. (P-10)

Finally, on June 12, 1973, the principal submitted a comprehensive report to the Superintendent in regard to the allegations of inefficiency against respondent, and the efforts of the supervisors to assist him to overcome the inefficiencies, as well as respondent's efforts to accept and implement the recommendations of the supervisors. The principal concludes in his report that:

> "After re-examining the observation-evaluation reports of [respondent] since February 27th to the present date, following a conference of all administrators [vice-principals] *** and the mathematics department chairman, I recommend that the original six (6) charges of inefficiency be forwarded to the Commissioner***.
>
> "The reasons for my recommendation are continued evidence [by respondent] of (a) subject matter incompetence, (b) ineffectual lesson and unit planning, (c) unwillingness to articulate clearly and consistently classroom objectives with the department chairman and (d) a failure to implement the practices, techniques and recommendations made by supervisory and administrative personnel.***" (P-32, at p. 2)

The principal also reports that respondent was uncooperative with the department chairperson during conferences following the evaluations she performed during the ninety day period, that respondent became belligerent with the vice-principal during an evaluation conference, that while specific recommendations were made to respondent by the supervisors to improve his performance he failed to carry out the recommendations, that the lessons respondent taught continued to be at variance with his written plans, that respondent had not demonstrated a thorough knowledge of the subject matter he was teaching, and that respondent still used imprecise mathematical language in his presentation. The principal also reports that respondent failed to maintain adequate class records with respect to pupil absences, that respondent failed to motivate the pupils in his classes, and that respondent failed to avail himself of the use of either the audio or videotape recorder, each of which was available to him for self-improvement.

The hearing examiner has reviewed the extensive testimony (Tr. XVIII; Tr. XIX; Tr. XX; Tr. XXI) and documents (R-11, 18, 20-23, 27-29, 31, 34-36, 38-39, 42, 51-56, 58-62, 65, 65A-68) offered by respondent in his defense against the charges. Respondent generally denies the truth of the charges herein with respect to his teaching performance being inefficient and asserts that many of the suggestions made to him by the department chairperson were either meaningless, or that he was already conducting his lessons and related responsibilities in the manner suggested, or that the recommendations proffered

were not suitable to his particular class of pupils or that the recommendations were not practical for his method of teaching.

Respondent's major defense entered in refutation against the charges is that the department chairperson and he had had a personal, amorous relationship since 1966, when the two were mathematics teachers, and which he terminated during 1969. Respondent asserts that she resisted the termination of their relationship, but that at his insistence the relationship ceased. The following year, when the department chairperson was appointed to her present position, respondent asserted she began a program of harassment against him by consistent negative evaluations. Respondent explained that this harassment culminated in the filing of the instant charges against him solely for the reason that he scorned her in 1969.

The hearing examiner places no weight on respondent's assertion in this regard. The record herein is solid with respect to the conclusions of the supervisors that respondent's performance was inefficient for the reasons stated. Even if a personal relationship had existed between respondent and the department chairperson, and even if he initiated its termination, the evaluations and respective testimony of each supervisor, heretofore addressed, overwhelmingly substantiates the charges herein. Specific recommendations were made to respondent for improvement, both before and after he was notified of his inefficiencies and invariably the recommendations were ignored, or, at best, loosely followed.

The hearing examiner finds that charges one through five certified by the Board against respondent are proven to be true. The hearing examiner recommends that charge six be dismissed since no proofs have been offered by the Board in support thereof except the assertions that respondent may not have used the audio or videotape recorder for self-help.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed and considered the report of the hearing examiner and the exceptions, objections and replies pertinent thereto filed by respondent. Respondent avers that the report is not supported by the total record and that oral evidence offered by him was rejected while all written reports and documents submitted by the Board were accepted as true in fact. He further avers that his proffered defense of bias by the department chairperson was hindered by the hearing examiner and that the examiner also deprived him of an opportunity to produce an expert in mathematics as a witness.

The Commissioner finds no merit in such exceptions. Respondent was afforded an extraordinarily lengthy hearing of twenty-nine days with full opportunity to rebut the charges against him and to cross-examine all witnesses who appeared for the Board in support of the five principal charges. The total record supports a finding that the charges are true in fact and that all school officials who worked with respondent over a period of months in an attempt to

assist in the correction of the recited inefficiencies were met with defiance and excuse. The inefficiencies continued during all of the period provided for remediation. The Commissioner so holds.

In the context of such holding, respondent's entitlement to tenure protection must be set aside. As the Commissioner said in *Starego, supra*:

> "***The paramount purpose of the public schools is to provide a thorough and efficient education for the children of the district. That purpose would be vitiated by protection in their employment of teachers who are proven to be inept and incompetent. The teacher in this case has had more than sufficient opportunity to rectify his patent shortcomings and to prove his capacity to discharge effectively the responsibilities of a teacher in the public schools. The teacher's unfitness having been clearly demonstrated by numerous incidents, cf. *Redcay v. State Board of Education*, 130 *N.J.L.* 369, 371 (*Sup. Ct.* 1943), affirmed 131 *N.J.L.* 326 (*E.&A.* 1944), and he having failed to correct his deficiencies after proper notice was given him, his right to continue in his employment in this school system under the protection of tenure (*R.S.* 18:13-16) is, in the Commissioner's opinion, rendered forfeit.***" (1967 *S.L.D.* at 274)

Accordingly, respondent is dismissed from his employment as a teaching staff member retroactive to the date of his suspension by the Board.

COMMISSIONER OF EDUCATION

September 2, 1977

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, September 2, 1977

For the Petitioner-Appellant, Michael E. Secula, *Pro Se*

For the Respondent-Appellee, Schenck, Price, Smith & King (David B. Rand, Esq., of Counsel)

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

December 7, 1977

In the Matter of the Tenure Hearing of Stephen Levitt, School District of the City of Newark, Essex County.

COMMISSIONER OF EDUCATION

DECISION

For the Complainant Board, Pickett & Jennings (Robert T. Pickett, Esq., of Counsel)

For the Respondent, Liss & Meisenbacher (Raymond Meisenbacher, Esq., of Counsel)

Charges of conduct unbecoming a teacher were certified to the Commissioner of Education by the Board of Education of the City of Newark, hereinafter "Board," on December 14, 1976 against Stephen Levitt, a teacher with a tenure status in its employ. Respondent denies the allegations and demands immediate reinstatement to his employment from which he has been suspended, with all back pay and emoluments withheld from him.

Hearings were conducted in the matter on March 1, 2, 4, and 7, 1977 at the offices of the Essex County and Union County Superintendents of Schools, and at the State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

The Board certified eleven charges of unbecoming conduct against respondent which may be categorized as follows:

> "***Stephen Levitt [respondent] did threaten, harass and abuse James Barrett, principal of Weequahic High School, at his home by use of a telephone located at his home.***
>
> "[Charge One] On or about April 30, 1976 at 1:39 a.m. and 1:40 a.m.***
>
> "[Charge Two] On or about May 6, 1976 at 12:01 a.m. and 12:02 a.m.***
>
> "[Charge Three] On or about May 12, 1976 at 1:22 a.m.***
>
> "[Charge Four] On or about May 14, 1976 at 1:49 a.m. and 1:50 a.m.***"

Charges Five through Eight allege that respondent was convicted in Newark Municipal Court on July 1, 1976 of making harassing telephone calls to the principal on the dates and times set forth in Charges One through Four.

Charges Nine through Eleven may be categorized as follows:

> "***Stephen Levitt [respondent] did threaten, harass and abuse Joelle

Zois, English Department Chairman of Weequahic High School, at her home by use of a telephone located at his home.***

"[Charge Nine] On or about April 30, 1976, at 1:41 a.m., 1:43 a.m., and 1:44 a.m.***

"[Charge Ten] On or about May 6, 1976, at 12:02 a.m.***

"[Charge Eleven] On or about May 12, 1976, at 1:25 a.m.***"

Respondent has been employed since 1968 by the Board as a teaching staff member and is assigned to the English department at the Weequahic High School. He is a member of the Newark Federated Teachers' Union, hereinafter "Union," and, as vice president of the Union, is a member of its negotiating team. During the 1975-76 academic year, respondent was excused from his regular teaching duties on October 24, 1975 to participate in negotiations with the Board. He returned to his teaching duties at the commencement of the 1976-77 academic year.

The principal and department chairman testified that subsequent to the beginning of school in September 1975 respondent's attitude towards them became uncooperative and adversary in nature. The principal testified that respondent engaged in activities to undermine his administrative authority and responsibility with respect to the operation of the school. The department chairman testified that respondent continually criticized her operation of the English department.

Specifically, the principal testified that during October 1975 respondent circulated a memorandum advising faculty members not to talk with school administrators without a union representative present. The principal also testified that respondent urged the faculty members to prepare lesson plans in their own fashion regardless of what was required of them by the school administrators. The department chairman testified that respondent had filed several grievances against certain procedures she formulated for the English department, that respondent took issue with her lesson plan requirements for the English department and that he strenuously objected to a meeting she called for reading teachers even though attendance was voluntary.

The principal testified that a teachers' strike occurred during the first week of February 1976 during which time he continued to report to his office. The principal explained that he began receiving anonymous telephone calls at his home late at night and early morning. The principal testified that his telephone would ring at eleven p.m., midnight, one, two or three a.m. When he answered his telephone, the caller would hang up. This would occur two or three times a night, Monday through Friday.

The principal testified that he initially considered the telephone calls a general kind of harassment which he associated with the teachers' strike. The principal explained he became concerned when the anonymous telephone calls continued into March and April. The principal finally contacted New Jersey

Bell Telephone Company, hereinafter "telephone company," and reported the occurrence of the anonymous calls.

The telephone company placed a trap at its central switching station on the principal's home telephone wires in an effort to establish where the anonymous calls were originating. This trap device enabled the telephone company to advise the principal that the anonymous calls were originating from one of two exchanges. An exchange is the first three digits of a telephone number.

The principal testified that he reviewed the telephone numbers of each employee assigned to the Weequahic High School. (P-1) He established that respondent's telephone number began with one of the two exchanges reported to him by the telephone company. The principal testified that he informed the telephone company that he suspected the anonymous calls were originating from the telephone number assigned respondent.

The department chairman's testimony with respect to her receipt of anonymous telephone calls at home during the late evening and early morning is essentially the same as the principal's testimony. The department chairman began receiving anonymous telephone calls during the one week teachers' strike at the beginning of February 1976. The calls continued into March and April, two or three times a night anywhere from 10:30 p.m. to 2:30 a.m., three or four nights a week. When she answered the telephone the caller would hang up. The department chairman complained to the telephone company and a trap was placed on her telephone wires at a central switching station. The telephone company advised her that her anonymous calls were originating from one of two exchanges, the same exchanges from which the telephone company advised the principal his anonymous calls were originating. The department chairman reviewed the telephone listings of all employees at Weequahic High School and determined that respondent's telephone listing was from one of the two exchanges. She, too, advised the telephone company of her suspicion that the anonymous calls were originating from respondent's telephone.

Thereafter, the telephone company placed a trap on respondent's telephone wires at its clerical switching station. The telephone company's chief switchman who is responsible for the maintenance of respondent's telephone exchange testified that the trap device placed on a specific telephone will record on paper tape each instance in which that telephone is placed in service for an outgoing call. That is, as soon as the telephone receiver is picked up and the caller dials a telephone number, or a portion thereof, the trap records the date, the time of the day the call is initiated, the telephone number dialed, and the time of day the call is completed. The device uses a twenty-four hour clock, with the minute being the smallest unit of time which may be recorded.

The chief switchman testified that the trap device placed on the principal's and department chairman's telephone wires could provide only the exchanges from which the anonymous calls were originating since the trap device was placed on the receiving telephone wires for incoming calls.

The chief switchman testified that the trap device was placed on respondent's telephone wires on April 27, 1976, and it was removed on May 14, 1976. The trap recorded on tapes (P-5, 6, 7, 8) that telephone calls were made to the principal's home from respondent's telephone on April 30, 1976 at 1:30 a.m., another within the same minute, and another call was made at 1:40 a.m. Telephone calls were made from respondent's telephone to the department chairman's home on April 30, 1976 at 1:40 a.m., 1:41 a.m. and another within the same minute of 1:41 a.m. (P-5)

Telephone calls were made from respondent's telephone to the principal's home on May 6, 1976 at 12:01 a.m., and another at 12:02 a.m. A telephone call was made from respondent's telephone to the department chairman's home on May 6, 1976 at 12:02 a.m. (P-6) A telephone call was made from respondent's telephone on May 12, 1976 to the principal's home at 1:22 a.m. and to the department chairman's home at 1:23 a.m. (P-7) Telephone calls were made from respondent's telephone to the principal's home on May 14, 1976 at 1:49 a.m. and another at 1:50 a.m. (P-8)

The principal and the department chairman filed criminal charges against respondent for the annoying telephone calls they received. The principal's complaint was heard in Newark Municipal Court on July 1, 1976, and respondent was found guilty of making annoying telephone calls to the principal on April 30, May 6, May 12, May 14 and May 17, 1976, contrary to provisions of *N.J.S.A.* 2A:170-29.4. Respondent was fined $100 plus twenty dollars in court costs, both of which were suspended. (C-1; C-2) It is noticed that the Board's charges herein are centered on the same dates that were considered by the Newark Municipal Court, with the exception of May 17, 1976. Consequently, to the extent that Charges Five through Eight allege respondent was found guilty in Newark Municipal Court of making annoying calls to the principal, those charges are true.

The department chairman's complaint against respondent was heard by the Municipal Court of South Orange. There, the Court found respondent not guilty of the charge because "***the link as to who made the calls was not there. It could have been him and it could have been somebody else. Maybe he has a wife or a parent or a son or somebody else in [his house] *** I cannot say that I am satisfied beyond a reasonable doubt he made the calls.***" (C-13)

Respondent, called as a witness by the Board, testified that he lives alone in his apartment. He is not married nor do his parents live with him. Respondent denied making the telephone calls complained of therein.

The hearing examiner finds respondent's denial of the telephone calls incredible in light of the telephone tapes (P-5, 6, 7, 8) and the absence of a plausible explanation of who could have made the calls from his telephone.

Administrative hearings do not require a standard of proof which establishes guilt beyond a reasonable doubt. Rather, it is sufficient for tenure charges to be sustained before the Commissioner if the Board establishes by a

preponderance of believable evidence that the charges are true. *Park Ridge v. Salimone,* 36 *N.J. Super.* 485, 498 (*App. Div.* 1955)

The hearing examiner finds that the weight of credible evidence herein establishes that respondent did, in fact, make the telephone calls or has caused the calls to be made to the principal's and the department chairman's homes as alleged by the Board.

The hearing examiner will now consider whether such anonymous telephone calls may be considered to have threatened, harassed, or abused the principal and/or the department chairman as alleged.

Black's Law Dictionary (rev. 4th ed. 1968) defines threat as:

> "***A menace; especially, any menace of such a nature and extent as to unsettle the mind of the person on whom it operates, and to take away from his acts that free and voluntary action which alone constitutes consent. ***" (at p. 1651)

The word abuse, used as a noun, is defined as:

> "Everything which is contrary to good order established by usage.***" (*Id.*, at p. 24)

Used as a verb, the word abuse is defined as:

> "To make excessive or improper use of a thing or to employ it in a manner contrary to the natural or legal rules for its use***." (*Id.*, at p. 25)

Webster's Third New International Dictionary 1031 (1966) defines harass as:

> "***[T]o worry and impede by repeated attacks***/to tire out***: EXHAUST, FATIGUE ***/to vex, trouble, or annoy continually or chronically (as with anxieties, burdens, or misfortune)***"

The principal testified that he is married and that he and his wife have two children, nine and thirteen years of age. The principal explained that the series of anonymous telephone calls he received late in the evening and early morning caused him and his family concern. Their sleep was interrupted and his wife and children began to worry about the continuous calls he received. Finally, the principal required medical attention for the stress and strain which resulted from the telephone calls.

The department chairman testified that she is married and has one child. The anonymous telephone calls she received were extremely disturbing to her family and interrupted everyone's sleep. The department chairman also required medical attention for stress and strain.

The hearing examiner finds that notwithstanding the fact that respondent

said nothing to the principal or the department chairman when they answered their telephones on the dates and at the times complained of herein, the telephone calls did in fact threaten, harass, and abuse the principal, the department chairman and their respective families.

Consequently, the hearing examiner finds that the charges certified by the Board, including Charges Five through Eight against respondent, are true in fact.

The hearing examiner will now discuss respondent's Motion to Dismiss the charges, which on a previous occasion, was procedurally denied.

Respondent asserts that the Board violated the provisions of *N.J.S.A.* 18A:6-13 by failing to certify the charges to the Commissioner within forty-five days from its receipt of the charges. Respondent in this regard relies on a memorandum (P-13) submitted to the assistant executive superintendent by the principal sometime in late August 1976. The principal advised the assistant executive superintendent that respondent had been found guilty of making annoying telephone calls to his home in Newark Municipal Court on July 1, 1976. Thereafter, the principal recapitulated his experiences from the beginning of April 1976 when he contacted the telephone company regarding the anonymous calls as hereinbefore reported. The principal then recited a series of events which occurred when the department chairman was appointed to that position in September 1974. It is noticed here that respondent had been the acting department chairman during the prior year. The principal explained that subsequent to the department chairman's appointment, he was inundated with nuisance grievances and telephone calls from newspapers and the police regarding false stories which were being circulated about the school.

The principal stated that at the time the anonymous calls were being made by respondent, an anonymous advertisement was placed in a local newspaper which, he asserts, was aimed at him. The advertisement was alleged to have read:

> " 'For Sale West African skunk. Rare in the U.S. Trained to answer to the name of Jim. Call between the hours of 3 and 5. $20.00' " (P-13)

The principal's given name is James and he is Black.

The principal stated that someone attempted to place false advertisement in a local newspaper which purportedly offered the department chairman's automobile for sale. The newspaper called the department chairman to verify the advertisement and was informed she did not plan to sell her automobile.

The principal concluded, while he could not prove who perpetrated the anonymous advertisements, that in light of respondent's anonymous telephone calls a clear pattern of harassment against him was established. The principal then recommended to the assistant executive superintendent that charges of unbecoming conduct be preferred against respondent for the anonymous telephone calls and further recommended that respondent not be allowed to return to school in September 1976. (P-13)

The assistant executive superintendent testified that she reviewed the principal's memorandum (P-13) sometime in September 1976 and subsequently discussed the matter with the deputy executive superintendent and Board counsel. The assistant executive superintendent then discussed the matter with the principal and the department chairman and the three began to draw up the charges in early October. Thereafter, they discussed the charges with the Board in executive session in late October or early November.

The Board notified respondent of the charges by letter dated November 10, 1976. (C-13) Respondent filed his response to the charges by cover letter dated November 30, 1976. (C-10) The Board took action to certify the charges on December 14, 1976 at a private session and ratified this action at a public meeting conducted on December 28, 1976. (C-15)

Respondent argues that the tolling of time with respect to the forty-five day requirement of *N.J.S.A.* 18A:6-13 began with the principal's memorandum of late August 1976. (P-13) The hearing examiner disagrees. *N.J.S.A.* 18A:6-11, as amended, requires that an employee against whom tenure charges are filed be given the opportunity to file a response with the Board prior to the Board determining whether to certify the charges to the Commissioner. It has been established that the forty-five day requirement of *N.J.S.A.* 18A:6-13 does not begin to toll until the affected employee files a response to the charges. *Marilyn Feitel v. Board of Education of the City of Newark, Essex County,* 1977 *S.L.D.* ___ (decision on Motion April 15, 1977)

In the instant matter, respondent filed his response (C-10) on November 30, 1976. The Board took action to certify the charges on December 14, 1976, well within the forty-five day requirement of *N.J.S.A.* 18A:6-13.

The hearing examiner recommends that respondent's Motion to Dismiss be denied.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record in the instant matter, including the report of the hearing examiner and the exceptions and objections filed thereto by respondent.

Respondent asserts that the hearing examiner improperly considered the professional differences he may have had with the principal and department chairperson during the 1975-76 academic year with respect to the finding that the charges are proven to be true. Respondent contends that his responsibilities as the union's building representative demanded that he raise areas of professional concern, emanating from the Board-Union agreement, with the principal and department chairperson. Consequently, respondent asserts that his relationship with the two administrators may not, in the context of his union responsibilities, be used against him to establish a negative attitude on his part.

The Commissioner does not agree. Respondent's first responsibility is that of a teacher whose immediate supervisors are the department chairperson and the principal. These persons are charged with the responsibility of implementing the educational program in the school as established by the Board. The fact that the hearing examiner reported the relationship which existed between respondent and the two administrators is not, in the judgment of the Commissioner, prejudicial to respondent.

Further, respondent asserts that because the Board called him as a witness during its case it is bound by his denial of the charges and cites *Standard Water Systems Company v. Griscom Russell Company,* 278 *F.* 703, *cert.* denied 42 *S.Ct.* 464, 259 *U.S.* 580 and *U.S. Drainage Company v. Manhattan,* 236 *F.* 144, aff'd 246 *F.* 446. Respondent also asserts that the telephone tapes (P-5, 6, 7, 8 do not establish that all the telephone calls set forth in the charges were made from respondent's telephone. Respondent specifically cites the telephone call he was to have made to the principal's home on April 30, 1976 at 1:39 a.m. and the telephone calls to the department chairperson's home on April 30, 1976 at 1:43 and 1:44 a.m. and on May 12, 1976 at 1:25 a.m. as not being supported by the telephone tapes.

The Commissioner observes that the hearing examiner, as the trier of fact, has the duty and responsibility to weigh the testimony and set forth his findings. The hearing examiner is not bound by the denial of respondent with respect to the charges. While respondent was called as a witness by the Board, the hearing examiner set forth sufficient reason why respondent's denial of the charges was not considered credible.

The fact that the telephone tapes do not support each of the specific telephone calls alleged in the charges does not alter the hearing examiner's finding that respondent made the calls as charged. Respondent is charged with making telephone calls to the principal's home on April 30, 1976; the tape (P-5) establishes that calls were made from his telephone to the principal's home on April 30, 1976 at 1:30 a.m., another within the same minute, and another at 1:40 a.m. The Commissioner places little weight on respondent's argument that the tape does not reflect a telephone call at 1:39 a.m. nor does the Commissioner find it significant that the tape (P-5) of telephone calls to the department chairperson's home from respondent's telephone does not record calls made at 1:43 a.m. and 1:44 a.m. on April 30, 1976. The tape does record that calls were made from respondent's telephone to the department chairperson's home on April 30, 1976 at 1:40 a.m., 1:41 a.m. and another within the same minute of 1:41 a.m.

Respondent asserts that he was not charged with causing calls to be made to the administrators' homes. Rather, he was charged with making the calls. Thus, respondent contends the hearing examiner exceeded his authority in his finding that respondent made the calls or caused them to be made.

The Commissioner finds that this argument places form over substance. The evidence establishes that the telephone calls set forth in the charges were made from respondent's telephone. It is a fair conclusion that respondent made

the telephone calls. It is also fair to conclude that respondent caused the calls to be made.

The Commissioner has reviewed the remaining objections of respondent with respect to the definitions of threat, abuse and harassment set forth by the hearing examiner. The Commissioner finds no merit in these objections.

Accordingly, the Commissioner adopts the findings of the hearing examiner that the charges against respondent are proven to be true. Respondent's conduct in this regard is highly unbecoming. As a teacher his responsibility is to demonstrate, through his behavior, proper conduct for his pupils to emulate. Surely, the type of conduct shown by respondent in regard to the early morning telephone calls which did abuse, threaten and harass the administrators and destroyed the tranquility of their respective homes, is not conduct desirable for emulation.

Respondent's unbecoming conduct warrants the termination of his employment and tenure status with the Board of Education of the City of Newark as of the date of his suspension. It is so ordered.

COMMISSIONER OF EDUCATION

September 6, 1977
Pending State Board of Education

Edgar Van Houten,

Petitioner,

v.

Board of Education of the Township of Middletown, Monmouth County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Greenberg and Mellk (Arnold M. Mellk, Esq., of Counsel)

For the Respondent, Norton and Kalac (Peter P. Kalac, Esq., of Counsel)

Petitioner has been employed by the Middletown Board of Education, hereinafter "Board," as a junior high school social studies teacher from 1956 to the present. During a portion of this period he was paid an additional annual stipend to serve from September 1966 through June 1976 as social studies

department chairman. He alleges that the Board's refusal to appoint him to the newly established position of social studies department coordinator for the period beginning September 1976 was an irrational, biased, arbitrary and capricious act in contravention of his statutory and constitutional rights. The Board, denying that its determination was other than a legal exercise of its discretionary authority under *N.J.S.A.* 18A:11-1 *et seq.*, moves for dismissal.

This matter is before the Commissioner of Education in the form of the pleadings, Motion to Dismiss, Briefs of litigants, exhibits and affidavits of petitioner's principal and the assistant superintendent of schools. The uncontroverted facts are as follows:

Petitioner, who had served as department chairman without stipend since September 1960, was appointed by the Board to continue to serve in that capacity beginning September 1966 at a stipend of $100 plus $5.00 for each of approximately six social studies teachers in the department. No written job description was articulated nor was it at any time required by the Board that petitioner be the holder of other than a teacher's certificate issued by the New Jersey State Board of Examiners. Nevertheless, petitioner applied for and was issued both a supervisor's certificate and a principal's certificate by the Board of Examiners on February 4, 1969.

In May 1976 the Board determined to restructure its administrative staff by eliminating the positions of its twenty-one junior high school department chairmen and establishing seven department coordinators in each of its three junior high schools. The posting of those positions in May 1976 and the job description adopted September 15, 1976, specified, *inter alia,* that a master's degree was preferred, that three years of teaching experience in the field of specialty, and New Jersey teacher certification were required, and that salary was to be negotiated. (Exhibits A, B)

As department chairman, petitioner had observed and assisted in the evaluation of social studies teachers, planned and conducted departmental meetings, prepared the departmental budget and inventories and assisted substitutes. Additionally, he had responsibility for field trips, news releases, and releases to parents and the establishment of departmental and individual teacher's goals and objectives. Time allocated for the performance of these duties in the seven-period daily schedule was one period per day. In the remaining six periods he was scheduled four periods for classroom teaching, one for duty assignment and one for professional preparation.

The job description, promulgated on September 15, 1976, requires a department coordinator to assist in preparation and implementation of curriculum objectives and the departmental budget, to provide substitutes with daily schedules and plans, to attend curriculum and professional conferences, and to oversee the department's supply, textbook and equipment needs. (Exhibit B)

Petitioner made application and was interviewed by an evaluation team but was notified on September 2, 1976 that he would not be appointed as a

department coordinator. Thereupon, he grieved the matter and, when the grievance was denied by the Board, elected not to carry it to arbitration but to file the within Petition of Appeal before the Commissioner.

The Board, in support of its Motion to Dismiss, cites and relies upon *Walter Wilson v. Board of Education of the City of New Brunswick, Middlesex County,* 1977 *S.L.D.* (decided May 6, 1977). Therein, the Commissioner, noting the similarity to *Herbert J. Buehler v. Board of Education of the Township of Ocean,* 1970 *S.L.D.* 436, aff'd State Board of Education 1971 *S.L.D.* 660, aff'd Docket No. A-2297-70 New Jersey Superior Court, Appellate Division, November 2, 1972 (1972 *S.L.D.* 664), determined that Wilson, who had a supervisor's certificate, was paid a stipend for performing the work of a department chairman, and taught but one class daily, was not tenured as a department chairman because the Board at no time required him to hold a supervisory certificate to fill that post. The Board, in the instant matter, argues that petitioner had less supervisory responsibility than did Wilson, that his assigned duties were basically those of a classroom teacher, and that it had at no time promulgated a job description which required that he hold a certificate other than that of a teacher, moves for dismissal of the Petition.

Petitioner argues, conversely, that although he does not meet the Commissioner's standard for tenure as enunciated in *Wilson, supra,* he would be eligible to accrue time toward tenure as a department coordinator were it not for the Board's allegedly irrational and illegal termination of his supervisory duties. He asserts that he has the right to a full plenary hearing in order to submit proof that the Board's action violated his statutory and constitutional liberty to engage in associational activity and express himself freely. Petitioner avers that his due process rights and rights to equal protection under the Constitution of the United States were violated by the Board's action and that the restoration of his good name, honor and integrity demand that he be reinstated to his supervisory capacity as a department coordinator. (Brief of Petitioner, at pp. 4-8) *Board of Regents of State Colleges v. Roth,* 408 *U.S.* 564 (1972); *Perry v. Sindermann,* 408 *U.S.* 593 (1972); *Armistead v. Starkville Municipal Separate School District,* 461 *F.2d* 276 (5th Cir. 1972)

Petitioner argues that his claim that the Board acted out of bias and had prejudged his application precludes summary judgment for the Board or dismissal of the Petition. (Brief of Petitioner, at p. 7)

The Commissioner, having carefully examined the record, finds sufficient uncontroverted facts upon which to render a determination of the dispute.

Petitioner errs wherein he argues that assignment to the position of department coordinator would have placed him in a tenure-eligible position. Nothing in the job description supports a conclusion that other than a teaching certificate is required for such position. (Exhibit B) It follows that appointment and service as a department coordinator would not meet the precise conditions of tenure enunciated by the Legislature in *N.J.S.A.* 18A:28-5, which states, *inter alia,* that:

> "***The services of 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* *** shall be under tenure during good behavior *** after employment *** for:
>
> (a) three consecutive calendar years *** or
>
> (b) three consecutive academic years together with employment at the beginning of the next succeeding academic year; or
>
> (c) the equivalent of more than three academic years within a period of any four consecutive academic years***."
>
> (*Emphasis supplied.*)

It is clear, therefore, that petitioner was not required by the Board to hold a supervisor's certificate as a department chairman. It is similarly apparent that, had he been appointed as a department coordinator, he would not have been required either by the Board, the statutes or rules of the State Board of Education to be certified other than as a teacher. Accordingly, in neither of these positions did he or could he have acquired tenure. The Commissioner so holds. *Wilson, supra; Buehler, supra*

The matter is similar to that of *Henry R. Boney v. Board of Education of the City of Pleasantville et al.,* 1971 *S.L.D.* 579 wherein the Commissioner, concluding that a department chairman had no entitlement to continue in that position, stated:

> "***[N]o tenure status accrues to extra-classroom assignments such as that performed by petitioner, and they are renewed or discontinued at the discretion of the Board.***
>
> "Under these circumstances, the Board had no obligation to give reasons for not reassigning petitioner or in fact to grant petitioner a hearing.***
>
> "***[T]he Board merely exercised its right to decline to reassign a teacher to a nontenured duty, and in exercising that discretion, it had no obligation to defend its action or to afford a hearing.***" (at 585)

Further, as the Court said in *Dunellen Board of Education and Commissioner of Education of New Jersey v. Dunellen Education Association and Public Employment Relations Commission,* 64 *N.J.* 17 (1973), a determination by a local board of education to consolidate department chairmanships is predominantly a matter of educational policy and within the parameters of such board's authority. (See also *Joseph J. Dignan v. Board of Education of the Rumson-Fair Haven Regional High School,* 1971 *S.L.D.* 336, aff'd State Board of Education 1974 *S.L.D.* 1276, aff'd Docket No. A-444-74, New Jersey Superior Court, Appellate Division, October 10, 1975 (1975 *S.L.D.* 1083).)

In one important aspect the instant matter is distinguishable from *Boney, supra,* namely, that Boney raised no allegation that his board had engaged in

statutorily or constitutionally proscribed discriminatory practice. Such allegations having been raised by petitioner herein, they must be examined to determine whether they constitute a sufficient offer of proof to require a plenary hearing.

A careful review of those allegations appearing in the Petition of Appeal reveals only that petitioner charges that his failure to be appointed as department coordinator resulted from his "***active participation in the Middletown Teachers Association as its President.***" (Petition of Appeal, at p. 3) No detailed summary of frictional encounters resulting from petitioner's associational activities is articulated in the Petition nor was any offered at the conference or in petitioner's Brief. Rather, petitioner merely characterizes the Board's determination as arbitrary, unreasonable, capricious and violative of his rights of due process and equal protection under law.

The Commissioner is mindful of that which was enunciated by the Court in *Burg v. State,* 147 *N.J. Super.* 316 (*App. Div.* 1977) as follows:

> "***It is thoroughly settled that on a motion challenging the legal sufficiency of a complaint, *R.* 4:6-2(e), 'the plaintiff is entitled to a liberal interpretation of its contents and to the benefits of all its allegations and the most favorable inferences which may be reasonably drawn from them.' *Rappaport v. Nichols,* 31 *N.J.* 188, 193, (1959); see also *Bonnett v. State,* 126 *N.J. Super.* 239, 242 (App. Div. 1974).***" (at 319-320)

Similarly applicable is that which was stated by our State's highest Court in *Tidewater Oil Company v. Mayor and Council of Carteret,* 44 *N.J.* 338, 342 (1965):

> "***It is clearly not enough if the asserted question is only remotely or speciously connected to the constitution by the loose or contrived use of broad constitutional terminology. Shibboleth mouthing of constitutional phrases like 'due process of law' and 'equal protection of the laws' does not *ipso facto* assure absolute appealability. *** In addition there must appear indication of true merit from the constitutional point of view, *i.e.,* that the issue tendered is not frivolous and has not already been the subject of a conclusive judicial determination.***"

The Appellate Division of the New Jersey Superior Court in *Marilyn Winston et al. v. Board of Education of the Borough of South Plainfield, Middlesex County,* 125 *N.J. Super.* 131 (*App. Div.* 1973) (1973 *S.L.D.* 802, 808-809), aff'd 64 *N.J.* 582 (1974) (1974 *S.L.D.* 1437), dismissed by Commissioner 1974 *S.L.D.* 999 in remanding to the Commissioner for a plenary hearing a matter which he had dismissed on motion, stated:

> "***[P]etitioner's claim of a deprivation of her constitutional rights was adequately detailed and corroborated, sufficient to require consideration of her complaint. Specifically the petition of appeal to the Commissioner set forth several instances in some detail indicating that Winston had

> questioned policy decisions, *** expressed criticisms among teachers concerning certain administrative directives and the like. *** 'Administrator's remarks' raise an inference that Winston's speech and expressions were considered too captious and contentious and that this may have been a material factor in the discontinuance of her employment.***
>
> "Here, Winston has made a sufficient showing that the decision by the respondent local board may have been prompted by her exercise of the right of speech protected under the First and Fourteenth Amendments. In this sense, she presented a bona fide claim of constitutional stature and was, therefore, entitled to a full evidentiary hearing***."
>
> (125 *N.J. Super.* at 144-145)

No sufficiently detailed offer of proof or specific allegations of incidents of impropriety have been made by petitioner in the instant matter. Accordingly, it must be concluded that the controversy is importantly distinguishable from *Winston, supra.*

Petitioner, being without tenure, contract, or promise of employment as a department coordinator, had no property right in that position. *Sallie Gorny v. Board of Education of the City of Northfield et al.,* 1975 *S.L.D.* 669; *Roth, supra*

Absent tenure entitlement or an adequate showing by petitioner to sufficiently amplify his naked allegations of impropriety by the Board, petitioner presents insufficient reason for further action. Accordingly, the Board's Motion to Dismiss the Petition of Appeal is granted. *Winston, supra; Boney, supra; Wilson supra; Buehler, supra; Tidewater, supra*

COMMISSIONER OF EDUCATION

September 12, 1977
Pending State Board of Education

William and Genevieve Fitzgibbon,

Petitioners,

v.

Board of Education of the Township of Jefferson, Morris County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Dolan and Dolan (Francis E. Bright, Esq., of Counsel)

For the Respondent, Murray, Meagher & Granello (James P. Granello, Esq., of Counsel)

Petitioners, tenured teaching staff members in the employ of the Board of Education of the Township of Jefferson, hereinafter "Board," allege that an action of the Board in 1972 withholding two days' salary and reprimanding them was an abuse of discretion in the circumstances and discriminatory. They demand judgment by the Commissioner of Education to this effect and salary reimbursement. The Board maintains that the action it took was a proper one grounded in a factual setting of willful absence from contracted teaching responsibilities and it moves for dismissal of the Petition.

A hearing was conducted on May 18, 1976 and continued on November 8, 1976. Briefs were subsequently filed and submission was completed on February 1, 1977. The report of the hearing examiner is as follows:

The original Petition herein was filed February 10, 1975 after a period of approximately two and a half years from the time in September 1972 when the Board took its controverted action to withhold salary from petitioners and to reprimand them for absence from teaching duties. Subsequently, the Petition was amended on June 2, 1976. This delayed filing is also advanced by the Board as a reason for dismissal of the Petition.

Certain primary facts are not disputed and may be set forth succinctly as a frame of reference for consideration of the principal issues.

Petitioners are tenured teaching staff members with long service in the employ of the Board as teachers of English, and/or other subjects in the curriculum of the middle school grades, who decided in the late winter of 1972 to enroll in a summer school program in English literature to be conducted in England. In early March 1972, after an investigation of passenger ship schedules they firmly committed themselves to sail to England after the close of school in June and to return to New York early on the morning of September 5, 1972. A return on this date in the context of school calendars of prior years in Jefferson would have enabled them to be present for the opening of school on Wednesday, September 6, and to attend all or the greater part of an orientation day on September 5. Labor Day fell on September 4 in 1972.

Such planning, based on a traditional school opening schedule, was rendered defective when on May 8, 1972, the Board adopted a school calendar for the 1972-73 academic year which set September 1, 1972 as orientation day and September 5 as the day for opening of school for pupils. (R-2) Petitioners knew of such adoption at the time it was made and immediately contacted school officials to discuss the effect of the alteration on their summer plans. They discussed such plans with department heads and principals and on June 19, 1972, Mr. Fitzgibbon addressed the following letter to the Superintendent:

> "I wish to request leave with pay for September 5, 1972, since an educational program in which I'm participating this summer will necessitate my being one day late for the opening of school.
>
> "The entire summer was planned to be devoted to educational pursuits (study and travel in the field of English literature). The first four weeks of the program are to be spent in classwork at the University of London, taking graduate courses in Shakespearian Drama and the Victorian Novel. The following weeks will be spent in travel to selected areas as part of the program of studies contemplated. Travel will be either with the course group or individually and will include visits to the scenes of major authors' lives and works.
>
> "Since neither my wife nor I choose to fly for various reasons, it was necessary to make transportation arrangements by ship. In order to assure passage (since tourist class is normally sold out by March), travel arrangements were completed before the end of that month—many weeks before the issuance of the calendar for the forthcoming school year which set September 5th as the opening day of school. It should be noted that the opening day of Tuesday is a departure from the tradition of starting school on the Wednesday following Labor Day. In other school districts in the area, Tuesday is being used by teachers to 'set up' their classrooms (as has been the case in Jefferson in past years). Since our ship is scheduled to dock Tuesday at 9:30 a.m., the 'setting up' on September 5 appeared to pose no problem when we originally made our travel plans.
>
> "An earlier time for return would be difficult, if not impossible, to arrange at this date. More important, if this could be done, it would represent a two-week curtailment of the summer educational program—merely to be on hand for a single day devoted mainly to orientation rather than teaching." (R-3)

The Superintendent replied promptly on June 22, 1972 to Mr. Fitzgibbon as follows:

> "Your request for leave with pay for September 5, 1972 has been referred to me by Mr. Storch as requests for leaves are handled through this office.
>
> "As you know, September 5th is the opening day of school and the school calendar also calls for one day of classroom preparation, orientation, planning, etc., before the opening of school. This is a crucial time and sets

the tone for the program that follows. Except in cases of illness, all staff members are required to be present and contribute to the purposeful opening of school. It appears that the program in which you are participating this Summer ends in sufficient time for you to return before September 1st and that your personal choice of the method of transportation is the complicating factor.

"In regard to the school calendar, this is the third year that this method of opening school will be in effect and, in any case, contractual obligations start September 1st and staff members should not make commitments beyond that date without expecting the possibility of conflicts.

"Your request is denied." (R-4)

Petitioners nevertheless maintained their plans, journeyed to England by ship as scheduled and enrolled in the summer program. At the completion of the summer program on July 27, 1972, petitioners embarked on a tour, characterized by them as part of an educational program, and returned to New York on the morning of September 5, 1972. They immediately returned to Jefferson Township and William Fitzgibbon arrived at his school at approximately 11:30 a.m. He remained at school the rest of the day although a substitute conducted his assigned classes. A substitute also conducted a full day of classes for Genevieve Fitzgibbon.

Thereafter on September 20, 1972, the Superintendent addressed the following letter to William Fitzgibbon:

"Our records indicate that you were absent from your duties on September 1 and September 5 without approval or an indication that unforeseen illness occurred. In light of my letter to you on June 22nd refusing you permission to be absent on these days and stating the reasons therefore (sic), I must assume that you willfully absented yourself from your tenure obligations with the Jefferson Township Board of Education. This is a very serious matter involving insubordination.

"In the light of the above, there will be two (2) days pay deducted from your salary and this letter will be placed in your file as an official reprimand. Should further acts of insubordination occur, it will be necessary to take more punitive action." (R-5)

A similar letter was sent to Genevieve Fitzgibbon. (R-6)

Petitioners both testified at the hearing. William Fitzgibbon testified that prior to departure for England and after the close of school in June he had gone to his school on three occasions to prepare his room for the fall term. (Tr. I-16) He further testified that after the Superintendent's letter of June 20, 1972 had been received petitioners had attempted to alter the date of their return journey but that ships were booked to capacity. (Tr. I-19) He testified that they had always attended orientation day in prior years and that there was no consideration by him in the spring of the possibility that salary would be

withheld for September 1. (Tr. I-17, 21) He also testified that another teacher similarly absent on September 1 had not been penalized, that few teachers had in fact been present on that day and that no meeting was held. (Tr. I-20)

Genevieve Fitzgibbon testified her principal had not indicated to her in the spring that there would be difficulty in obtaining leave for September 5 and that she had then made oral application for a personal leave day. She testified that she had made substitute plans for that day in the time prior to her departure for England. (Tr. I-46-47)

Another teacher in the employ of the Board testified that he had not been present on September 1, 1972, and that no action was taken against him. He said that it was understood that teachers were permitted to work a day prior to September 1 in lieu of work on that specific day and that this practice had been followed in previous years. (Tr. I-56) He testified that he had fulfilled his responsibility in this respect "sometime" during the month of August 1972. (Tr. I-58)

The Superintendent testified that while September 1 had been established as an "orientation day" there had been a "side bar" agreement with the officers of the local education association that "***staff members could come some day that week after the custodial work had been done***." (Tr. I-69) He testified he did not think a work day earlier in the summer by teachers could serve in lieu of September 1 work because of the necessity to use classrooms for other purposes; storage, renovation, summer school, etc. (Tr. I-68) He testified that four teachers had not complied with the requirement to be present on orientation day or in the week prior thereto but that he had ultimately secured excuses which he deemed sufficient from one of the two teachers other than petitioners and that salary deductions had been authorized for three teachers. (Tr. I-71 *et seq.*; R-7, 8, 9a-e)

Finally, it is noted that notice of orientation day was sent to all teachers by building principals on or about July 28, 1972 but that there is no evidence that petitioners, who were in England, received it prior to the opening of school. (R-1) It is also noted that petitioners requested documentation with respect to the withholding of salary payments in years prior to 1972 from teaching staff members but that such request was not deemed relevant by the hearing examiner with respect to an allegation of discrimination in September 1972 and was denied. (Tr. II-47)

Petitioners argue that all such documentation and testimony attest to the truth of an allegation that their salary was withheld illegally, that they were not properly afforded notice of the withholding, and could not have expected it as the result of prior experience. Further, petitioners aver that school administrators did not in June 1972 "***suggest any problem with September 1, 1972 and at most suggested their pay would be assessed the cost of the substitute with presumably full knowledge of the letter written by the superintendent in June.***" (Petitioners' Brief, at p. 11) Petitioners also aver that the evidence with respect to the teaching staff member whose absence on September 1 was excused was treated with a "different attitude" by the

Superintendent. (Petitioners' Brief, at p. 11) Petitioners maintain that they promptly pressed their claim before the Board and that documentation to this effect is sufficient rebuttal to a defense of laches at this juncture.

The Board maintains that petitioners were guilty of laches herein by the long delay in pressing their claim before the Commissioner but that, even if this is adjudged not to be so, they are not entitled to be paid for unauthorized absences from their teaching duties. It also avers that it is the responsibility of local boards of education to adopt school calendars and that such responsibility may not be countermanded or surrendered by agreement. The Board argues that once a school calendar is adopted the individual teachers under contract to the local board have no right to pick from it those days they wish to be in attendance at school. The Board avers that a decision to the contrary "would create chaos in the public school system." (Board's Brief, at p. 13) In summary the Board avers "***the actions of the Petitioners bespeak of individuals who lacked the concern for their pupils and their employer, the Board of Education, and were only interested in satisfying their own personal aspirations.***" (Board's Brief, at p. 14) Accordingly, the Board maintains it exercised its discretion in good faith and that the Commissioner may not substitute his discretion for that of the Board.

The hearing examiner has considered all such facts and arguments and finds no merit in an avowal that the doctrine of laches should bar petitioners' presentation herein before the Commissioner on its merits. The doctrine was not advanced at the conference of counsel prior to hearing as reason to bar consideration; and in a Reply Memorandum, with attachments, petitioners have demonstrated that, despite the long delay, the instant dispute has been maintained as a viable one at all times forward from the point of its inception before either the Board or the Commissioner.

The principal issue for determination with respect to the merits of the claim is whether the Superintendent's letter of June 22, 1972 (R-4), in the context of petitioners' discussions with school officials and petitioners' actions of preparation in June 1972 for the opening of school in the fall, is sufficient notice that if petitioners persisted in their determination to proceed with their travel plans, their salary would be withheld. Petitioners admit that they continued their formulated plans despite the letter (Tr. II-16, 31) but argue in effect that the penalty ultimately levied was not set forth in advance and in fact was not to be expected as the result of prior experience. Their further claim of discrimination is founded on the fact that the Superintendent reversed an initial decision with respect to another teaching staff member for what was considered "good and sufficient" reason but refused to consider the facts of their travel to be similarly categorized.

The hearing examiner leaves the determination with respect to this question to the Commissioner on the following primary finding of facts and the recital, *ante*:

1. Petitioners made early plans for a trip of educational and personal value to England in the spring of 1972.

2. Later the Board adopted a school calendar which was of concern to petitioners and which caused them to request a "leave with pay" for September 5, 1972. (R-3)

3. The request was denied by the Superintendent. (R-4)

4. Petitioners nevertheless continued the scheduled trip and were not present for the orientation day or the morning session of the first day of school although they returned to school as soon as it was possible to do so.

5. There was no firm orientation day attendance requirement in the context of the agreement the Superintendent had made that another day could be used for classroom preparation.

6. Petitioners' duty of classroom preparation was in fact performed at least in part in June 1972, at the very beginning of the summer recess.

7. The Board withheld the salary of one other teacher for cause in the summer of 1972.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and the exceptions, replies and comments pertinent thereto filed by petitioners and the Board. Petitioners aver that they were denied an opportunity to submit written comments with respect to the Superintendent's letter of reprimand and that such denial was contrary to provisions of the contract which governs relations between the Board and its employees. They further aver that this action was a denial of due process. Petitioners also reiterate a view previously expressed that the Board's action controverted herein to withhold their salary for two days was discriminatory and improper and that neither of them were told in advance of the disciplinary action which would be taken against them. They further maintain that consideration should have been afforded them by the Board as the result of their long prior service without such incidents. The Board takes exception to the finding of the hearing examiner with respect to the doctrine of laches and also objects to that finding wherein it was said that petitioners "***returned to school as soon as it was possible to do so.***" (Board's Exceptions, at p. 5) The Board avers that in fact petitioners' summer educational program was completed on July 27, 1972 and that they could have made alternative arrangements to return home between that date and September 1. The Board also maintains that there was a firm requirement "***that teachers not only prepare their class for the opening of school but attend orientation meetings and other planning session.***" (Board's Exceptions, at p. 5)

The Commissioner has reviewed all such exceptions in the context of the facts which are not in contest and the findings of the hearing examiner and determines that the record in this matter attests to the propriety of a determination that petitioners' salaries were legally withheld by the Board for

services which were not rendered. Petitioners were not in fact present for any one of the days immediately preceding the opening of school to perform duties required of them at a vitally important time and they were not in fact present for the first day of school. Such facts must be assessed in the context of the Superintendent's letter of June 22, 1972. (R-4) This letter categorically and without equivocation denied petitioners' request for "leave with pay" prior to and at the time of school opening and it stands as justification for both the salary withholdings and the reprimands as well. The Commissioner so holds.

This holding is consonant with a previous decision of the Commissioner in *Florence P. Greenberg v. Board of Education of the City of New Brunswick,* 1963 *S.L.D.* 59. Therein, as here, petitioner had requested a leave of absence for days immediately preceding or following a vacation period and subsequently attacked the validity of a decision by the Board to withhold her pay. Such decision was predicated on a rule of the New Brunswick Board which granted leaves of absence for days immediately preceding or following vacation periods but without pay. The Commissioner was required to evaluate the rule and found it reasonable. He also found "***without question***" that the Board "***could have acted to prohibit all such leaves as are involved herein***." (at p. 61) He further reiterated the view that any rule with respect to leaves of absence must meet three tests which he listed as:

1. it must be reasonable,

2. it must not be inconsistent with other provisions of Title 18A or other rules of the State Board of Education and

3. its effect must be toward the maintenance and support of a thorough and efficient system of public schools.

While the Board in the instant matter had no such clearly defined rule as was required to be assessed for efficiency and propriety in *Greenberg, supra,* the tests set forth therein with respect to the rule are equally applicable to the decision of the Board that petitioners' salary for a two day period should be withheld. It was a reasonable action of the Board to deny a request for personal leave to petitioners for absence for personal reasons at the vitally important beginning of an academic year. The action was not contrary to the provisions of any other rule or law. It is reasonable to expect and require that teachers shall adequately plan for the opening of school and that absent a valid reason such as illness or any other *bone fide* emergency they will be present on opening day. In the instant matter, as in *Greenberg,* it is clear that the Board had the authority to deny petitioners' request, to withhold their salary for services not rendered and to issue the controverted reprimand for their voluntary act to absent themselves from their posts of duty.

Accordingly, the Petition is dismissed.

COMMISSIONER OF EDUCATION

September 14, 1977
Pending State Board of Education

Paul Ferrara et al.,

Petitioners,

v.

Board of Education of the Scotch Plains-Fanwood Regional School District, Union County,

Respondent.

COMMISSIONER OF EDUCATION

ORDER

For the Petitioners, Read, Leib, Kraus & Grispin (Walter L. Leib, Esq., of Counsel)

For the Respondent, Casper P. Boehm, Jr., Esq.

This matter having been brought before the Commissioner of Education (Lillard E. Law, Assistant Director, Division of Controversies and Disputes) by Paul Ferrara *et al., pro se,* on a Petition of Appeal dated May 9, 1977 and Motion to Stay dated May 24, 1977, requesting temporary restraint against the Board of Education of the Scotch Plains-Fanwood Regional School District to prevent the Board from proceeding to unseat fourteen appointed high school cheerleaders for the school year 1977-78; and

The arguments of counsel having been heard regarding the allegation by petitioners that irreparable harm may result if respondent Board is not restrained from proceeding with the aforementioned execution of unseating fourteen appointed high school cheerleaders for the forthcoming school year, pending the final determination by the Commissioner of the Petition of Appeal; and

The Commissioner having considered the criteria set forth by the courts for the exercise of discretion in the issuance of a *pendente lite* restraint (*United States v. Pavenick,* 197 *F.Supp.* 257, 259-60 (*D.N.J.* 1961) and *Communist Party of the United States of America v. McGrath,* 96 *F.Supp.* 47, 48 (*D.D.C.* 1951)); and

The Commissioner having considered the arguments of counsel regarding the statements and documents issued by the Superintendent and the High School principal of March 17, 18, 24 and 25, 1977; and

The Commissioner having balanced the interests of petitioners, the interests of the Board, and the interests of the pupils and residents of the community at large; and

The Commissioner having found that no irreparable harm will result by permitting the Board to continue with its plan to hold a second try-out for high school cheerleaders which the Board has determined to be in the public interest and which action is entitled to a presumption of correctness (*Thomas v. Board*

of Education of Morris Township, 89 *N.J. Super.* 327 (*App. Div.* 1965), aff'd 46 *N.J.* 581 (1966)); therefore

IT IS ORDERED that petitioners' request for restraining order, *pendente lite,* is denied; and

IT IS FURTHER ORDERED that this matter proceed to final determination as expeditiously as possible.

Entered this 22nd day of July 1977.

COMMISSIONER OF EDUCATION

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Read, Leib, Kraus & Grispin (Walter L. Leib, Esq., of Counsel)

For the Respondent, Casper P. Boehm, Jr., Esq.

Petitioners, residents and parents of pupils enrolled in Scotch Plains-Fanwood High School charge that the Board of Education of the Scotch Plains-Fanwood Regional School District, hereinafter "Board," did unseat fourteen duly appointed high school cheerleaders without proof of irregularities contrary to the Board's adopted Code of Ethics and that its actions were arbitrary, capricious and unreasonable. Petitioners pray that the Commissioner of Education rescind the Board's action and reinstate the fourteen originally appointed high school cheerleaders. The Board denies the allegations and asserts that it is charged with the operation of the school system and as such has the authority to make decisions which are the subject matter of the Petition of Appeal and further, *inter alia,* that petitioners failed to state a violation of any State or Federal law or cause of action thereunder.

Petitioners advanced a Motion for Interim Relief to Stay the Board's action which overturned the original selection of the varsity high school cheerleading team and called for new try-outs. The Board filed a Cross-Motion to Dismiss the Petition of Appeal. Oral argument on the motions was conducted on June 9, 1977 at the Department of Education, Trenton, by a representative of the Commissioner. The Commissioner denied both motions and ordered that the

instant matter proceed to a plenary hearing and final determination. *Paul Ferrara et al. v. Board of Education of the Scotch Plains-Fanwood Regional School District, Union County,* 1977 *S.L.D.* ___ (ordered July 22, 1977)

Hearing in this matter was conducted on July 13, 14, and 15, 1977 at the office of the Union County Superintendent of Schools, Westfield, and thereafter on July 20, 1977 at the office of the Somerset County Superintendent of Schools, Somerville, by a hearing examiner appointed by the Commissioner. Written summation was filed in lieu of Briefs at the conclusion of the hearing. The report of the hearing examiner is as follows:

The following sequence of events which are not in dispute occurred prior to the time of the hearing;

On September 30, 1976, a committee of the whole Board, the Superintendent of Schools and the high school principal met with citizens and representatives of the negro community to discuss their concerns with regard to certain educational policies, at which time the issue of the selection of judges for the cheerleading team was raised.

On March 10, 1977, ten judges, five of whom were from outside the school district, selected fourteen finalists as members of the high school varsity cheerleading team, one of whom was a negro pupil.

On March 11, negro pupils met with the high school principal and the cheerleader advisor to review the procedure and the final results for the selection of cheerleaders.

On March 14, the high school principal and the cheerleader advisor met with a teaching staff member who also served as one of the ten judges to review alleged irregularities orally submitted by the teaching staff member-cheerleader judge.

On March 17, the Board directed the Superintendent to conduct an investigation of the alleged irregularities and also appointed a Committee of the Board to do the same.

On March 18, the teaching staff member-judge filed a written complaint before the Superintendent wherein he alleged certain irregularities in the selection of the varsity cheerleaders. (R-1; R-3F)

The Superintendent filed a report with the Board on March 25, 1977, which included the findings and recommendations of the Superintendent, the high school principal, the assistant high school principal and the Committee of the Board. (R-3A)

On March 29, at its annual reorganization meeting, the Board passed a resolution to rescind the previous selection of the cheerleading team as follows:

"***that the Board of Education direct the building principal to redo all

tryouts for cheerleaders, using his judgement as to how this could be effected, and remove all doubt as to the validity of the previous charges." (R-4)

There were five affirmative, three negative and one abstention votes on the motion.

Subsequently, the second try-outs were called pursuant to "Procedures to be Utilized for the Selection of: Cheerleaders, Color Guard, Flag Squad, Mascots and Twirlers," dated April 25, 1977. The five judges selected were all from outside the school district and were paid for this duty. (J-1)

The results of the second try-outs were as follows: Fourteen girls were selected. Eleven of the girls who were selected at the first try-outs were selected at the second try-outs. One girl who was selected on the second try-outs, eliminated herself to become the captain of the junior varsity cheerleading team. Two girls who were selected at the first try-outs failed to make the team at the second try-outs. One girl who was successful at the first try-outs refused to attend the second try-outs and, therefore, was not selected for the cheerleading team.

This controversy arose from the allegations of the teaching staff member-cheerleading judge who set forth a complaint to the Superintendent as follows:

"***1. The selection of judges: (all selected by advisor)

A. Many were friends of advisor

B. One was advisor[']s sister

C. One was recommended by a student (cheerleader)

D. Advisor reluctant to fully identify the judges

E. Advisor stated I was needed to judge because I was black not because of qualifications

"2. The presence of sr. cheerleaders was both a distracting and unfair influence on judges. Their behavior showed obvious favoritism for certain girls in terms of their applause, flashing 'smile sign,' etc. [Advisor] admitted these girls were not really needed.

"3. Discrepancy in call-back procedure—no one should be called back after they leave the floor. An exception was made for a returning cheerleader after she revised her routine. It was [the] second time it was revised. In addition she was allowed to rest and did do [the] same routine when called back.

"4. Advisor stated to me personally before try-outs that she knew who

she wanted to win and since she knew most of the judges, it shouldn't be a problem.

"5. The teacher evaluation format needs to be closely looked at. It's prejudicial to all involved.

"6. Advisor admitted to me that [the] best girls did not win and that some winners committed numerous errors in try-outs.

"7. The fact that only one Black finished in [the] top twenty seems totally incomprehensible to me.

"8. Advisor also in conversation with me stated that [the] best girl of all—she was white—did not win. I agreed.

"I would like to further state that this is not a racial issue—although there are certainly racial overtones. My major concern here is that *all* students receive a fair try-out. They can accept defeat when judged fairly. However, it is difficult when the situation leads to a list of concerns this long." (*Emphasis in text.*) (R-1; R-3F)

A careful review of the testimony discloses no substance nor proofs to sustain the allegations as set forth by the teaching staff member-judge, with the sole exception of his assertion that one of the judges is the sister of the cheerleader advisor. This allegation is true in fact; however, the testimony reveals that this individual had been called to act as a judge in the school district for the past five years, three years of which preceded her sister's appointment as Varsity Cheerleader advisor. (Tr. II-80-83) The testimony further reveals that the responsibility for the selection of the judges was delegated to the assistant cheerleader advisor rather than the advisor as alleged who, in turn, delegated this past practice responsibility to graduating senior cheerleaders to acquire certain judges. Three judges, two from outside and one from within the school district, testified that they were requested to serve by graduating senior cheerleaders. One of the three judges admitted that it was her cousin, a graduating senior, who invited her to participate as a judge. (Tr. I-165, 183-184; Tr. II-63-64) Of the seven judges who testified, excluding the teaching staff member-judge, six stated that they had prior experience in such activities. Six judges testified that they were not personal friends of the advisor as alleged. (Tr. I-122-123, 155-156, 183, 198; Tr. II-2-3, 37-42, 57-62)

The propriety of the use of blood relatives of staff members and/or cheerleader candidates was rendered moot with the promulgation of the "Procedures" dated April 25, 1977. (J-1)

The testimony of the judges refuted the allegation that they were influenced in any way to arrive at any decision but an objective score in regard to the try-outs. The seven judges testified that in their opinion the judging was fair and objective. The teaching staff member who set forth the allegation testified that he voted objectively on the capabilities of the cheerleader candidates. (Tr. I-23-24) One judge expressed the opinion, however, that the

Teacher Evaluation Form used to rate the pupil with regard to a class grade and behavioral characteristics should have been a precondition to participate in the try-outs rather than a part of the concluding total score. (Tr. II-4-9; R-3M) In all other respects, the hearing examiner cannot find any evidence to support the allegation that the judges were influenced in any manner in making their final selection of cheerleaders on March 10, 1977.

The teaching staff member-judge who filed the alleged irregularities with regard to the cheerleader try-outs testified that he had some reservations about accepting the responsibility of a judge inasmuch as he was asked to serve because he was Black and not necessarily for any particular qualifications he might have possessed. He testified that he did not particularly care for the manner in which he was approached by the advisor when she informed him that she needed Black representation. He testified that when he accepted the responsibility, the advisor informed him that "***it wouldn't be a problem because she already knew who she wanted on her squad, and that it wouldn't be a problem for me." He testified that he did not raise any questions with the advisor because he did not feel it was his place to question her at that particular time, that he had no evidence and, "***I didn't want to jump the gun on any particular issue." (Tr. I-17-19)

The cheerleader advisor denied the allegations that she had influenced any of the judges or that she had pre-selected any of the cheerleader candidates prior to the try-outs on March 10, 1977. She testified that she told the teaching staff member-judge that she wished that there were more Black pupils on the cheerleader team. She testified that she had mentioned to him the names of two Black pupils she thought should try out for the team. One of the two named pupils did try out and failed to make the team, while the other Black pupil did not try out. (Tr. III-36, 42-44)

The teaching staff member-judge testified that:

> "***after much thought, after the conversation [with the advisor] I accepted the responsibility of being a judge, because I wanted to see first-hand exactly what the procedure was. There had been problems with cheerleading in the past, students had complained to me in the past about the procedure. There was an opportunity for me first-hand to observe what was going on." (Tr. I-22)

The teaching staff member-judge testified that prior to the try-outs he knew that the advisor's sister would serve as one of the ten judges; however, he did not raise any objections because he did not want to "***jump the gun on any accusations." (Tr. I-25-26) He testified that he made no objections to the presence of the graduating senior cheerleaders at the try-outs, nor did he suggest that they be removed from the proceedings. (Tr. I-26) He testified that he first became familiar with the Teacher Evaluation Form in 1973-74; however, he had never raised an objection with regard to its use until subsequent to the March 10, 1977 cheerleader try-outs. (Tr. I-30-31) He testified that he thought there was a discrepancy with regard to the call-back procedure for one of the contestants to repeat her routine; however, he did not voice an objection at the time. (Tr.

I-32-35) He did not object to any of the procedures to be used when the advisor explained them to the judges prior to the try-outs. (Tr. I-43) Nor did he raise any objections with regard to the selection of the ten judges prior to the try-outs. (Tr. I-43, 51-53) He testified to his understanding, prior to the tryouts, that the procedure was "rigged." He testified that he did not raise any objections to anyone with regard to his understanding. (Tr. I-93) He further testified that he was as objective as he could be in his evaluation of the cheerleader candidates but he had reason to believe that the other judges were not equally objective. (Tr. I-99)

The hearing examiner finds the testimony of this witness incredible. His testimony was based, in great measure, upon speculation and opinion which lacked proofs. If indeed he had credible evidence of alleged irregularities prior to the cheerleader try-outs and failed to report his findings to responsible school authorities, he demonstrated a dereliction of duty as a teaching staff member. The hearing examiner finds no proofs to support the bare allegations set forth by the teaching staff member-judge, which subsequently resulted in the instant controversy.

Extensive testimony was elicited with regard to the September 30, 1976 meeting of the Board and representatives of the Black community. It was alleged that the high school principal stated that the judges for the subsequent cheerleader try-outs scheduled for March 10, 1977 would come from outside the district. The President of the Board testified that it was his interpretation that the principal did not indicate that all the judges would be selected from outside the school district but rather, that some of the judges would be selected in that manner. He testified that other Board members assumed that all the judges would come from outside the district which resulted in a disagreement among the Board members. He stated that the Board took formal action and directed the Superintendent to conduct an investigation of the allegations set forth by the teaching staff member-judge. He testified that both the Superintendent and school principal recommended that the try-outs of March 10 not be set aside, but rather that members be added to the cheerleading team. A similar recommendation was made by a committee of Board members. Despite the recommendations of the Superintendent, the principal and the Board committee, the Board voted to set aside the March 10 cheerleader try-outs and directed the principal to conduct the second try-outs. The Board President testified that as far as he was able to determine the Board had not taken any official action in the past with regard to the selection of judges or with regard to cheerleader try-outs. He testified that, although he had voted for the second try-outs, it was unfair to the pupils who had been selected in the first try-outs and that he would have preferred that they would have remained and the team expanded. (Tr. II-109-112, 116, 119-120, 129-132, 144, 147, 150-151; R-3A through R-30)

The Board member who propounded the motion to repeat the cheerleader try-outs testified that he did so because there was a sufficient question of doubt as to the manner in which the whole proceeding had been conducted. He referred to the September 30, 1976 meeting of the Board with the representatives of the Black community and asserted that at some time in the

past the former Superintendent had instructed that all of the judges be selected from outside the school district. (Tr. II-106, 168, 170, 176-177, 179, 184, 187)

The former Superintendent, who appeared voluntarily to testify in the instant matter, refuted the testimony of the Board member that he had directed that all the judges be selected from outside the district. He testified that the only agreement that he had made with the representatives of the Black community occurred in 1968 and 1974 at which time he agreed to have Black representation on the judges' panel for the cheerleader and twirler teams and that the school would discontinue the use of pupils as judges. He testified that due to the tension and emotion in the school community, at the time of these agreements, it might be necessary to go outside the school district to find Black judges who had experience in such activities. He testified that he did not make an agreement of any kind with anyone, that the judges would be selected from outside the school district. (Tr. IV-33-39)

The Board member who made the motion to repeat the try-outs testified that he knew that only one of the ten judges had objected to the try-outs procedure and further, that he had reviewed the reports and recommendations of the Superintendent, the principal and the committee of the Board before he proposed the motion. (Tr. II-166-168, 180-184) He further asserted that the selection of cheerleaders was a function that took place in the school under the direction of the principal and was not a function of the Board. (Tr. II-175-176)

The principal testified that the March 10, 1977, cheerleader try-outs were conducted in accordance with the school's past practice and procedure in effect since 1968. He testified that the only change with regard to the procedure was that there had to be Black representation in the selection process. He denied that he stated that all of the judges for the cheerleader try-outs would come from outside the school district. (Tr. III-119-120, 124-126)

The principal stated that he conducted an investigation of the March 10, 1977 cheerleader try-outs at the direction of the Superintendent and subsequently filed his findings with the Superintendent. He testified, and his report so indicated, that he contacted the nine remaining judges and his report stated as follows:

> "***Without exception, all 9 judges said that they felt no influence had been placed on them by [the advisor] to vote for or against any candidate or group of candidates. Without exception, all 9 judges felt it completely fair that the one candidate, under question, was called back to redo her routine *** that the opportunity was there for any candidate to be called back***.
>
> "In relation to the question on the generality of unfairness existing throughout the entire judging process, I must again state that all judges felt that no unfairness existed.***" (R-3I) (Tr. III-142-145)

The judges who testified corroborated the principal's findings.

He testified that it was his recommendation to the Superintendent that the March 10 try-outs not be overturned but, rather, that the cheerleader team be expanded. He testified that the process had taken place in accordance with all guidelines that had been used for a number of years and that he saw no reason to create unfairness to those who had already been selected. He stated that the concept to expand the cheerleader team had been established by precedent when the color guard team was expanded due to a controversy in 1967-68. (Tr. III-145-148)

Conflicting testimony was presented with regard to the September 30, 1976 meeting of the Board and the allegation that the principal asserted that all of the cheerleader judges would come from outside the school district. Three representatives of the Black community and the wife of a Board member testified that they attended the meeting and that the principal asserted that the judges would be selected from outside the district. A Board member testified that he also heard the principal state that the judges would come from outside the district; however, he did not know whether the word "all" had been used or whether it was just "the judges from outside the district." (Tr. IV-165-166, 182-183, 187, 192, 199)

A Board member who did not attend the September 30, 1976 meeting of the Board testified that he voted against the motion to set aside the original try-outs because there was not enough proof that the try-outs were conducted improperly. He testified that the recommendations of the Board committee, the Superintendent and the principal were not put to a vote by the Board. It was his assertion the matter should have been handled at the administrative level, not by the Board. (Tr. III-3-10; R-3B, R-3C, R-3)

The Superintendent testified that he attended the September 30, 1976 meeting of the Board and during the course of the meeting Black community members expressed a grievance with regard to the selection of cheerleader judges. He testified that he had no knowledge of the procedure and since he was not involved in the selection of cheerleaders he referred the grievance to the principal at the meeting. The Superintendent testified that he was not certain of the details, but he remembered that the principal stated that the future judges for the spring of 1977 would come from outside the district. The Superintendent testified that on the morning following the September 30 meeting, he called the principal and discussed the issues presented the previous evening. He indicated to the principal that the cheerleader matter was resolved and that it would not be a problem in the future. He testified that he did not recall any subsequent discussion with regard to cheerleaders until after the try-outs of March 10, 1977. (Tr. IV-221-224)

The Superintendent testified that he filed a complete report to the Board prior to March 29, 1977 (R-3A through R-30) and that his report represented an accurate report of his investigation of the matter. (R-3C) He testified that he recommended, *inter alia,* that: the fourteen original cheerleaders be maintained and the team be expanded by five new members, the judges for the selection of the five new cheerleaders come from outside the district, a district-wide committee of parents and staff members be established to develop acceptable

criteria and procedures for the future selection of cheerleaders, an additional position of assistant advisor be created to provide for supervision of the expanded cheerleader team and additional funds be provided for uniforms for the expanded team. (Tr. IV-225-236; R-3C)

The Superintendent testified that the Board's action to repeat the try-outs was directed to the principal for resolution. He testified that, because the Board's determination had not set any limitation upon the number of cheerleaders to be selected at the second try-outs, the principal had the option of enlarging the team to more than the original fourteen members. The Superintendent testified, however, that he had not directed the principal to select more than fourteen. (Tr. IV-238-240)

The Superintendent indicated that he could not make a sound judgment as to the validity of the charges and counter-charges as set forth by the teaching staff member-judge and the cheerleader advisor. (Tr. IV-236)

Three of the four pupils who were originally selected for the varsity cheerleader team and failed to be selected at the second try-outs testified. One pupil expressed disappointment and testified that she felt the first try-outs were fair and that it was not necessary for those who were selected to prove it again. Another pupil testified that when she was not selected in the second try-outs she felt embarrassed, disappointed and humiliated. (Tr. IV-41, 62)

After a careful review of the record before him, the hearing examiner believes that the disagreement between petitioners and the Board herein is a classic example of the kind of dispute that is more effectively handled between the parties without formal litigation. In the first instance, the Board accepted bare allegations that there were irregularities in the conduct of the cheerleader try-outs on March 10, 1977. Secondly, the Board took action to overturn the original cheerleader try-outs without sufficient proofs of the alleged irregularities and such Board action was counter to the recommendations of its own committee, the Superintendent and principal.

The hearing examiner fully understands the importance of the concept of a presumption of correctness with regard to an action of a board of education in this State absent a finding of a violation of law, bad faith and/or an abuse of the board's discretion. Similarly, he also understands the need for communication between and among people. If the Board placed a high priority on the proposition that all judges would be selected from outside the school district, this should have been communicated to the appropriate school officials in writing. The hearing examiner finds that the Board's action to set aside the original try-outs and conduct the second, only added disorder to an already confused situation.

The finding that the Board's action to set aside the original try-outs harmed three pupils compels the hearing examiner to recommend to the Commissioner that the three pupils affected be added forthwith to the selected cheerleader team.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the fact-finding report, the record, and the recommendations. He observes that both parties have agreed to waive receipt of the report and the filing of exceptions thereto.

The instant matter concerns a determination by the Board to vitiate the results of a competitive selection for membership on the varsity high school cheerleader team for the 1977-78 academic year, and its call for a new competitive selection. Petitioners assert that, absent written policies and procedures promulgated by the Board, its action to overturn the original selection of cheerleaders was arbitrary, capricious, unreasonable and caused irreparable harm to three pupils.

The role of the Commissioner in determining such matters is found in *Ruth Ann Singer et al. v. Collingswood Board of Education et al.*, as cited in *Reiss and Celia Tiffany, parents and guardians ad litem of Marla Tiffany, a minor v. Board of Education of the Township of Cinnaminson et al.*, 1974 *S.L.D.* 87, 89. The Commissioner stated the following:

> "******the scope of the Commissioner's review is not to substitute his judgment for that of the local board but to determine whether their conclusions had a reasonable basis.***'
>
> "******The Commissioner has in numerous instances been called upon, in his quasi-judicial capacity, to make determinations regarding the reasonableness of the actions of local boards of education. The Commissioner will, in determining controversies under school laws, inquire into the reasonableness of the adoption of policies, resolutions, or by-laws, or other acts of local boards of education in the exercise of their discretionary powers***. See 62 *C.J.S.*, Municipal Corporations, § 203, *Cf. Kopera v. West Orange Board of Education, supra.*' [60 *N.J. Super.* 288, *App. Div.* 1960] ***"

In a previous decision, *Clinton F. Smith et al. v. Board of Education of the Borough of Paramus et al.*, 1968 *S.L.D.* 62, aff'd State Board of Education 69, dismissed New Jersey Superior Court, Appellate Division, September 8, 1969, the Commissioner found and determined, *inter alia,* as follows:

> "***extracurricular or cocurricular activities comprise all those events and programs which are sponsored by the school and may reasonably be characterized as a supplement to the established program of studies in the classroom in order to enrich the learning and self-development opportunities of pupils***." (at 69)

The Commissioner determines that the instant controversy does arise under school law and that cheerleader activities are a supplement to the established program of studies and fall, therefore, within the purview of

authority granted local boards of education by *N.J.S.A.* 18A:11-1.

The Commissioner adopts the report of the hearing examiner as his own, and finds that the evidence supports the charge of arbitrary, capricious and unreasonable action on the part of the Board. Irreparable harm was caused to those pupils who were duly selected and later denied the opportunity to serve as varsity high school cheerleaders. Notwithstanding the Board's lack of consideration of, or its refusal to accept the recommendations of its Superintendent, principal and its own committee, the Commissioner finds each of the three recommendations, or a combination thereof, to be acceptable as set forth.

The Commissioner therefore orders the Scotch Plains-Fanwood Regional School District Board of Education to immediately reinstate the three pupils who were successful in the competitive cheerleader try-outs and were subsequently denied the right to participate. Further, in order that no harm be caused to those pupils who were successful in the Board's second competitive cheerleader try-outs, the cheerleader team shall be expanded from fourteen members to seventeen members for the 1977-78 academic year.

COMMISSIONER OF EDUCATION

September 14, 1977

Stuart Williams,

Petitioner,

v.

Board of Education of the Township of Teaneck, Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

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

For the Respondent, Parisi, Evers & Greenfield (Irving C. Evers, Esq., of Counsel)

Petitioner, a tenured teacher employed by the Board of Education of the Township of Teaneck, hereinafter "Board," claims entitlement to a higher salary than that which he received from the Board for the 1975-76 school year. The

Board denies that he has legal entitlement thereto and asserts that the action of the Board in retaining petitioner at his level of compensation for the 1974-75 school year was legal and proper.

This matter is jointly submitted to the Commissioner of Education for Summary Judgment by Motion of petitioner and Cross-Motion of the Board based on the pleadings, Briefs, exhibits and affidavits.

Petitioner is a tenured teaching staff member assigned to the Thomas Jefferson Junior High School and for the 1974-75 school year petitioner's salary was $18,000. On April 9, 1975, the Board approved a resolution authorizing his continued employment for the 1975-76 school year at a salary of $19,667. By letter dated April 15, 1975 (Exhibit A), the Board, through its Secretary, informed petitioner of the above-stated resolution and requested that petitioner contact the Board within ten days if he did not plan to return in September 1975. Petitioner did not contact the Board with regard to said letter during the ten day period ending April 25, 1975.

On May 14, 1975, the Board rescinded the resolution of April 9, 1975 with respect to petitioner's salary increment and/or adjustment. The Board voted to maintain petitioner at the level of compensation he had received during the 1974-75 school year. By letter dated May 16, 1975 (Exhibit B), the Board, through its Superintendent of Schools, informed petitioner that it had resolved on May 14 to rescind its resolution of April 9, 1975.

Petitioner alleges he was denied the remuneration to which he was entitled by virtue of the resolution of April 9 and letter dated April 15, 1975. Petitioner further alleges he learned of the rescission of his salary increment and the basis of such rescission only after such action was taken by the Board. Petitioner avers that he was entitled to the sum of $19,667 for the school year 1975-76 by virtue of the Board's action adopting the resolution of April 9, 1975. (Petitioner's Brief, at pp. 1-2) Petitioner asserts that the Board is bound by its salary and contractual resolutions and cannot rescind the same after the meeting at which said resolutions are passed and cites *Leonard V. Moore et al. v. Board of Education of the Borough of Roselle, Union County,* 1973 *S.L.D.* 526; *Albert DeRenzo v. Board of Education of the City of Passaic, Passaic County,* 1973 *S.L.D.* 236; *Robert Anson et al. v. Board of Education of the City of Bridgeton, Cumberland County,* 1972 *S.L.D.* 638; *James Docherty v. Board of Education of the Borough of West Paterson, Passaic County,* 1967 *S.L.D.* 297; *Samuel Hirsch v. Board of Education of the City of Trenton, Mercer County,* 1960-61 *S.L.D.* 189; *William F. Shershin v. Board of Education of the City of Clifton et al., Passaic County,* 1950-51 *S.L.D.* 53; and *Marion S. Harris v. Board of Education of the Township of Pemberton, Burlington County,* 1939-49 *S.L.D.* 164 (1938).

Petitioner further asserts deprivation of his constitutional rights to due process by the Board's unilateral rescission of his salary increment without affording him the opportunity to vindicate his claim and cites *Mullane v. Central Hanover Trust Co.,* 339 *U.S.* 306 (1950); *Grannis v. Ordean,* 234 *U.S.* 385, 394 (1914); *Goss v. Lopez,* 419 *U.S.* 565 (1975); and *J. Michael Fitzpatrick v. Board*

of Education of the Borough of Montvale, Bergen County, 1969 *S.L.D.* 4. (Petitioner's Brief, at p. 9)

Petitioner, in summation, alleges the Board has failed to comport with the minimum requirements of due process as enunciated by the due process clause of the Fourteenth Amendment, Title 18A, Education, and the Commissioner in *Fitzpatrick, supra.* (Petitioner's Brief, at p. 14)

The Board offers the affidavit of the Superintendent with attached exhibit. Schedule A of the exhibit is herein set down in pertinent part:

> "As a follow-up to our meeting at 8:25 a.m., Tuesday, May 6, 1975, which was also attended by Mr. Dimmit, I am going to review in writing our conversation, the Administration's and Board's concerns, and immediate action.
>
> "As you recall this very morning, I stated to you rather bluntly that I personally considered you unfit to continue teaching Teaneck youngsters. I therefore requested that you retire from your position in Teaneck. You were presented with a photocopy of your last seven years attendance record which revealed, even to your own admitted surprise, a total of 313 1/2 days absences. You insisted you were ill, a nose operation last year, colds, tripping on the stairs, etc., all very much documented with physicians' notes.
>
> "I informed you that you would not return to your position at Thomas Jefferson Junior High School next September, that if you should return (and you indicated that retirement was not in your immediate plans), you would be given an assignment elsewhere, unless some other action were instituted. For your information, drastic measures are still being seriously considered, unless you decide to change your mind and retire or resign.
>
> "Until I hear about such a change, I can inform you that I shall recommend to the Superintendent that he, in turn, recommend to the Board of Education that your increment and adjustment be withheld for the 1975-76 school year.***"

Additionally, a copy of a grievance dated June 5, 1974, filed by the Teachers Association on behalf of petitioner, is submitted as Schedule B.

The affidavit of the Superintendent states in pertinent part as follows:

> ***
>
> "3. Under date of May 6, 1975, I directed a communication to Mr. Williams***.
>
> "In that communication I made it crystal clear to Mr. Williams that I intended to recommend to the Board that his increment and adjustment be withheld for the 1975-76 school year.

"4. I received no reply of any kind from Mr. Williams in response to that letter and under date of May 16, 1975, Mr. Williams was notified by Dr. Joseph P. Robitaille, the then Superintendent, of the action taken by the Board at its May 14th meeting to withhold his salary increment and/or adjustment for the school year 1975-76.

"5. The reasons for the recommended withholding of the increment are set forth specifically in my communication of May 6, 1975, and at all times Mr. Williams was made aware of the reasons for the recommendation of the withholding of the increment and except as hereinafter noted never took any other action prior to the filing of the Petition in this matter to challenge or contest the action of the Board.

"6. I have read the Petition filed in this matter and while Petitioner alleges that the Teaneck Board of Education acted in violation of his rights, the reason for the action taken by the Board has been set forth above and in my opinion was proper in all respects.

"Paragraph 5 of the Petition improperly and incorrectly alleges that there was a failure to notify the Petitioner of the Board's intention to take the action which was taken on May 14, 1975, because my letter of May 6, 1975, clearly stated what action was contemplated as well as stating reasons why the action in question was going to be taken.

"7. Mr. Williams had full opportunity to request a hearing after he received a letter of May 6th but did not see fit to request one.

"8. On or about June 5, 1975, there was submitted on behalf of Mr. Williams by the Teaneck Teachers Association, a Grievance alleging that the decision to withhold an increment was inequitable, improper and an unjust violation of the contractual relationship between the parties, past practice in the district, and applicable law. That Grievance was never processed through all of the stages of the Grievance Procedure although it was alleged the action of the Board violated the contract between the Board and the Teachers Association.***"

The Board asserts that petitioner was notified of its contemplated action to withhold his increment and that he knew full well the reason for such action. He filed a grievance because of that action and then abandoned it. (Board's Brief, at p. 2)

The Board argues further that "***a board of education has the right to withhold an increment for good cause.***" *Clifton Teachers Ass'n., Inc. v. Clifton Board of Education,* 136 *N.J. Super.* 336 (*App. Div.* 1975); *Westwood Education Ass'n v. Board of Education of the Westwood Regional School District,* Docket No. A-261-73 New Jersey Superior Court, Appellate Division, June 21, 1974 (1974 *S.L.D.* 1436), *cert.* denied 66 *N.J.* 313 (1974)

A determination to withhold an increment is within a board's discretionary authority, absent a finding of arbitrary, unreasonable, capricious or illegal action. *Dominick DiNunzio v. Board of Education of the Township of Pemberton, Burlington County,* 1977 *S.L.D.*____ (decided January 21, 1977)

Where there is a reasonable basis for the withholding of an increment, the action of a board will not be disturbed. *Jean Warren v. Board of Education of the Borough of Brooklawn, Camden County,* 1976 *S.L.D.* 981; *Robert Longo v. Board of Education of City of Absecon, Atlantic County,* 1975 *S.L.D.* 336; *Alfred Zitani v. Board of Education of the Township of Willingboro, Burlington County,* 1975 *S.L.D.* 439 (Board's Brief, at p. 3)

The Board refutes the argument that action, once taken by a board, cannot be rescinded by stating that none of the cases cited by petitioner dealt with the withholding of an increment. The Board further contends that the payment of increments is not mandatory. *Zitani, supra* A person may have a vested right to a salary but he has no vested right to an increment. Petitioner's claim of a violation of due process rights is refuted by the Board citing *Robert Quay et al. v. Board of Education of the Township of Haddon, Camden County,* 1976 *S.L.D.* 118 wherein the Commissioner ruled that a contention that *Board of Regents of State Colleges v. Roth,* 408 *U.S.* 564 (1972) entitled an individual to a salary increment or a protected property right was improperly grounded. (Board's Brief, at p. 4)

The Board contends that petitioner further knew of the recommendation to withhold the increment because of extensive absenteeism by an addendum to the evaluation of March 1, 1975. (Board's Brief, at p. 5)

Lastly, the Board invokes the doctrine of laches citing *John Gregg v. Board of Education of Camden County Vocational and Technical School District, Camden County,* 1977 *S.L.D.*____ (decided February 25, 1977); *Vincent L. De Chiaro v. Board of Education of Morris School District, Morris County,* 1976 *S.L.D.* 752; *Gloria Ulozas v. Board of Education of Matawan Regional School District, Monmouth County,* 1975 *S.L.D.* 598, aff'd State Board of Education 604, aff'd Docket No. A-1183-75 New Jersey Superior Court, Appellate Division, February 3, 1977; *Scott Rosenthal v. Board of Education of Greater Egg Harbor Regional High School District et al., Atlantic County,* 1975 *S.L.D.* 619; *Robert Savoia v. Board of Education of the City of Hoboken, Hudson County,* 1975 *S.L.D.* 98; and *Quay, supra.* (Board's Brief, at p. 6)

The Commissioner cannot agree that the doctrine of laches should apply. The narrow issue herein concerns petitioner's withheld increment of $1,667. The teacher retired June 30, 1976. The Board suffers no detriment nor commitment by overstaffing and the matter is ripe for judgment on the legal issue.

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

> "Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a majority vote of all the members of the

board of education. It shall be the duty of the board of education, within 10 days, to give written notice of such action, together with the reasons therefor, to the member concerned. The member may appeal from such action to the commissioner under rules prescribed by him. The commissioner shall consider such appeal and shall either affirm the action of the board of education or direct that the increment or increments be paid. The commissioner may designate an assistant commissioner of education to act for him in his place and with his powers on such appeals. It shall not be mandatory upon the board of education to pay any such denied increment in any future year as an adjustment increment."

The Commissioner holds that the general conditions of this statute have been met by the Board:

1. After a conference, the letter of May 6, 1975 from the Assistant Superintendent notified petitioner of his attendance record during the past seven years with 313 1/2 days of absences.

2. In that same letter the Assistant Superintendent warned "Until I hear about such a change, I can inform you that I shall recommend to the Superintendent that he, in turn, recommend to the Board of Education that your increment and adjustment be withheld for the 1975-76 school year."

3. On May 14, 1975 the Board voted to place petitioner for the school year 1975-76 at the level of compensation he had attained during the 1974-75 school year.

4. Within the 10 days prescribed for notification of petitioner, specifically on May 16, 1975, the Board through its Superintendent notified petitioner that his salary increment and/or adjustment had been withheld.

It is evident to the Commissioner that petitioner had been informed by the Board, through written communication by its administrative officers, that the Board was concerned about his attendance record. The administrative officers found absenteeism excessive to the degree that the Assistant Superintendent advised petitioner that he "***considered him unfit to continue teaching Teaneck youngsters."

Petitioner's legal argument that he has been denied a property interest is without merit. The Commissioner addressed himself to this precise matter in *Quay, supra,* in which he said:

"***Petitioner's assertion that the Court's decision in *Roth* *** entitled him to the controverted salary increment as a constitutionally protected 'property right' is improperly grounded. In *Roth* the court said:

> '***Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that

secure certain benefits and that support claims of entitlement to those benefits.*** (92 *S.Ct.* at 2709)'***" (1976 *S.L.D.* at 122)

The applicable law herein, *N.J.S.A.* 18A:29-14, is clear that a salary increment must be earned and that it may be withheld.

The Commissioner observes that petitioner's attendance record was known on March 1, 1975 when his immediate supervisor evaluated him and recommended that he be granted an annual increment. The Board should have had access to his attendance record when it voted on April 9, 1975 to grant the increment and salary adjustment. The subsequent action of the Board on May 14, 1975, withdrawing this increment, discloses a lack of clear communication between the administrative staff and the Board. The Commissioner is constrained to emphasize the heavy responsibility carried by superintendents of schools to keep local boards of education fully informed of such circumstances to enable them to reach judgments based upon all of the relevant facts.

The Commissioner, having found no basis to grant petitioner's prayer for relief, accordingly dismisses the Petition.

COMMISSIONER OF EDUCATION

September 20, 1977
Pending State Board of Education

Montclair Concerned Citizens Association; Mary Jane Willis; Sergio Garcia-Rangel; Oscar Mockridge IV, by his parents; Seth Goldsamt, by his parents; Trey Willis, by his parents; Edward and Mary McCormick; Staats and Jane Abrams; and Melinda Staniszewski Keck,

Petitioners,

v.

Board of Education of the Town of Montclair, Essex County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Raymond I. Korona, Esq.

For the Respondent, McCarter and English (Andrew T. Berry, Esq., of Counsel)

Petitioners, consisting of a voluntary association of residents, as well as individual pupils, parents and property owners in Montclair, allege that the

adoption on June 1, 1976 by the Board of Education of Montclair, hereinafter "Board," of its Revised Modified Green Plan of school reorganization, scheduled to become effective September 1977, is contrary to its announced purpose of achieving racially balanced schools within the district. They pray the Commissioner of Education to issue an order which would not only declare the Revised Modified Green Plan null and void and permanently restrain its implementation, but also direct the Board to hold additional public hearings and adopt an alternate educationally feasible plan to achieve the greatest possible racial balance in the Montclair public schools.

The Board asserts that its adoption of the Revised Modified Green Plan resulted from a sound exercise of its discretionary authority and is in full compliance with constitutional, educational, and legal requirements.

Four days of hearing were conducted at the office of the Morris County Superintendent of Schools on March 11, 14-16, 1977 by a hearing examiner appointed by the Commissioner. Briefs were filed by the litigants. The report of the hearing examiner, setting forth first the uncontroverted factual context as stipulated or otherwise evident, is as follows:

In 1972 the Board adopted a plan of action to reorganize its schools which, after four years, failed to achieve an acceptable level of racial integration in its neighborhood elementary schools. Indicative of the failure of that plan to integrate its schools in the district, which has a 43 percent minority enrollment, are the following selected figures for 1975-76 compiled by the Board:

School	Grade	Minority
Nishuane	K	98%
Nishuane	1	100%
Nishuane	4	51%
Bradford	K	12%
Bradford	1	10%
Northeast	K	19%
Glenfield	K	96%
Edgemont	4	23%

(J-5)

Thereafter, the Board sought approval from the Commissioner for certain revisions of its existing plan. Those proposed revisions were rejected as inappropriate on July 29, 1975 by the Commissioner who directed the Board to undertake a comprehensive review in order to formulate a better balanced desegregation plan. Various proposals referred to as gold, red, blue, yellow and green plans (R-12) were formulated and after a public hearing, numerous conference meetings and monthly meetings at which the matter was discussed, the Board adopted its red plan on May 24, 1976. On June 1, however, the Board rescinded that plan and adopted the Revised Modified Green Plan, hereinafter "Plan," which is now the center of the instant controversy. (J-1-2) The Plan was approved by the Commissioner on June 4, 1976. (R-4a through R-4t)

Scheduled to become effective September 1977, the Plan would

result in the following usage of the Board's existing elementary and middle schools:

1976-77		1977-78
Bradford	K-4	Pre-Kindergarten - 5 (Regular)
Primary Unit Magnet		Fundamental Magnet
		Primary Unit Magnet
Edgemont	K-4	K-5 (Regular)
Grove	K-4	K-5 (Regular)
Northeast	K-4	K-5 (Regular), ESL
Nishuane	K-4	Pre-Kindergarten - 2
Primary Unit Magnet		Gifted & Talented Magnet
		Primary Unit Magnet
Hillside	K-8	3-5 (Regular)
		Gifted & Talented Magnet
Watchung	K-4	K-5 (Regular)
Southwest	K-4	closed
Glenfield	K-8	6-8
Mount Hebron	5-8	6-8

(J-2)

The Plan, as proposed, offers parents the freedom of choice to enroll their children in any one of the three magnet programs at Bradford School or the paired schools of Nishuane and Hillside. Pupils in magnet programs would be subject to assignment by the Board as an aid to achieving racial integration in those programs and the schools in which they are to be located. Parents of pupils not in magnet programs would be free to select, if they chose, any elementary school outside their designated attendance district in which to enroll their children as long as that enrollment would not cause overcrowding or upset the racial balance of the schools affected. (P-15) All elementary and middle school pupils living more than 1 1/4 miles and 1 3/4 miles, respectively, from their schools would be transported at public expense by the Board.

Minority and non-minority estimates of pupil enrollment developed by the Board for schools in the district are as follows:

	1976-77		1977-78	
	M	NM	M	NM
Bradford	27	73	34	66
Edgemont	30	70	31	69
Grove	48	52	47	53
Nishuane	57	43	51	49
Hillside	54	46	51	49
Northeast	28	72	28	72
Watchung	34	66	40	60
Glenfield	50	50	48	52
Mt. Hebron	42	58	42	58
District-Wide	43	57	43	57

(J-5)

The testimony of three expert witnesses and others called by petitioners is summarized as follows:

Dr. John T. Repa, Professor of Human Relations at New York University and consultant for various school desegregation plans, testified that his study of the Plan convinced him that there would be both schools and classrooms with wide variations from the district-wide ratio of 43 percent minority to 57 percent majority. (Tr. 1.25) He criticized the Plan stating that his preference would be to establish magnet schools *per se* rather than to establish magnets within schools which also offer regular programs of instruction. (Tr. 1.28) He further stated that his analysis convinced him that there should have been more public input prior to the adoption of the Plan. (Tr. 1.31)

Dr. Repa testified further that he had concern over the advisability of projected enrollments of minorities in the paired schools of Nishuane and Hillside which would exceed 50 percent. He iterated his doubt that the magnet programs there would have "***sufficient attraction to overcome the negative stereotype of a minority school.***" (Tr. 1.38) Dr. Repa stated also that he believes that the mere presence of an acceptable balance of minority-majority in a school does not constitute an integrated school, but that true integration requires programs in which racially diverse pupils react with each other in purposeful organized studies and activities. He testified that he believes the Board can achieve its goal of schools with minority enrollments with no greater deviation than 15 percent from the district-wide 43 percent minority enrollment but stated that he cannot foresee that level of integration in classroom enrollments. (Tr. 1.40-41, 65, 69) Dr. Repa testified that:

> "***The way the plan is currently designed, I don't think there'll be a tendency for***white withdrawal.***" (Tr. 1.69)

Dr. John Finger, Professor of Education at Rhode Island College and preparer of desegregation plans for numerous cities for the NAACP, testified that based on a one-day analysis he perceives the Plan as unstable and inadequate to achieve integration in Montclair's schools. He averred that the Plan depends too heavily upon voluntarily enrollment and that magnet programs are an inappropriate tool to achieve either educational desegregation or quality education. (Tr. 2.82, 84-96) Dr. Finger stated that not only schools but their component classes should be desegregated. He criticized the Plan for requiring more busing for some pupils than others. He also stated that he perceives inequities which will work adversely to the prime requirement of an effective, smoothly functioning educational system. (Tr. 2.89, 95, 120)

Dr. Finger testified that:

> "***It is really hard to develop a desegregation balance, it is not an easy thing to do.***[E]ven in a community which is relatively, geographically small like Montclair, kids are going to get reassigned, and people feel very strongly about it and it creates a lot of problems.***" (Tr. 2.112-113)

Dr. Finger stated that, although he had not seen the various plans developed for

the Board's consideration, he has himself relied on such a multi-plan approach in the formulative stage of plan development. He testified also that, in his experience, court sanction of a 15 percent variation from district-wide minority enrollment has not been unusual. (Tr. 2.115, 133-136)

Dr. Ronald Edmonds, desegregation planner, writer and Director of the Research Center for Urban Studies, Harvard, on the basis of his eight hours of study, criticized the Plan, *inter alia,* as follows:

> "***First, any plan that has as its intention, desegregation and then undertakes to use homogeneous grouping as an instrument [is] *** not only internally illogical, but also educationally indefensible***. [T]he proposal to create the two magnet schools *** and to use homogeneous grouping to achieve heterogeneous outcomes is not only linguistically difficult, but demographically unlikely.***
>
> "***[M]agnet schools, particularly in the elementary grades are in and of themselves a dubious educational venture, and *** when a magnet school is going to be used explicitly for desegregation purposes, it is even more dubious.***
>
> "***What is proposed are two special programs. One concentrating on children who are defined as being gifted and talented, and the other program concentrating on children who are defined as representing either special needs or special interests in basic skills in that these two groups of children are presumed to be racially distinct and *** a means by which desegregation will be accomplished.***" (Tr. 2.139-140)
>
> "***I don't think what is being proposed is a desegregation school, and most assuredly it is not an integration plan. It may have a demographic effect***. And, overtime, I would think its negative outcomes will be even more observable.***" (Tr. 2.142)

A citizen of Montclair who had served on Group B of the citizen task force testified that she was unable to resolve discrepancies between the 112 minority pupils anticipated in the primary unit magnet which were reported to the Commissioner in November 1976 as compared to the 170 projected in the HEW application on the Board's 1978 funding proposal. (P-2; Tr. 1.73-75) She alleged that gross inconsistencies exist in the Board's enrollment projections. She objected to the Plan which she averred would force pupils in the primary unit magnets to be bused between its two locations at Nishuane-Hillside and Bradford schools to achieve racial balance. (Tr. 1.85-89) She further objected to the busing of educationally disadvantaged pupils as a means of achieving racial balance. In this regard she stated:

> "***I find it offensive that we would use children who have particular learning problems to integrate these schools in that manner and I think it would tend to enforce racial stereotypes***." (Tr. 1.98)

An officer of the Montclair Concerned Citizens Association testified that

the Association was formed after June 1 when the Board voted to adopt the Plan. She stated that although a Modified Green Plan had been discussed by the public prior to June 1, the Plan as adopted had never been presented in its final form to the public for their reaction and comment. She testified that although various plans had been presented by the Board and discussed by the public and, although the public had in fact submitted proposed plans of integration to the Board, the very fact of the existence of numerous plans made their consideration extremely difficult. She testified further that 1100 citizens of Montclair had expressed their disapproval of the Plan by signing a petition opposing it. (Tr. 2.3-20)

The Chairman of the Education Committee of the League of Women Voters of Montclair testified that she felt the public had not participated as fully as would be desirable in the formulation of plans considered by the Board. She stated that she finds it objectionable that the Board held so many public conference meetings at which the public, by Board policy, was not allowed to speak. (Tr. 2.33-34) She objected further that the public was often in the position of "***never knowing what would come next. I think you give less attention to five or six plans than you give to one plan that you know is seriously being considered for adoption.***" (Tr. 2.77) She testified that she was also perplexed by the differences in enrollment projections sent to the Commissioner as compared to those sent to HEW. She testified, nevertheless, that she assumes the Board will achieve its goals on minority levels within various school buildings. She stated that her studies lead her to anticipate a decline in the number of classrooms in the district with no more than what she considers an acceptable 10 percent deviation from the district-wide 43 percent minority enrollment. (P-14-17; Tr. 2.37, 40-44, 79)

Petitioners' Brief, hereinafter "PB," sets forth the argument that the Plan not only ignores and defies State and Federal Law, but would deprive Montclair of a racially integrated system of schools by increasing segregation and fostering abhorrent stereotypes of intellectual superiority and inferiority, thus depriving pupils of equal educational opportunity. *Brown et al. v. Board of Education of Topeka et al.*, 347 *U.S.* 483 (1954); *Milliken v. Bradley*, 418 *U.S.* 717 (1974) Petitioners cite, also, *Evans v. Buchanan*, 416 *F.Supp.* 328 (*D. Del.* 1976) wherein it was stated:

> "***In determining whether any voluntary plan *** meets the requirements of a desegregation plan, the Court has had to consider the goals which *any* plan ordered by the Court would be required to meet; and then determine whether the plan proposed offers adequate assurance that the goals would be met.***
>
> "The magnet program is heavily dependent upon the unique drawing power of particular programs and faculty to attract and hold students. There is necessarily a limited market for special programs. While magnets might be used to desegregate individual schools otherwise not part of a segregated system, their use as the sole means of system-wide desegregation is decidedly unpromising.***

"***[Voluntary plans] are unacceptable where there are 'reasonably available other ways *** promising speedier and more effective conversion to a unitary, nonracial school system***.'***" (at 345-346)

Petitioners argue that the heavy reliance by the Board on magnets to achieve desegregation is similarly inappropriate in Montclair. They predict that the Plan will meet neither its announced goals nor the requirements as enunciated by the New Jersey Supreme Court in *Booker v. Board of Education of the City of Plainfield,* 45 *N.J.* 161 (1965) wherein it was stated that, when racial imbalance exists in the public schools, local boards and the Commissioner have an affirmative duty to take action to eliminate it whenever reasonably feasible. (PB, at pp. 26-28) Petitioners not only aver that the Board's acceptance of a 15 percent deviation from the racial balance in the district is inappropriate but also argue that the Plan, if implemented, will worsen the imbalance which already exists. Accordingly, they maintain that the Commissioner, under his authority as enunciated in *Jenkins et al. v. Morris School District et al.,* 58 *N.J.* 483 (1971), should declare the adoption of the Plan null and void and remand the matter to the Board for formulation of an alternative plan with appropriate input from the citizens of Montclair. (PB, at pp. 28-32)

Petitioners contend that the Plan was unlawfully adopted by the Board at a conference meeting in an arbitrary and capricious manner without opportunity for public comment, thus depriving the public of due process pursuant to *N.J.S.A.* 18A:7A-2(a)(5) which "***encourages local participation consistent with the goal of a thorough and efficient system serving all the children of the State." It is argued that lack of community involvement in the development of the Plan is in no way ameliorated by the limited role assigned by the Board to the task force to help implement the Plan following its adoption. Petitioners assert that the Plan will create such inequities of pupil placement in magnet programs, busing, and access to neighborhood schools as will lead to withdrawal from the public schools and constitute an offense to the principle of equal protection of the laws. *Baker v. Carr,* 369 *U.S.* 186 (1962); *Reynolds v. Sims,* 377 *U.S.* 533 (1964) (PB, at pp. 33-37)

Petitioners argue, in conclusion, that because of unusual facts in this case the Board's action may not properly be accorded a presumption of validity, and that the Board is obligated to prove the reasonableness of the Plan, a burden which it has failed to meet.

A Motion to Dismiss at the conclusion of petitioners' case was procedurally held in abeyance for disposition by the Commissioner. (Tr. 3.1-21)

Testimony of witnesses called by the Board is briefly summarized as follows:

The director of pupil services from the Superintendent's office, hereinafter "director," submitted in writing document R-2, containing his responses to petitioners' written evidence (P-2 through P-11) concerning current and projected minority and non-minority enrollments in the schools of the district. Petitioners argue that, because this material was entered into the record without

full and detailed testimony of the director, they were unfairly prevented from cross-examining him on the contents. The record bears witness, however, that petitioners were not precluded from doing so by any ruling of the hearing examiner but chose not to cross-examine him in depth regarding the sources and authenticity of the data in R-2. (Tr. 3.22-35)

The thrust of R-2, in which the director responds to each point of argument set forth by petitioners in P-2 through P-11 wherein enrollment projections of the Board are challenged, is that petitioners' exhibits were based on incomplete or incorrect data or faulty assumptions. (R-2, at pp. 3-5, 7, 9, 11, 13, 15, 17)

The director contends that the Plan, when implemented in each school building and program, will more closely approximate the minority/non-minority ratio of the district and will meet pupil needs in regular, magnet and special education programs. (R-2, at pp. 9, 19, 21, 23)

The director testified further that it is his understanding that pupils residing in the Nishuane attendance district are subject to assignment to the primary unit magnet by the Board, regardless of whether or not their parents choose to enroll them in that magnet. (Tr. 3.33-35)

The Board President testified that when the Commissioner required a revision of the desegregation plan in 1975, the Superintendent was directed to review statistics and effects of the then existing plan upon residents and, after consultation with citizens, to devise alternate plans for consideration. He testified that the Superintendent was instructed to give serious consideration to the reduction of bus transportation, quality education which would not result in "white flight," economy, and maintenance of the neighborhood school concept. (Tr. 3.42-48, 61) The President testified that the Board was responsive for many months to the expressed views of the citizenry as evidenced by the numerous conference and monthly meetings of the Board at which the public was in attendance during discussion of the development of alternative plans for integration.

The Board President also testified that, when the Plan was adopted, the Board determined that a 15 percent deviation from racial composition of the district was acceptable. He stated that on the night the Plan was adopted no discussion was allowed from the public but that a task force was promptly created by the Board with one administrative resource person assigned as a technical assistant to each subdivision thereof. The President testified that numerous suggestions of the task force and the public have since been incorporated as modifications of the Plan. (Tr. 3.59, 61, 63-68, 70, 114) He stated that numerous questionnaires, official publications, news articles, and informative meetings have been provided to inform the public and that members of the teaching staff have been trained throughout the 1976-77 school year. (Tr. 3.70-78) Concerning the magnet programs at Nishuane and Hillside where the greatest concentration of minority residents live, he stated:

"***I believe that the neighborhood students will benefit from the magnet

> program that will exist in that facility. I think that parents have an opportunity to make their children available to the magnet school. I do not feel that the children who do not participate specifically in the magnet will feel inferior, nor do I feel that they would receive an inferior education.***" (Tr. 3.78)

The President emphasized that, in contrast to the now existing school organization, the Plan has the highly desirable feature that any pupil could continue to be enrolled in the same school from kindergarten through fifth grade.

The Superintendent testified that he was repeatedly advised by the Board to give serious consideration to input from the public and that he did so in the formulation of proposed plans to integrate the schools of Montclair. He stated that he and his staff not only studied and visited integration plans in operation across the Nation, but also conferred frequently with the officials of the Office of Equal Educational Opportunity of the State Department of Education, municipal officials, individuals and organized citizen groups in Montclair. (Tr. 4.33-34, 41-44, 48-56)

The Superintendent testified that he was determined to devise a more creative system which would reduce the forced displacement of pupils caused by scheduling them at different elementary schools for different grades, to reduce the discontent caused by involuntary busing, and to close at least one school in consideration of a reduction of 1483 enrolled pupils over a five year period. (Tr. 4.35, 130) He testified that no pupil would be required to enter any magnet program, but that any pupil enrolling in a magnet would be subject to unilateral assignment to a building in which that magnet is offered. (Tr. 4.74-75)

The Superintendent, testifying that the fundamental magnet is designed not as a remedial program but to accommodate parents and pupils who desire a structured, teacher directed program with strong emphasis on the three R's, stated:

> "***[W]e think it's as viable a method of teaching as open classrooms or self-contained classrooms or multiple aging. It's another process, it's another method.
>
> "The youngsters in the fundamental program will have the same curriculum, same textbooks***." (Tr. 4.79)

Of the gifted and talented magnet the Superintendent stated:

> "***[O]ur thinking basically was guided by little of what we found outside of Montclair relative to gifted-talented programs.
>
> "We thought they had too narrow a base, they are [elitist].***
>
> "Every youngster is gifted-talented. All youngsters have some form of gifts

and talents***. What we've designed is a program more in the line of enriching the elementary curriculum.***

"There are areas like foreign language *** science *** leadership, creativity, futuristic studies which deal with ecology and environment, undersea world, outer space, *** institutions in America.***

"We've designed a reading curriculum *** which deals with great books***.

"Now that's what the gifted talented program purports to do and will do. It has fourteen areas instead of three and schedules youngsters in those on either a 6 week basis, a semester basis or a yearly basis. It deals with drama, dance, gymnastics***." (Tr. 4.81-83)

The Superintendent termed the citizen input of the task force to be of inestimable value in finalizing the Plan and stated:

"***[B]y and large what they've recommended, we've accepted and implemented and in most cases have felt it to be unbelievably useful because it also raised a number of parental concerns in almost every area that we as an administrative group tried to deal with in our presentation of this program to the public and design it out.***" (Tr. 4.89-90)

He stated that efforts of his staff to acquaint the public with the Plan have included living room dialogues, school publications, videotapes, programs on magnets, and neighborhood school meetings. He testified also that eleven unassigned teachers have been assigned for the 1976-77 school year to prepare curricula and materials for use in September 1977 in an educational program of which he is "***absolutely positive that it will work***and work better in ensuing years***." (Tr. 4.95)

In regard to busing, the Superintendent testified that although the budget provides the same funds for 1977-78 as for 1976-77, the rebidding of contracts at an anticipated 15 percent increase in cost will decrease the amount of busing in accord with diminished need. (Tr. 4.167-169)

It is contended in respondent's Brief, hereinafter "RB," that the Plan is neither discriminatory nor educationally unsound since magnet programs are not to be chosen on the basis of academic ability but are available to minority and non-minority pupils. The Board argues that:

"***The figures do not mirror with precision the general figures in the township but there is a large enough group of white students in each school that is in difficult to see how there could be any badge of inferiority.***" (RB, at p. 7)

In this regard the Board cites, in addition to *Milliken, supra, Swann v. Charlotte-Mecklenburg Board of Education,* 402 *U.S.* 1 (1971), 91 *S.Ct.* 1267, 1270 wherein it was stated by the Court:

> "***The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole***." (at 24)

The Board argues further that such busing as will be required affects equally minority and non-minority pupils in compliance with that which was stated by the Commissioner in *Michael Austin, et al. v. Board of Education of the Township of Union, Union County,* 1970 *S.L.D.* 25, as follows:

> "***The evidence fails to disclose any intention on the part of the Board to place the onus for desegregation on the black community or a failure on its part to consider and evaluate a variety of solutions. On the contrary, it appears that the Board considered a number of alternatives, including the one advocated by petitioners, and made a determination that the central sixth grade arrangement represented the most complete, long-term solution that could be devised. *** While this does not constitute an equal balance in terms of movement, it must be recognized that most situations where the instant problem is found present such complex difficulties that a solution which is exactly equitable for every child or group is impossible to devise.***" (at 31)

The Board contests the validity of petitioners' expert witnesses' testimony on grounds that their studies allegedly were limited in scope, superficial, fraught with error, and averaged perhaps one day per expert and revealed limited knowledge of Montclair. (RB, at pp. 14-17)

The Board contends that the Plan meets applicable standards of flexibility for racial balance in New Jersey as enunciated in *Booker, supra,* as follows:

> "***As in *Vetere* and *Barksdale,* the goal here is a reasonable plan achieving the greatest dispersal consistent with sound educational values and procedures. This brings into play numerous factors to be conscientiously weighed by the school authorities. Considerations of safety, convenience, time economy and the other acknowledged virtues of the neighborhood policy must be borne in mind. Costs and other practicalities must be considered and satisfied. And trends towards withdrawal from the school community by members of the majority must be viewed and combatted.***." (45 *N.J.* at 180)

The Board argues that the Plan complies with all guidelines, rules, directives and statutory prescription of the Legislature, Courts, State Board of Education and the Commissioner. (RB, at pp. 19-26) In this regard is cited *Paulsboro Community Action Committee v. Board of Education of the Borough of Paulsboro, Gloucester County,* 1969 *S.L.D.* 51 wherein was stated the following:

> "***The Commissioner has observed, in the cases brought before him involving an issue of de facto school segregation, many attempts to arrive at a statistical definition of unlawful racial segregation and has noted the consistent refusal of minority group leaders to become involved in any such 'numbers game.' From this study of the problem of racial imbalance

the Commissioner is convinced that it cannot be reduced solely to statistical analysis or defined precisely in terms of numbers.

"The test of racial balance is not properly expressed in terms of ratios or numbers but in terms of objectives. What is sought is not some acceptable statistic or formula but conditions which guarantee equality of educational opportunity, which enhance the climate for learning and which stimulate pupil growth rather than stultify it.***" (1969 *S.L.D.* at 54)

Thus, the Board argues, a school by school enrollment in which minority-majority ratios vary no more than 15 percent from the district-wide ratio is sufficient and a similar class by class requirement, while desirable, is not mandatory. (RB, at pp. 26-28)

The Board avers that even in those instances in which classrooms or grades or magnet classes in schools do not fall within 15 percent of the district-wide ratios there will be sufficient co-mingling of pupils to develop desirable interpersonal relationships in special programs, assemblies, field trips, lunchrooms, playground activities, career awareness seminars, counseling services, art, music, enrichment periods, learning center and library activities.

The Board asserts that it complied in all instances with the Open Public Meetings Act, *N.J.S.A.* 10:4-6 *et seq.,* that members of the public attended numerous meetings from January through June 1976 in large numbers and on January 5, April 5 and May 3 iterated their views on desegregation. It is maintained, however, that citizen involvement neither absolves the Board from its responsibility nor strips it of its discretionary authority to act. *N.J.S.A.* 18A:31-1 In this regard *Austin, supra,* is cited wherein the Commissioner stated:

"***[W]hen the matter is one of choice between plans aimed at reducing racial imbalance, each of which is legally sufficient and educationally sound, the discretionary prerogative lies with the local board of education and is not subject to dictation by the Commissioner or other person or agencies.***" (at 32)

Thus, the Board concludes that its adoption in good faith of an innovative educational program which improves integration levels and reduces forced bus transportation may not be thwarted by "***[t]he complaints of a small group of citizens no matter how well-intentioned***." (RB, at p. 42)

The hearing examiner, having carefully reviewed the pleadings, exhibits in evidence, testimony of witnesses and arguments of fact and law, makes the following findings of fact:

1. The Board and its professional staff conscientiously sought to inform and invite the public to participate in and comment upon various proposed integration plans. Although the public was not made aware in advance that the Plan as revised would be voted upon on June 1, 1976, the public had ample opportunity to become acquainted with such integral elements as pairing of schools, closing of a schoolhouse, magnets, financing, and busing which were

under consideration by the Board. While it would undoubtedly have been desirable for the public to have had opportunity to study and comment upon the final revision of the Plan prior to its adoption, the hearing examiner knows of no such requirement of law. It must be understood that the Board, faced with having already passed its deadline for submission of an integration plan, was obligated to act without delay.

2. The Plan was legally adopted at a duly constituted public meeting of the Board in the presence of 450 members of the public. (R-4(s))

3. The apparent inconsistencies in enrollments reported to the Commissioner and those reported to HEW are explained by the fact that HEW figures did not (and should not) include those pupils for whom funding was to be provided by the Board as did the figures reported to the Commissioner. (R-2) The hearing examiner perceives no gross inconsistencies in the Board's projected enrollments.

4. Pupils voluntarily enrolled in magnet programs are subject to unilateral assignment by the Board as one method of achieving its goal of having no school with more than 15 percent deviation from district-wide racial composition ratios.

5. The Board also has revised its attendance area boundaries to further promote its ratio goals. (P-15; R-9, 14)

6. Once adopted, the Plan was revised and modified further as the result of valuable and extensive studies by the citizen members of the advisory task force, school administrators and other teaching staff members. (J-4; Tr. 4.79-89) The public and the Commissioner have been informed of both the Plan and its subsequent revisions by appropriate memoranda, publications and other approaches. (Tr. 4.89-92; R-5, 6; J-3, 6)

7. Bus transportation would be limited only to those who chose to enroll in magnet programs and total busing in the district would decrease if the Plan were implemented. (Tr. 4.167-169)

8. The Plan would provide on an optional basis well devised educational offerings for pupils in magnet programs, regular classes, ESL program and special education. This finding is grounded upon the convincing testimony of the Superintendent who elaborated upon the means by which valuable input from both citizens and professional staff has resulted in the present dimensions and flexibility of the Plan to offer programs desired by the citizens of Montclair.

9. The testimony of expert witnesses called by petitioners is in part of doubtful value since it was based upon minimal knowledge of Montclair and almost total unawareness of the philosophic approach of the Board's professional staff as it applies to the inception and operation of the Plan. This resulted in erroneous assumptions that the fundamental magnet was to be a remedial program and that the gifted and talented magnet was to be restricted to those whose high achievement test scores were the bases for acceptance.

10. The concentration of special education classes at Bradford is but a continuation of an established practice in the district. (R-2, at p. 19)

11. The closing of the Southwest School with its 120 pupils is amply justified by the substantial decrease in pupil enrollment of the district during the past five years. *Green Village Road School Association et al. v. Board of Education of the Borough of Madison, Morris County,* 1976 *S.L.D.* 700, aff'd State Board of Education 716

12. Implementation of the Plan would result in pupil enrollment ratios which more closely approximate those which currently prevail and would obviate the likelihood of unfavorable stereotypes of predominately minority or predominately non-minority schoolhouses. (R-2) In certain instances those same desirable ratios will not prevail in individual classroom enrollments. (R-2, at p. 4)

Absent a finding that the Board acted in bad faith, arbitrarily, capriciously or illegally, the hearing examiner recommends that the Commissioner determine that the Board's adoption and amplification of the Plan is entitled to a presumption of correctness and that pursuant to the Court's direction in *Booker, supra,* "***reasonably feasible steps toward desegregation are being taken in proper fulfillment of State policy***." (45 *N.J.* at 178) *Boult and Harris v. Board of Education of the City of Passaic,* 1939-49 *S.L.D.* 7, 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)

This concludes the report of the hearing examiner.

* * * *

The Commissioner has carefully reviewed the entire record of the controverted matter including the hearing examiner report and the exceptions thereto filed by petitioner on July 7, 1977 pursuant to *N.J.A.C.* 6:24-1.17(b). No exceptions were filed by the respondent Board which by letter of July 8, 1977 represented only that since the hearing "***citizen response to the fundamental and gifted and talented magnet programs has exceeded the projections made by respondent at the hearing, to the extent that applications for such programs were closed as of June 30, 1977***."

Principal among exceptions filed by petitioners is the charge that the hearing examiner "*** ignored without basis all of the best and leading educational opinion made available on the subject plan.***" (Petitioners' Exceptions, at p. 1) The Commissioner, after careful review of the hearing examiner report and the transcripts of testimony of the educational experts called by petitioners, finds this charge baseless. The report fairly summarizes at length and aptly quotes the critical thrust of their testimony. The examiner found such testimony to be of doubtful value, however, because of those experts' unawareness of the Board's philosophic approach governing admissions of pupils into the magnet programs. A review of the record convinces the Commissioner that not only was this analysis by the hearing examiner correct

but all other findings as well. Accordingly, the Commissioner adopts as his own each finding of fact which the examiner has set forth in his report.

The Commissioner finds no validity to petitioners' further exception which avers that the Board's plan is overly reliant upon voluntary participation by the citizenry. This exception is improperly based in view of the redistricting which has been shown to be an inherent part of the Board's Plan. (P-15; R-9) Nor does the voluntary nature of participation by pupils and parents in the magnet program enrollment in any way invalidate the Plan as alleged in petitioners' exceptions. Indeed, it is the compelling drawing power of such magnet programs with their intrinsic appeal of currently extant, differing philosophies and techniques of education to which parents in Montclair and elsewhere in our nation ascribe which may prove to be the greatest asset in the successful operation of the Plan. In no way is such voluntary participation either illegal, contrary to federal, state or decisional law, or a detriment to the workability of the Plan. The Commissioner so holds.

Neither is the Plan rendered *ultra vires* by reason of lack of citizen participation. The record is replete with evidence that, both prior to the Board's adoption of the Plan and thereafter in implementation of its uncompleted details, citizen participation was invited and welcomed by the Board. (J-3, 4, 6; R-5, 6; Tr. 4.79-92) Petitioners' charge in Exception 9 that the Board has made "***a public mockery of citizen participation***" is found to be without merit, as are the remaining exceptions advanced by petitioners.

Petitioners have failed to meet their burden of presenting a preponderance of credible evidence that the Plan or its procedural adoption were educationally unsound, violative of petitioners' or pupils' statutory or constitutional rights, contrary to decisional law, or the result of capriciousness, bias, prejudice or bad faith. A careful review of the record leads to the conclusion that the Board's action adopting the Plan was in compliance with existing law, as well as the directive of the Commissioner to develop a reasonable plan to integrate the Montclair schools. *Swann, supra; Milliken, supra; Booker, supra* The Commissioner perceives that the Plan offers adequate assurance that its announced goals will be met. *Evans, supra*

The Commissioner knows of no requirement, as suggested by petitioners, that each classroom in the Board's neighborhood elementary or other schools must duplicate the minority ratio goals which the Board has set for each of its schools. Desirable as that goal would be, it is not feasible to accomplish in the face of pupil preferences to participate in optional course offerings and honors programs, the implementation of mandated compensatory, remedial and special education programs, and the vagaries of minority-majority enrollment by grades. The Commissioner is not unmindful, however, of the desirability that class ratios approximate insofar as possible the ratios extant within the district and the Board is directed to instruct its administrative officers to strive for such attainment as is feasible.

Petitioners having failed in their burden of proof, the Board's Plan is entitled to a presumption of correctness. *Boult, supra; Green Village Road, supra*

Accordingly, the Board's Motion to Dismiss, procedurally held in abeyance, is granted. The Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

September 22, 1977

Board of Education of the City of Gloucester,

Petitioner,

v.

Mayor and Common Council of the City of Gloucester, Camden County,

Respondent.

COMMISSIONER OF EDUCATION

ORDER

This matter has been opened before the Commissioner of Education through the filing of a formal Petition of Appeal by the Board of Education of the City of Gloucester, hereinafter "Board," William C. Davis, Esq., which challenges the reduction imposed by the Mayor and Council of the City of Gloucester, hereinafter "governing body," John W. Dailey, Esq. The principal facts are these:

At the annual school election held March 29, 1977, the Board submitted the following proposal for an amount to be raised by local taxation for the 1977-78 school year:

Current Expense	$1,586,524

This proposal was defeated. Thereafter, the Board and the governing body consulted and the governing body adopted a resolution determining that a lesser amount was necessary to be raised by local taxation as follows:

	Board's Proposal	Governing Body's Resolution	Reduction
Current Expense	$1,586,524	$1,523,524	$63,000

Subsequently the parties entered into a Stipulation of Settlement and Dismissal which provides that the following amount in current expense be raised by local taxation for the 1977-78 school year:

Current Expense	$1,555,024

The Stipulation of Settlement and Dismissal provides for current expenses in the amount of $31,500 to be added to the amount previously certified by the governing body to be raised for current expense for the Gloucester City School District for the 1977-78 school year.

The Commissioner concurs with the Stipulation of Settlement. The Petition of Appeal is hereby dismissed this 23rd day of September 1977.

COMMISSIONER OF EDUCATION

Thomas B. Price,

Petitioner,

v.

Board of Education of the Township of Harding, Morris County,

Respondent.

COMMISSIONER OF EDUCATION

ORDER

For the Petitioner, Thomas Price, *Pro Se*

For the Respondent, Mills, Hock & Murphy (John M. Mills, Esq., of Counsel)

This matter having been opened before the Commissioner of Education by Thomas B. Price, *pro se,* against the Board of Education of the Township of Harding, hereinafter "Board," John Mills, Esq., alleging that the Board has improperly denied him transportation reimbursement for the first semester of the 1975-76 academic year in the amount of $100 as authorized by law; and

It appearing that the parties have agreed to have this matter determined by the Commissioner solely on the pleadings and supporting documents attached thereto, and that a review of these documents and petitioner's affidavit establishes that petitioner's son attended a private school during the 1975-76 academic year approved by the Morris County Educational Services Commission, hereinafter "Commission," and that the Pupil Transportation Coordinator of the Commission, hereinafter "Coordinator," informed petitioner in writing on August 22, 1975 that he was eligible to receive transportation reimbursement for his son during the 1975-76 academic year in the amount provided by law, without filing further forms or applications with the Commission; and

It appearing that, upon further inquiry made by petitioner to the Coordinator in May 1976, when $100 of said reimbursement was not forthcoming, he was informed that further written certification was required to be submitted to the Commission by him and having received said certification form and completed same on May 24, 1976 and forwarded this information to the Coordinator as required; and

It appearing that the Board upon receipt of this information from the Commission determined that petitioner was not eligible to receive the $100 reimbursement for the transportation of his son, by virtue of his untimely application pursuant to the rules of the State Board of Education (*N.J.A.C.* 6:24-1.1 *et seq.*); and

The Commissioner having concluded that petitioner was improperly advised by the Coordinator with respect to the procedure and forms required to be completed within the prescribed deadline; now therefore

The Commissioner finds and determines, in view of these special circumstances, that petitioner is entitled to receive $100 pupil transportation reimbursement from the Board for the first semester of the 1975-76 academic year. Accordingly, the Board is directed to compensate petitioner in said amount for the period of time in question.

IT IS SO ORDERED on this 29th day of September 1977.

COMMISSIONER OF EDUCATION

Jersey City Education Association,

Petitioner,

v.

Board of Education of the City of Jersey City, Hudson County,

Respondent.

COMMISSIONER OF EDUCATION

ORDER

This matter having been opened before the Commissioner of Education (August E. Thomas, Director, Division of Controversies and Disputes) by Philip Feintuch, Esq., attorney for petitioner, on a Motion for Partial Summary Judgment dated February 18, 1977, requesting a judgment by the Commissioner that certain unnamed certificated Title I personnel are entitled to tenure and other benefits, William A. Massa, Esq., counsel for the School District of the City of Jersey City, hereinafter "Board"; and

It appearing that counsel have filed Briefs in support of their respective positions; and

It appearing that an earlier Petition of Appeal in this matter was filed on November 18, 1975; and

It appearing that Title I teachers may be eligible for tenure and benefits afforded other teaching staff members (*Jack Noorigian v. Board of Education of Jersey City,* 1972 *S.L.D.* 266, aff'd in part/ rev'd in part State Board of Education 1973 *S.L.D.* 777); and

It appearing that the Board has established a district board of examiners pursuant to *N.J.S.A.* 18A:26-3 which issues certificates to teach in Jersey City (*N.J.S.A.* 18A:26-5); and

It appearing that no evidence has been submitted to show that the unnamed petitioners possess appropriate teaching certificates in addition to those issued by the district board of examiners (*N.J.S.A.* 18A:29-1; *N.J.S.A.* 18A:26-5; *Henry Butler et al. v. Board of Education of the City of Jersey City,* 1974 *S.L.D.* 890, aff'd State Board of Education 1074, aff'd in part/ rev'd in part Docket No. A-2803-74 New Jersey Superior Court, Appellate Division, July 9, 1976 (1976 *S.L.D.* 1124), *cert.* den. 72 *N.J.* 468 (1977)); and

It appearing that petitioner has failed to follow the conference agreements dated April 2, 1976 which required, *inter alia,* that all aggrieved individuals be named and show their certification; and

It appearing that there is insufficient evidence submitted by petitioner to grant the relief requested; and

It further appearing that many facts are in dispute (Conference Agreements, April 2, 1976); now therefore,

IT IS ORDERED that petitioner's request for Partial Summary Judgment is denied; and

IT IS ORDERED that petitioner submit to the Commissioner and to the Board the evidence required as set forth in the conference agreements dated April 2, 1976; and

IT IS FURTHER ORDERED that this evidence must be filed with the Commissioner no later than thirty days after receipt of this Order or the Petition of Appeal in this matter filed November 18, 1975 will be dismissed for lack of prosecution.

Entered this 29th day of September 1977.

COMMISSIONER OF EDUCATION

Margot Outslay,

Petitioner,

v.

Board of Education of the Borough of Midland Park, Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

ORDER

For the Petitioner, Saul R. Alexander, Esq.

For the Respondent, Podesta, Myers & Crammond (John H. Crammond, Esq., of Counsel)

This matter having been opened before the Commissioner of Education on July 2, 1975 by the filing of a Verified Petition of Appeal wherein petitioner, a school nurse, alleges that the reduction of her full-time employment to part-time employment and compensation as a nurse was an illegal act of the Board of Education of the Borough of Midland Park, hereinafter "Board"; and

An Answer to the Verified Petition of Appeal having been filed by the Board on August 18, 1975, wherein the Board admits that petitioner's employment and compensation were reduced but also denies that its action was other than a legal exercise of its discretionary authority; and

A Notice of Motion for Summary Judgment having been filed before the Commissioner by petitioner on November 1, 1975; and

Oral argument on the Motion having been heard by a representative of the Commissioner at the State Department of Education, Trenton, on January 26, 1976; and

The arguments of counsel having been heard wherein petitioner maintained that no important factual issue exists and that the Board's action was in violation of her tenure and seniority rights as set forth in *N.J.S.A.* 18A:6-10; *N.J.S.A.* 18A:28-5, 9; *N.J.S.A.* 18A:25-1; *N.J.S.A.* 18A:28-11, 12; *N.J.S.A.* 18A:27-10; and in the determination of the Commissioner in *Arthur L. Page v. Board of Education of the City of Trenton et al., Mercer County,* 1973 *S.L.D.* 704; and

The arguments of counsel having been heard wherein the Board avers that it acted legally pursuant to *N.J.S.A.* 18A:28-9 to abolish petitioner's full-time position and gave her ample notice of its intent to employ her in a part-time position; and

The Commissioner having considered and carefully balanced the arguments of counsel within the context of the cited case law and the pleadings and exhibits entered into evidence at the aforementioned oral argument; and

The Commissioner having concluded that a decision in the matter requires the determination of certain relevant and crucial facts which are at this juncture unknown; now, therefore

IT IS ORDERED that the litigating parties proceed to submit the official minutes of the Board's actions appended to a stipulation of the relevant facts within fifteen days of receipt of this Order and submit memoranda, if desired, within fifteen days thereafter in precisely the manner agreed upon at a conference of counsel on January 27, 1976.

Entered this 27th day of April 1976.

COMMISSIONER OF EDUCATION

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Saul R. Alexander, Esq.

For the Respondent, Podesta, Myers & Crammond (John H. Crammond, Esq., of Counsel)

Petitioner, a tenured school nurse in the employ of the Midland Park Board of Education, hereinafter "Board," alleges that the Board's actions reducing both her hours of employment and compensation to less than full time beginning with the 1975-76 school year was invalid, by reason of violation of her seniority rights and procedural defects. The Board, conversely, asserts that its action was a legal exercise of its discretionary authority to curb expenditures and determine the staffing needs of its schools.

Petitioner, on October 1, 1975, gave Notice of Motion for Summary Judgment which was the subject of oral argument before a representative of the Commissioner of Education at the State Department of Education, Trenton, on January 26, 1976, at which time numerous exhibits were marked into evidence. That Motion was denied by the Commissioner's interlocutory Order dated April 27, 1976 for the reason that certain relevant and crucial facts were not at that time in evidence. The Order directed that the litigants agree upon those facts, which, after long delay, were submitted on April 12, 1977 as a Stipulation of Facts. (J-1) The record in the form of the pleadings, stipulation, transcript of oral argument, exhibits and Memorandum of respondent is ripe for a determination. The relevant facts which gave rise to the dispute follow:

The Board employed three school nurses of whom petitioner was second in seniority. The nurse with greatest seniority was not affected by the Board's changes in working hours and salary of its nursing staff. (J-1, at p. 1) The Board, having considered with its administrators during the 1974-75 school year ways to effect financial economies in operating its schools, received from its Superintendent a recommendation that the positions of two full-time librarians and two full-time nurses be reduced to part-time positions. A motion reducing their employment from full time to part time but not specifying the hours or salaries of part-time employment was adopted at a special public meeting on March 24, 1975. (P-1, at p. 5)

The Superintendent in a letter dated March 26, 1975 notified petitioner of the Board's action and stated further that:

> "***Specific information concerning the number of hours per day you will work, along with starting time and ending time will be forthcoming." (P-2)

On March 31, 1975 petitioner requested details regarding her salary status (P-3), which details were supplied in the Superintendent's letter of April 9, 1975, as follows:

"***You will be required to work the hours of 10:00 a.m. to 2:00 p.m. which will include a half hour for lunch at the salary of $11,000***.

"Your salary was computed by using the following formula:

"1/200 x $18,750 (1975-76 full time salary) divided by the number of hours per day = hourly rate. Hourly rate x 3 1/2 hours (to be worked) = daily rate x 200 days = 1975-76 part time salary or $11,000.***" (P-4)

Thereafter on April 28, 1975, having in the interim been advised of the preferred method for changing full-time positions to part-time positions, the Board, at a special public meeting, rescinded its action of March 24, 1975, *ante,* voted to abolish the positions of the four full-time nurses and librarians and directed that the tenured staff members affected be notified of their seniority status pursuant to *N.J.S.A.* 18A:28-11 and 12. By separate resolution, the Board, at the same meeting, created two half-time school nurse positions and two half-time librarian positions for the ensuing year. (P-6) Petitioner on May 1 was notified in writing of the Board's actions and offered opportunity to apply for a half-time position. (P-7) Petitioner responded that, under protest and without waiver of her rights to challenge the legality of the Board's action, she accepted a half-time position on the terms previously outlined by the Superintendent in P-4, *ante*. (P-8; J-1, at pp. 3-5)

Petitioner, arguing that notice received of the Board's official action was untimely, cites *Arthur L. Page v. Board of Education of the City of Trenton et al.*, 1973 *S.L.D.* 704, rem. State Board of Education 1974 *S.L.D.* 1416, decision on remand 1975 *S.L.D.* 644, aff'd State Board 1976 *S.L.D.* 1158 wherein the Commissioner stated, *inter alia,* that:

"***1. The authority of a local board of education to abolish positions of employment is statutory.

"2. Such authority is not absolute, however, and may not, on all occasions and under all circumstances, be exercised in an arbitrary manner in complete disregard of those rights to timely notice with respect to future employment which are afforded to nontenured teachers by specific statutory authority; and, the Commissioner holds, to tenured employees by indirection.***

"Thus, the *** action of the Board in August 1973, to abolish *** [Page's] position, was patently frivolous, since the stated reason for the abolishment *** if valid in fact, was as valid in June as it was in August.

"It follows, then, that the Commissioner determines that the action taken herein by the Board was not in 'good faith.' Additionally, however, the Commissioner holds that even a contrary opinion in this specific regard would not obviate the harm caused by the precipitate and untimely notice which petitioner received that his position would be abolished. In the circumstances, the Commissioner holds he was entitled to a more considerate treatment (the Board could expect no less than a sixty-day

> notice if petitioner had resigned (*N.J.S.A.* 18A:28-8)); and therefore, should be made whole at this juncture on these grounds alone. Accordingly, the Commissioner directs that the Board immediately restore petitioner to a position which embraces administrative duties of the kind previously performed by him, and that his salary be restored retroactive to the date of September 1, 1973, and be continued at that rate for the balance of the 1973-74 school year." (at 709-710)

Petitioner contends that the Board's May 1, 1975 notice to her as a tenured teacher does not comply with clear dicta in *Page, supra,* and that she was entitled to at least as early notice as is statutorily required by *N.J.S.A.* 18A:27-10 for nontenure teachers, as follows:

> "On or before April 30 in each year, every board of education in this State shall give to each nontenure teaching staff member continuously employed by it since the preceding September 30 either
>
> > "a. A written offer of a contract for employment for the next succeeding year providing for at least the same terms and conditions of employment but with such increases in salary as may be required by law or policies of the board of education, or
> >
> > "b. A written notice that such employment will not be offered."

Petitioner contends that the Board's rescission of its prior actions on April 28, 1975, nullified those actions and that her subsequent notification two days after April 30, 1975 does not comply with applicable decisional law in *Page, supra.* (Tr. 11-16)

Petitioner also argues that the Board could not legally create a half-time school nurse position when such a part-time position was not specified or provided for by statute. *N.J.S.A.* 18A:40-3.1 (Tr. 17-18) She contends further that *N.J.S.A.* 18A:28-9 provides only for reduction in *number* of staff, not for reduction in hours of employment or salary.

It is additionally argued that allowing boards of education to reduce the salaries of tenured employees by reducing their positions to less than full-time would create the evil of utilizing such procedures as a ruse to force their resignations, thus thwarting the intent of the tenure laws. (Tr. 18, 52)

For the foregoing reasons petitioner prays for an order of the Commissioner directing the Board to reinstate her to full-time employment as a school nurse together with lost salary and attendant emoluments. Petitioner contends also that, in the event she should not prevail in her prayer for reinstatement, she is, in the alternative, entitled to have her salary computed on the basis of four clock hours daily, as opposed to 3 1/2 hours whereby her half-hour lunch period is excluded. (Petition of Appeal, at p. 5)

The Board argues, conversely, that it has the statutory right to abolish staff positions for valid reasons, one of which is economy. In this regard the

Board asserts its right to employ part-time nurses to effect such economy. (Tr. 37) The Board avers that, although it did not follow preferred procedure when it first reduced petitioner's employment from full time to part time, it gave clear and valid notice to petitioner of its intention to alter her employment status. (Memorandum of Respondent, at pp. 2-5; Tr. 27-33)

The Board contends that its letter of May 1, 1975 notifying her of abolishment of her full-time position and creation of a part-time position, properly gave her opportunity to accept or decline employment in that position. (Memorandum of Respondent, at p. 4) Thus, the Board avers that its actions were not only procedurally acceptable but in the best interests of the community it serves, and that it has not abused its discretionary authority.

The Commissioner, having carefully considered the pleadings, exhibits in evidence, and legal arguments in the light of existing educational law, finds for the Board. Petitioner's argument that the Board is precluded from establishing one or more part-time school nurse positions is specious. While it is true that *N.J.S.A.* 18A:40-3.1 does not specifically make reference to the employment of a part-time nurse, the legality of such employment has been rendered *stare decisis* by decisional law in *Bruce W. Roe et al. v. Board of Education of the Township of Mine Hill, Morris County,* 1976 *S.L.D.* 673, aff'd State Board of Education 677, as follows:

> "***The Commissioner also holds that there is no requirement that each school district of the State employ a full-time nurse or that a nurse be present at all times in each school building. (See *Leona Smith et al. v. Board of Education of the Borough of Caldwell-West Caldwell, Essex County,* 1972 *S.L.D.* 232.) A nurse is a teaching staff member whose position is mandated by specific statutory authority. *N.J.S.A.* 18A:40-1 The same authority also states, however, that the '***board shall fix their salaries and terms of office.' Thus, the conditions pertinent to the position of school nurse are left to the discretion of local boards charged with the general government and management of the public schools. *N.J.S.A.* 18A:11-1 *The statutes nowhere provide that nurses or any teaching staff member must be employed on a full-time basis.****" (*Emphasis supplied.*) (at 677)

Nor does petitioner's argument that her notice was untimely withstand scrutiny of the record. The instant matter is importantly distinguishable from *Page, supra,* in that Page, who had accepted an appointment with attendant salary for the ensuing year was notified on August 16 of a unilateral salary reduction and transfer in position to take effect only two weeks later on September 1. No comparable abruptness of impending change occurred herein. Petitioner, by contrast, was given timely notice on March 26 of a change in employment status and salary to become effective months later in the forthcoming school year.

That notice was not rendered void by subsequent action. The Board's action on March 24, 1975, reducing her employment and compensation, while not the preferred procedure, was identical to that which has been held legal in

other instances, such as *Mildred Wexler v. Board of Education of the Borough of Hawthorne, Passaic County,* 1976 *S.L.D.* 309, aff'd State Board of Education 314. Therein, in upholding the legality of a board's reduction of salary and time of employment of a teacher of French without formal abolishment of position, the Commissioner stated:

> "***The Commissioner, in recognition of the language of *N.J.S.A.* 18A:28-9, opines that the proper way to effectuate such a change would have been to abolish the full-time position and establish in its place the part-time position, to which petitioner was entitled by reason of her seniority rights. However, the Commissioner finds that the Board's resolution by its clear and unambiguous language reveals an intent which comports with the intent of the Legislature as set forth in *N.J.S.A.* 18A:28-9 *which places no limitation on the time when a board of education may effectuate a reduction in teaching staff for reasons of economy or other good cause.* Accordingly, the Commissioner holds that the Board's July 8, 1975 resolution is legal and valid.***
>
> "Accordingly, absent a showing of impropriety, the Board's action is entitled to a presumption of correctness. *Boult and Harris v. Board of Education of Passaic,* 1939-49 *S.L.D.* 7, 13, affirmed State Board of Education 15, affirmed 135 *N.J.L.* 329 (*Sup. Ct.* 1947), affirmed 136 *N.J.L.* 521 (*E.&A.* 1948)***" (at 313-314)

In the instant matter, the Board, having initially failed to follow the preferred procedure, by an act of good faith rescinded its action on April 28, 1975. Without further delay, it abolished petitioner's full-time position, created two part-time nurse positions and offered petitioner opportunity to accept one of them.

The hours which the Board deemed necessary to provide adequate nursing services in two separate schools were from 10:00 a.m. to 2:00 p.m. for petitioner and from 11:00 a.m. to 2:30 p.m. for the nurse who had less seniority than petitioner. (Affidavit of Superintendent) It is easily seen that the hours of these positions may not be combined into a single full-time position. The Board has statutory discretionary authority to determine the necessary staffing of its schools. *Porcelli v. Titus,* 108 *N.J. Super.* 301 (*App. Div.* 1969), *cert.* den. 55 *N.J.* 310 (1970) Its determination, absent a showing of bias, arbitrariness or bad faith, must be accorded a presumption of correctness. *N.J.S.A.* 18A:11-1; *Boult, supra*

The Commissioner perceives herein no attempt on the part of the Board to thwart the legislative intent of the tenure laws. Petitioner, having been notified that her position was abolished, was offered opportunity to accept or decline a part-time position. Since that position, which she accepted, could not be combined with the overlapping hours of the other part-time school nurse position, the Board was not legally compelled to combine those positions in order to continue her as a full-time school nurse. The Commissioner so holds. The Board was not, as petitioner also suggests, required to negotiate its reduction in force. *Union County Regional High School Board of Education v.*

Union County Regional High School Teachers Association: Cranford Board of Education v. Cranford Education Association, 145 *N.J. Super.* 435 (*App. Div.* 1976) Nor does the Commissioner find inappropriate the Board's calculation of petitioner's part-time salary.

Absent a determination that the Board's action was procedurally defective or that it resulted from bias or other impropriety, the Commissioner determines that its actions constituted a legal exercise of its discretionary authority. There being no relief which may properly be afforded, the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

September 29, 1977

Joseph Van Os,

Petitioner,

v.

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

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Goldberg, Simon & Selikoff (Joel S. Selikoff, Esq., of Counsel)

For the Respondent, Murray, Meagher & Granello (Robert J. Hrebek, Esq., of Counsel)

Petitioner is a nontenure teacher of English and science in the employ of the Board of Education of the Township of Cinnaminson, hereinafter "Board," since 1974. He holds regular certification as a teacher of English and biological science.

On April 27, 1976, petitioner received written notice from the Board that he would not be reemployed for the 1976-77 academic year because his position had been eliminated due to "financial exigency and the need for educational efficiency.***" (Petitioner's Brief, at p. 1) On that same date he made oral application to teach biology in the Middle School, followed by written application on May 6, 1976.

The Board on May 7, 1976, notified petitioner that his application was not acceptable since the certificate required for the biology position was a comprehensive field endorsement to include biology, physics and chemistry.

Petitioner requests reemployment and assignment to the Middle School position to teach biology with requisite back pay alleging that the Board's action was arbitrary, capricious, unreasonable and *ultra vires* and that the Board cannot require excessive certification for a teaching position. (Petitioner's Brief, at p. 8)

The Board argues that it is wholly within its discretion to establish requirements for a position which are greater than a regular teaching certificate for the immediate subject matter area, and therefore requests that petitioner's Appeal be dismissed. (Board's Brief, at p. 6)

On December 14, 1976, a conference of counsel was held by a representative of the Commissioner of Education at the State Department of Education, Trenton, at which no agreement on issues could be reached by the parties. As a result of a review of the record in the instant matter, subsequent to the unsuccessful conference, the Commissioner's representative by letter dated January 31, 1977 limited the issue to the following:

> "May a board of education not establish higher standards of an applicant to be considered for employment as a teaching staff member beyond those standards necessary for teacher certification in the applied for area."

Petitioner admits that it would be proper for a board to refuse to employ a teacher with a specific endorsement in the field of biological science if, in addition, he would be required to teach classes in physics and chemistry. Petitioner asserts that the position for which he applied in the Middle School was solely to teach biology. (Petitioner's Brief, at pp. 6-7)

In support of his argument petitioner cites *N.J.S.A.* 18A:4-10 and *N.J.A.C.* 6:11-3.3:

> "The State Board of Education may make and enforce rules and regulations for the granting of *appropriate* certificates or licenses to teach***pupils in public schools operated by boards of education***."
> (*Emphasis supplied.*)

N.J.A.C. 6:11-3.4 defines a teaching staff member as

> "***a member of the professional staff of any district or regional board of education***of such character that the qualifications, for such office, position or employment, require him to hold a valid and effective standard, provisional or emergency certificate, *appropriate to his office, position, or employment,* issued by the State Board of Examiners***."
> (*Emphasis supplied.*)

Petitioner argues that it is arbitrary, capricious and unlawful for the Board to deny employment based on the "lack of flexibility" of certification, where

flexibility is not specifically required. He avers that a local board of education's refusal to recognize a valid and appropriate certificate issued by the State Board of Examiners has to be considered *ultra vires*. (Petitioner's Brief, at p. 7)

Petitioner further relies on *Frank Grasso et al. v. Board of Education of the City of Hackensack,* 1960-1961 *S.L.D.* 137; *Veronica Smith et al. v. Board of Education of the Borough of Sayreville,* 1974 *S.L.D.* 1095, aff'd State Board of Education 1975 *S.L.D.* 531, aff'd Docket No. A-2654-74 New Jersey Superior Court, Appellate Division, February 27, 1976 (1976 *S.L.D.* 1170); *Eric Beckhusen et al. v. Board of Education of the City of Rahway et al.,* 1973 *S.L.D.* 167; *James Mosselle v. Board of Education of the City of Newark,* 1973 *S.L.D.* 197, aff'd State Board of Education 1974 *S.L.D.* 1414; and *Luther McLean v. Board of Education of the Borough of Glen Ridge et al.,* 1973 *S.L.D.* 217, aff'd State Board of Education 1974 *S.L.D.* 1411.

The Board argues that the State Board of Education has established a certification process which sets minimum standards for teachers who are to be employed by local boards of education. State Board certification requirements have provided that, for example, a biology teacher must satisfy certain educational requirements. See *N.J.A.C.* 6:11-7.37(a)1. The Board contends that these standards are simply minimum standards and that boards of education are free to require that certain positions be staffed only by those who possess more than the minimum certification in a particular subject area. (Board's Brief, at p. 1)

The Board asserts that under *N.J.A.C.* 6:11-8.1(6) standards provide the basis for defining the additional requirements to be met in order to qualify for additional teaching authorizations by applicants who hold New Jersey regular certificates in other fields. (Board's Brief, at pp. 1-2) In further support of its position the Board cites *Ciro D'Ambrosio v. Board of Education of the Borough of Palisades Park et al., Bergen County,* 1976 *S.L.D.* 718, aff'd State Board of Education March 2, 1977. The Board contends that this decision is supportive of the Board of Education's position regarding the requirement of certification. (Board's Brief, at p. 4)

In a Reply Memorandum petitioner argues that *D'Ambrosio, supra,* not only fails to support respondent's position, but indeed militates against it. (Petitioner's Reply Memorandum, at p. 2)

The Board in an answering letter in lieu of a formal Brief maintains that the *D'Ambrosio* case lends support to the position of the Board. (at p. 2)

In *D'Ambrosio, supra,* it was stated that "***circumstances demanded consideration of a restructuring of the foreign language department in order that, *if required,* a teacher certified in both Spanish and Italian might be assigned with flexibility.***" (*Emphasis added.*) (at p. 721)

In the judgment of the Commissioner, the argument that a local board of education may only require broad or multiple certification for a position if classes exist for each level of certification would create an artificial stricture on

boards and teachers alike. Such a holding would preclude planning for maximum staff utilization and personnel procurement for curriculum reorganization by boards of education, and would discourage plans for professional improvement and advancement on the part of teaching staff members.

Conversely, a board cannot be wholly arbitrary in its quest for teachers with multiple certification. Such requirements, if established for particular positions, must be based upon established needs and/or purposes for such certification. The need may not be immediate, but be determined by proper preplanning and goal setting for a future date. The Commissioner so holds.

For the aforementioned reasons, the Commissioner finds in the instant matter that the Board properly exercised its discretion in filling the biology position with a teacher with a comprehensive field endorsement. A board may establish higher standards of an applicant to be considered for employment as a teaching staff member beyond those minimum standards for teacher certification in the applied for area.

Accordingly, the Petition is dismissed.

COMMISSIONER OF EDUCATION

October 5, 1977

David Dedrick,

Petitioner,

v.

Board of Education of the Town of Hammonton, Atlantic County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Ruhlman and Butrym (Paul T. Koenig, Jr., Esq., of Counsel)

For the Respondent, Donio and DeMarco (Samuel A. Donio, Esq., of Counsel)

Petitioner, a teacher employed by the Board of Education of the Town of Hammonton, hereinafter "Board," alleges that his dismissal on June 30, 1975, and loss of wages subsequent to his reemployment on December 1, 1975, were

ultra vires acts in violation of his tenure and seniority rights as provided by *N.J.S.A.* 18A:28-5 *et seq.* and *N.J.A.C.* 6:3-1.10. The Board holds that it properly abolished the position of Special Assignment Teacher to which petitioner was assigned and that he had not acquired seniority status in the category of Social Studies Teacher or the category of Driver Education Teacher in which he held valid teaching certificates.

The matter is directly before the Commissioner of Education on a Motion for Summary Judgment entered by the parties, exhibits and Briefs. The relevant facts are as follows:

In May 1970, petitioner was duly certificated by the Board of Examiners of the State Department of Education as a Secondary School Teacher of Social Studies. Subsequently in September 1970, petitioner was employed by the Board as a Special Assignment Teacher, which was in the nature of a permanent substitute teaching staff member, and held such employment and assignment through June 1975, for five continuous academic years. In May 1974, petitioner became certificated as a Teacher of Driver Education.

On March 20, 1975, at an open public meeting, the Board took official action to abolish the position of Special Assignment Teacher and subsequently notified petitioner that he would not be reemployed for the 1975-76 academic year. At that time petitioner was at Step VIII of the then effective salary guide. Subsequently, in December 1975, petitioner was employed by the Board in the position of Teacher of Driver Education at Step VI of the Board's salary guide.

The Board concedes that petitioner was a tenured employee at the time of his termination of employment. It argues, however, that seniority is a separate and distinct classification under school law and is a matter to be determined solely under those statutes and regulations governing seniority. *N.J.S.A.* 18A:28-9 *et seq*. The Board avers that it was in compliance with *N.J.A.C.* 6:3-1.10 and *N.J.S.A.* 18A:28-12 which require that petitioner

> "***remain upon a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified and he shall be reemployed by the body causing dismissal, if and when such vacancy occurs***."

The Board asserts that petitioner was properly notified that he had five years of seniority in the category of Special Assignment Teacher, and that was the full extent of his seniority status at the time of the termination of his employment with all of his seniority rights fully honored. (C-2) With regard to *N.J.A.C.* 6:3-1.10(f), it is stated that if a title of employment does not properly describe the duties performed, the person holding that employment shall be placed in a category in accordance with the duties performed. The Board avers that petitioner's position as Special Assignment Teacher placed him in a category which was not coextensive with the terms of his teaching certificates. It argues that his acquisition of seniority was only in the categories in which he served the Board and not in any category in which he may have been certified but did not serve. Certification alone is not a basis for acquiring seniority, contends the

Board. Moreover, it asserts that it is specifically required that actual time of service be accumulated in the certificated area. *Christine Compton v. Board of Education of the Township of Hanover, Morris County,* 1972 *S.L.D.* 274

The Board acknowledges that *N.J.S.A.* 18A:28-12 provides salary protection to persons reemployed in a school district as the result of a preferred eligible seniority list. It asserts, however, that the statute did not apply to petitioner since his reemployment was not by way of seniority but, rather, in a new position in which he had never served nor had any seniority rights. For this reason the Board invoked its policy as it was applied to all applicants for new positions in the district and placed petitioner at Step VI of its salary guide for experienced teachers new to the district.

As a tenured employee whose position was abolished, petitioner declares that he had seniority rights throughout his category of employment to the extent of his certification at the time of his termination. Petitioner avers that there is no such category as Special Assignment Teacher and, absent any certificate or endorsement for such position, his employment was for the convenience of the Board and should not operate to his disadvantage.

Petitioner argues that in the event there were no positions available to him in the areas of his certification at the time of his termination, the Board failed to recognize his tenure and seniority status in those areas. His subsequent employment by the Board as Driver Education Teacher wherein the Board placed him at a lower step on the salary guide than he had previously held was a violation of his seniority rights. He declares that he is entitled to all the emoluments of his former position including, but not limited to, proper placement on the salary guide, tenure, pension credits and all other benefits accorded teaching staff members within the school district.

Petitioner sets forth the principle enunciated by the Commissioner in the matter of *Jack Noorigian v. Board of Education of Jersey City,* 1972 *S.L.D.* 266, aff'd in part/rev'd in part State Board of Education 1973 *S.L.D.* 777, and *Ruth Nearier et al. v. Board of Education of the City of Passaic,* 1975 *S.L.D.* 604, wherein the source of funding for particular employees' salaries or the label "Title I" teachers did not operate to make such employees ineligible for the tenure status and the other rights and emoluments which accrue therefrom.

The Commissioner has carefully considered and weighed the arguments of law of the contending parties in this dispute and has researched the statutes and applicable case law. He agrees with petitioner's contention that no statute or rule of the State Board has ever been promulgated which provides for such category as Special Assignment Teacher, or permanent substitute teacher. A close reading of *N.J.A.C.* 6:3-1.10 discloses no such category of employment. Absent such a category as Special Assignment Teacher and finding that petitioner had acquired a tenure status, it remains to be determined in which category or categories his seniority eligibility is to be recognized.

It is noted at this juncture that pursuant to the direction contained in *N.J.S.A.* 18A:28-13, the Commissioner did "classify" the "fields or categories"

of employment and did establish guidelines to determine seniority, and that these guidelines were adopted by the State Board on August 18, 1969, as the "Standards Established to Determine Seniority." The pertinent rules are found as *N.J.A.C.* 6:3-1.10(b), (f), (h), and (i).

The Commissioner observes that at the time of petitioner's initial employment by the Board, petitioner held a valid permanent secondary teaching certificate endorsed for Social Studies and was entitled to teach the subject in any grade from seven through twelve. At the Board's discretion, petitioner was assigned as a Special Assignment Teacher and served a sufficient period of time to acquire tenure status in the school district. *N.J.S.A.* 18A:28-5

The record discloses that at the time the Board abolished the position of Special Assignment Teacher there were five Board employees in the category of Social Studies Teacher, none of whom had less time of employment in the district than petitioner. One employee commenced employment at the same time as petitioner and had acquired five continuous years in the category of Social Studies Teacher. (Board's Brief, Exhibit "B")

The Commissioner determines in the instant matter that petitioner had residual tenure entitlement in the position or category of employment as Secondary Teacher of Social Studies, and, therefore, has gained seniority in such position. *Mary Ann Popovich v. Board of Education of the Borough of Wharton, Morris County,* 1975 *S.L.D.* 737; *Marianne H. Polaski v. Board of Education of Burlington County Vocational Technical High School, Burlington County,* 1977 *S.L.D.* (decided March 24, 1977)

The Commissioner also determines that petitioner did not acquire additional seniority in the category of Driver Education Teacher. This determination is based upon the facts that petitioner acquired the certification in this category subsequent to his initial employment and the Board never assigned him such duty during the five years of his employment. Therefore, the Board had the discretionary authority to offer him new employment under his certification as a teacher of driver training, a category in which he possessed no seniority at the time of the reduction in force, at a step on the salary scale which was less than he had received during his prior employment.

Accordingly, for the reasons stated, the Commissioner directs the Board to determine the seniority of persons affected by its abolition of the position of Special Assignment Teacher and holders of valid Secondary Social Studies Teacher certificates (*N.J.S.A.* 18A:28-11), and notify all persons so affected as to his or her seniority status for the positions.

In all other respects, the Petition is dismissed.

COMMISSIONER OF EDUCATION

October 5, 1977

Joan Scrupski and Laura Soden,

Petitioners,

v.

Board of Education of the Township of Warren, Somerset County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION ON MOTION

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

For the Respondent, Reid and Vogel (Charles A. Reid, Jr., Esq., of Counsel)

Petitioners, formerly employed as school nurses by the Board of Education of the Township of Warren, Somerset County, hereinafter "Board," challenge the propriety and legality of the Board's action in abolishing their positions and the subsequent creation of five positions of school health aide. Petitioners demand that the Commissioner of Education set aside the action of the Board and order their immediate reinstatement. The Board denies the allegations and asserts that its action with respect to petitioners' complaints was in all respects proper and legal.

Subsequent to the joining of the pleadings herein and after the Board received its required approval from the Somerset County Superintendent of Schools to create the positions of school health aide (*N.J.A.C.* 6:11-4.9(c)), petitioners moved to restrain the Board from making appointments to the school health aide positions pending a plenary hearing with respect to their allegations.

Oral argument on the Motion was heard by a representative of the Commissioner on November 17, 1975 at the State Department of Education, Trenton. The record of that proceeding, including exhibits, is now before the Commissioner for adjudication.

During the 1974-75 academic year the Board employed three school nurses, two of whom were employed full time while the third was employed part time. Each of the school nurses possessed an appropriate certificate for her respective assignment as required by law (*N.J.S.A.* 18A:26-2) and in conformity with State Board rules. *N.J.A.C.* 6:11-12.8

During March 1975, the Board determined to abolish one full-time position and the one part-time school nurse position, both of which were held by petitioners, neither of whom had acquired a tenure status. Thereafter, the Board determined to create five positions of school health aide. By letters dated March 25, 1975, the Superintendent of Schools notified petitioners individually that

"***The Board of Education has decided at this time to eliminate the [school] nurse position that you have held this year.***

"***If you find you are interested in an aide or substitute position, we would be most interested in having you." (C-1; C-2)

On April 22, 1975, the Board directed its Superintendent

"***to proceed with the development and implementation of a plan for full nurse coverage, including one full time certified [school] nurse and five [school health aides] registered nurses, (each to work four days per week on an hourly basis)***." (C-3)

The Board submitted its application (J-2) to the office of the Somerset County Superintendent of Schools to secure approval for its proposed five positions of school health aide. *N.J.A.C.* 6:11-4.9(c) At that time, however, severe fiscal restraints imposed upon the Department of Education resulted in a temporary cessation of functions of the existing and regularly assigned county superintendents of schools. The duties of the offices were carried out on a day-to-day basis by Department staff members who had been temporarily assigned the responsibility.

The staff member who had been assigned to the Somerset County Office of the Department of Education reviewed the Board's application (J-2) for approval of its proposed school health aide positions. On July 31, 1975, the staff member determined not to approve the Board's application.

Subsequently, on August 22, 1975, petitioners filed their complaint challenging the Board's action abolishing their positions as school nurses.

Shortly thereafter, the State's fiscal crises eased, although barely perceptibly, to the degree that the regularly assigned county superintendents of schools were returned to their official duties and functions. When this occurred, the Board resubmitted its application (J-2) for approval, with a corresponding job description (J-1) of the proposed school health aide position, to the Somerset County Superintendent of Schools. By letter (J-3) dated October 7, 1975, the Board was notified that its application for the creation of five positions of school health aide was approved, on a trial basis, by the Somerset County Superintendent of Schools. He also cautioned the Board that the school health aide "***_may not_ assume the duties and responsibilities of School Nurse***." (J-3)

The Commissioner observes that an applicant for the position of school health aide in the Warren Township School District must be a registered nurse. It is also observed that to be certified as a school nurse by the State Board of Examiners one must not only be a registered nurse but, subsequent to July 1, 1975, new applicants must possess, as a minimum, a bachelor's degree. *N.J.A.C.* 6:11-12.8 Even prior to that date, a person must have had in her possession a minimum of thirty semester-hour credits, in addition to a license as a registered

professional nurse in New Jersey, in order to be certified as a school nurse. *N.J.A.C.* 6:11-12.8

The Commissioner has previously held that school nurses who possess standard school nurse certificates are to be compensated in the same manner as other teaching staff members. *N.J.S.A.* 18A:29-4.2; *Evelyn Lenahan v. Board of Education of Lakeland Regional High School District, Passaic County,* 1972 *S.L.D.* 577 The rates of compensation, however, for the positions of school health aide may be established by the Board independent of the statute, *N.J.S.A.* 18A:29-4.2. In the matter herein, the Commissioner observes that the school health aide will be compensated at an hourly rate to be established by the Board. (J-1)

Furthermore, the Commissioner observes from the job description (J-1) of the school health aide that the duties assigned include first aid care and consultation with the school principal with respect to the physical condition of pupils on an emergency basis so that he may determine appropriate action. Additionally, the aide is assigned duties concerned with the measurement of heights and weights, the scheduling of physical, dental, audio, and visual examinations, Tine tests, flu shots, and measles clinics. It is noticed that while the school health aide is responsible for the scheduling, the job description (J-1) also provides that the remaining school nurse, to whom all school health aides report, is alone to assist the medical inspector or carry out the respective examinations herself. Finally, the school health aide is responsible for clerical duties such as typing, the distribution and collection of reports, and logging telephone calls.

In support of their Motion to Restrain the Board from making appointments to the disputed positions of school health aide, petitioners argue that the job description (J-1) delineates those duties which more properly must be assigned to certified school nurses. As such, petitioners assert, the creation of the school health aide positions is a device used by the Board to abolish the two positions of school nurse in name but not in fact.

Finally, petitioners argue, that a decision by a board of education to create an aide position of any kind which replaces a certificated teaching staff position is contrary to the State Board of Education policy with respect to aide positions promulgated on February 7, 1968, and supplementing *N.J.A.C.* 6:11-4.9.

The Board, to the contrary, argues that it is required by statute to employ only one school nurse which it does. *N.J.S.A.* 18A:40-1 Furthermore, the Board argues that it has the authority to create aide positions with the approval of the County Superintendent of Schools. *N.J.A.C.* 6:11-4.9 Also, the Board argues that the persons to be appointed to school health aide positions, who will be registered professional nurses, will not be assigned teaching responsibilities as would be certificated school nurses, nor required to provide direct health services to pupils. The Board argues that each of the school health aides will report directly to the school nurse and that it is their duty to assist her in carrying out her responsibilities.

Finally, the Board argues that the job description (J-1) of its school health aides does not contravene an earlier holding of the Commissioner with respect to the duties of a school nurse as set forth in *Leona Smith et al. v. Board of Education of the Borough of Caldwell-West Caldwell, Essex County,* 1972 *S.L.D.* 232.

The Commissioner is constrained to observe that the purpose of a restraint is to prevent an immediate and irreparable harm occurring prior to a full and deliberate determination on the merits of the matter. *Sunbeam Corporation v. Windsor-Fifth Avenue,* 14 *N.J.* 222, 233 (1953); *Outdoor Sports Corporation v. A.F. of L., Local 23132,* 6 *N.J.* 217, 230 (1951) The granting of such relief has as its purpose the full deliberation of the merits while the status quo is maintained so that the parties remain in substantially the same position. *Peters v. Public Service Corporation of New Jersey,* 132 *N.J. Eq.* 500, 511 (*Chan. Div.* 1942), affirmed 133 *N.J. Equity* 283 (*E.&A.* 1943)

Generally, a restraint will not issue if petitioners' asserted rights are not clear as a matter of law. *Citizens Coach Company v. Camden Horse Railroad Company,* 29 *N.J. Eq.* 299, 304 (*E.&A.* 1878)

In the instant matter, petitioners will not suffer irreparable harm if the relief requested is not granted. Should they prevail on the merits, appropriate relief may then be granted to make them whole.

On the other hand, boards of education enjoy the presumption of correctness with respect to their actions and such actions will not be set aside absent a clear and positive showing of violation of law or total unreasonableness, arbitrariness, or capriciousness. *Thomas v. Morris Township Board of Education,* 89 *N.J. Super.* 327 (*App. Div.* 1965), aff'd 46 *N.J.* 581 (1966)

The factual issues to be determined herein are whether the school health aide positions have been created by the Board illegally or improperly to take the place of the school nurse positions it abolished, and whether the job description (J-1) of the school health aide is a realistic expectation pursuant to law and adequate for the needs of the Warren schools.

Petitioners' Motion for Restraint is hereby denied. The Commissioner of Education directs his representative to proceed forthwith to a plenary hearing with respect to the issues set forth above.

COMMISSIONER OF EDUCATION

March 24, 1976

COMMISSIONER OF EDUCATION

DECISION

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

For the Respondent, Reid and Vogel (Charles A. Reid, Jr., Esq., of Counsel)

Petitioners, formerly employed as school nurses by the Board of Education of the Township of Warren, Somerset County, hereinafter "Board," challenge the propriety and legality of the Board's action in abolishing their positions and the subsequent creation of school health aide positions. Petitioners pray that the Board's controverted action be set aside and that the Commissioner of Education order their immediate reinstatement to their former positions of employment. The Board denies the allegations and asserts that its actions with respect to petitioner's complaints are in all respects proper and legal.

A hearing was conducted in this matter on May 20, 1976 at the office of the Somerset County Superintendent of Schools by a hearing examiner appointed by the Commissioner. Thereafter, the parties filed Briefs in support of their respective positions. The report of the hearing examiner follows:

It is initially observed that the Commissioner denied petitioners' Motion for *pendente lite* relief. (See *Joan Scrupski and Laura Soden v. Board of Education of the Township of Warren, Somerset County,* decision on Motion, March 24, 1976.)

During the 1974-75 academic year the Board employed three school nurses, two of whom were employed full-time while the third was employed part-time. Petitioner Soden, who possesses a provisional certificate as a school nurse, began her employment with the Board in September 1974, and was employed on a part-time basis. Petitioner Scrupski, who also possesses a provisional certificate as a school nurse, was employed full-time by the Board for the 1973-74 and 1974-75 academic years.

During March 1975, the Board determined to abolish one full-time and one part-time school nurse position held by petitioners. Thereafter, the Board determined to create five positions of school health aides for the 1975-76 academic year in addition to the remaining full-time school nurse position. The full-time school nurse position is occupied by a person who possesses a standard school nurse certificate and who is not a party to the action, *sub judice.* (Tr. 14)

The Superintendent, by similar letters dated March 25, 1975, notified petitioners individually that

> "***The Board of Education has decided at this time to eliminate the*** [school] nurse position that you have held this [1974-75] year. The

elimination of this position effective June 30, 1975 is a policy decision and in no way reflects on the quality of your performance.***

"If you find you are interested in an aide or substitute position, we would most assuredly be interested in having you." (P-1; P-2)

On April 22, 1975, the Board directed its Superintendent

"***to proceed with the development and implementation of a plan for full nurse coverage, including one full time certified [school] nurse and five [school health aides] registered nurses, (each to work four days per week on an hourly basis)***." (C-3)

The Board submitted its application (J-2) to the office of the Somerset County Superintendent of Schools to secure approval for its proposed five positions of school health aides. *N.J.A.C.* 6:11-4.9(c) Severe fiscal restraints imposed upon the Department of Education at that time resulted in a temporary cessation of functions of the existing and regularly assigned county superintendents of schools. The duties of the offices were carried out on a day-to-day basis by Department staff members who had been temporarily assigned the responsibility.

The staff member who had been assigned to the Somerset County Office of the Department of Education reviewed the Board's application (J-2) for approval of its proposed school health aide positions. On July 31, 1975, the staff member determined not to approve the Board's application.

Shortly thereafter, the regularly assigned county superintendents of schools were returned to their official duties and functions. When this occurred, the Board resubmitted its application (J-2) for approval, with a corresponding job description (P-3) of the proposed school health aide position, to the Somerset County Superintendent of Schools. By letter (J-3) dated October 7, 1975, the Board was notified that its application for the creation of five positions of school health aides was approved, on a trial basis, by the Somerset County Superintendent of Schools. He also cautioned the Board that the school health aide "***_may not_ assume the duties and responsibilities of School Nurse***." (*Emphasis in text.*) (J-3)

The job description of the school health aide sets forth requirements, working hours, conditions of employment, and duties of the position. Each aide is required to be a registered nurse who shall have expertise in first aid and possess an American Red Cross first aid certificate. The aide shall also have typing skills and possess a substitute certificate issued by the office of the Somerset County Superintendent of Schools. *N.J.A.C.* 6:11-4.7

The school health aides work seven hours a day and are paid on an hourly basis. The aides receive neither sick leave nor vacation time. Those aides who are regularly employed for more than twenty hours a week may join the public employees retirement system.

The school health aide administers first aid to pupils, provides information to the principal upon which the principal decides whether to send a pupil who is ill home or to the hospital, notifies the rescue squad and/or the school nurse and the principal when an emergency exists, and records pupils' heights and weights twice a year in grades kindergarten through five, annually in grades six through eight in cooperation with the physical education teacher. The school health aide also schedules physical and dental examinations for pupils in grades one, five and eight, annual audio and vision screening examinations for all pupils, schedules Tine tests, flu shots and measles clinics. While the aide schedules the examinations, tests, innoculations and clinics, it is the school nurse who assists the medical inspector in each of the respective activities. The school health aide is responsible for pupil emergency cards, the maintenance of a telephone log, typing reports and correspondence, the processing of medical records as requested by the school nurse, insuring proper immunization records of new pupils, keeping accurate records of pupils who visit the health room, advising classroom teachers regarding pupils who have particular medical problems, keeping accurate records of approved medication to be dispensed to pupils upon the direction of a family physician, pupil attendance, and other tasks assigned by the school nurse.

Petitioners assert that these enumerated tasks more properly fall within the authority and responsibility of school nurses who hold appropriate certificates. Petitioners contend that school health aides, not certificated as school nurses, may not perform these functions. This being so, petitioners maintain their employment was not renewed for the 1975-76 academic year for an improper reason. Consequently, petitioners assert they have not been given valid reasons for their non-reemployment contrary to *Donaldson v. Board of Education of North Wildwood,* 65 *N.J.* 236 and *N.J.S.A.* 18A:27-10 *et seq.* Petitioners demand that the Commissioner set aside the Board's action of creating the positions of school health aides and order the Board to reinstate them to their former positions of employment.

The hearing examiner can discern no significant difference between the assigned duties of the school health aide positions created by the Board herein and the duties assigned school nurses who are properly certified pursuant to *N.J.A.C.* 6:11-12.8. This being so, the hearing examiner finds that the creation of the school health aide positions by the Board has as its practical effect the replacement of certificated teaching positions contrary to the provisions of *N.J.A.C.* 6:11-4.9(a). The rule reference provides, *inter alia*:

> "School aides and/or classroom aides, assisting in the supervision of pupil activities under the direction of a principal, teacher, or other designated certified professional personnel, shall be approved in accordance with regulations and procedures adopted by the State Board of Education in February, 1968.***"

The regulations and procedures adopted by the State Board of Education in 1968 provide in pertinent part that:

> "***Personnel policies should provide that aides are not employed to

relieve teachers of their teaching responsibilities nor to change the overall student-to-teacher ratio in a school.***" (C-1)

It is recognized that the Somerset County Superintendent of Schools did approve the Board's application for the creation of the school health aide positions pursuant to his authority at *N.J.A.C.* 6:11-4.9(c). Such approval, however, was on the basis of the Board's written application (J-2) and such application had not been subject to an adversary hearing as herein.

Consequently, the hearing examiner finds that the Board improperly created the controverted school health aide positions herein by substituting these positions for the two school nurse positions held by petitioners. Thus, petitioners' non-reemployment for 1975-76 must be held to be improper. The hearing examiner so finds.

The hearing examiner recommends that the Commissioner direct the Board to compensate petitioners in the amount they would have earned in 1975-76 in its employ had they not been improperly terminated and, further, to abolish the positions of school health aides and reestablish the two positions of school nurse or properly abolish the school health aide positions and the two positions of school nurse.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record in the instant matter including the report of the hearing examiner and the exceptions and objections filed thereto by the Board.

The Board asserts that the duties assigned the positions of school health aide are uniquely those of an aide and that such duties are not assigned to a school nurse and cites *Leona Smith et al. v. Board of Education of the Borough of Caldwell-West Caldwell, Essex County*, 1972 *S.L.D.* 232 and *Bruce W. Roe et al. v. Board of Education of the Township of Mine Hill, Morris County,* 1976 *S.L.D.* 672, aff'd State Board of Education 676. Consequently, the Board contends that the hearing examiner erred in his finding that no significant differences can be found between the duties assigned the controverted positions of school health aide and those duties generally assigned a school nurse.

Finally, the Board asserts that petitioners are not entitled to relief because it did provide reasons for their non-reemployment. The Board relies on the fact that petitioners failed to request of it an opportunity to be heard in support of its position that monetary relief, as recommended by the hearing examiner, is not warranted and cites *Donaldson, supra*.

The Commissioner observes that *N.J.S.A.* 18A:40-1 provides, in pertinent part, that:

"***Every board of education *** shall employ one or more school nurses***."

N.J.S.A. 18A:1-1 defines school nurse as a teaching staff member. *N.J.S.A.* 18A:26-2 provides, in pertinent part, that:

> "No teaching staff member shall be employed in the public schools by any board of education unless [the person] is the holder of a valid certificate to *** direct or supervise the rendering of nursing service to, pupils in such public schools***."

The requirements for the possession of certificates to teach are established by the State Board of Examiners. *N.J.S.A.* 18A:6-38 The established requirements for the possession of a school nurse certificate are set forth at *N.J.A.C.* 6:11-12.8. It is noticed that subsequent to July 1, 1975 applicants for a school nurse certificate must meet the higher requirements set forth in *N.J.A.C.* 6:11-12.9.

In each instance, the certificate acquired pursuant to *N.J.A.C.* 6:11-12.8 or 12.9 authorizes the possessor to provide service "***as a school nurse *** and [to teach] areas related to health.***"

During 1974-75, the Board had employed two full-time school nurses and one part-time school nurse, each of whom was properly certificated. Petitioners, each of whom had held one of the three school nurse positions, were notified by the Superintendent on March 25, 1975 that their positions were to be eliminated for 1975-76. (P-1, P-2) Thereafter, the Board directed the Superintendent on April 22, 1975 to proceed with a plan for "****full nurse coverage,* including one full time certified [school] nurse and five [school health aides] registered nurses***." (*Emphasis supplied.*) (C-3)

It is obvious to the Commissioner that the Board did not eliminate one and one-half school nurse positions as the Superintendent informed petitioners on March 25, 1975, *ante.* Rather, the Board relegated the one and one-half school nurse teaching staff positions to five teaching aide positions contrary to the provisions of *N.J.A.C.* 6:11-4.9 (a). The Board effectively replaced teaching staff members with aides.

The Board's requirement that its school health aide applicants be registered nurses establishes, in the Commissioner's judgment, the attempt by the Board to provide "full nurse coverage" through the use of less than fully trained school nurses who meet the State Board of Examiners' academic requirements set forth in *N.J.A.C.* 6:11-12.8 and/or 12.9.

The Commissioner has reviewed the job description (P-3) of the school health aides, the hearing examiner's finding that such duties more properly are assigned to school nurses, and the Board's objections thereto. The Commissioner opines that if the assigned duties of the school health aide were solely of a clerical nature, as the Board insists, then there would be no sound reason why the aide must also be a registered nurse. In reality, the school health aides are assigned the duties of providing nursing services to pupils, which duties are reserved for properly certificated school nurses. The Commissioner so holds.

The Commissioner has reviewed his prior decisions in *Smith, supra,* and *Roe, supra,* and finds that those matters are not on point. In neither case was the question raised of whether a Board may replace a teaching staff position with an aide position.

In the instant matter, the Commissioner finds and determines that the Board improperly and contrary to State Board rules and regulations assigned duties of its two school nurses to the five positions of aide. Consequently, the action of the Board by which it eliminated its one and one-half school nurse positions and the action by which it created five positions of school health aide are hereby set aside.

This holding does not preclude this Board or any other board of education from eliminating teaching staff positions or from reductions in force so long as such actions are consistent with the statutes and the positions are properly eliminated. No board of education has authority to replace the duties of a teaching staff member by assigning such duties to an aide.

In the instant matter, the Board may properly eliminate the controverted one and one-half school nurse positions and assign their duties to the remaining school nurse. Or it may continue all three school nurse positions and employ properly certificated school nurses. The Board may not continue to provide "full nurse coverage" through the use of its school health aides.

The Commissioner will now address the issue of the relief recommended to be afforded petitioners by the hearing examiner. It is well established that a board which does not continue the employment of a nontenure teaching staff member must provide reasons for such non-reemployment when requested. *Donaldson, supra* In the instant matter, petitioners were advised their positions of employment were being eliminated and that their non-reemployment was not related to their service to the Board.

It has been determined herein that the Board's reason for eliminating the school nurse positions is improper. Thus, it may be concluded that petitioners were not reemployed for 1975-76 for improper reasons and that their employment, absent proper reasons to the contrary, should have been continued.

Accordingly, the Commissioner finds and determines that the Board improperly terminated petitioners' employment for 1975-76. The Board of Education of the Township of Warren is directed to compensate Joan Scrupski and Laura Soden the amount of money they would have earned during 1975-76, less mitigation, had their employment not been improperly terminated.

Nothing in this decision shall be construed to imply that either petitioner has any further claim upon the Board.

COMMISSIONER OF EDUCATION

October 5, 1977

Freehold Regional High School Education Association and Walter Holcombe,

Petitioners,

v.

Board of Education of the Freehold Regional High School District, Monmouth County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Chamlin, Schottland, Rosen & Cavanagh (Michael D. Schottland, Esq., of Counsel)

For the Respondent, Murray, Meagher & Granello (Robert J. Hrebek, Esq., of Counsel)

Petitioners are teaching staff members employed by the Board of Education of the Freehold Regional High School District, hereinafter "Board," who contest the action taken by the Board which changed the school calendar for the 1974-75 academic year. Petitioners pray that the Commissioner of Education direct the Board not to alter a teaching staff personnel calendar without a valid educational basis and that the teachers who worked extra days be compensated according to the per diem salary scale for each person.

The Board asserts that it has the sole authority to adopt a calendar and thereafter filed a Brief supporting a Motion to Dismiss the instant Petition of Appeal on the grounds of laches. Petitioners filed a Brief in opposition to the Motion. Submitted in evidence is an arbitrator's award, A-1 through A-17, and a series of Board minutes, A-18 through A-20. Subsequently, Briefs on the relevant law were submitted. The salient facts of the instant matter are not in substantial dispute; therefore, it is ripe for Summary Judgment by the Commissioner. A history follows:

The Board denied petitioners' request to negotiate the 1974-75 school calendar in which petitioners sought to have Monday, October 28, 1974, Veterans Day, set aside as a school holiday. Other holidays as well were scheduled as regular school days, except that Washington's birthday was scheduled as an "in-service" day for professional staff. (A-1-5)

The Board learned on or about October 25, 1974, that many teachers intended to be absent on Veterans Day pursuant to State law which provides that public employees may not be compelled to work on legal holidays. *N.J.S.A.* 18A:36-2; *Carl Moldovan et al. v. Board of Education of the Township of Hamilton,* 1971 *S.L.D.* 246 The Superintendent then issued a memorandum which said in effect that schools would be closed on Veterans Day, because he was unable to obtain a sufficient number of substitute teachers. Additionally, he announced that schools would be closed on all legal holidays for the remainder of the school year and that lost days would have to be made up later. (A-6)

In February, the Superintendent sent a copy of the proposed revised calendar to the president of the Association which showed Monday, June 23, 1975 as the last day of school for pupils and Monday, June 30, 1975 as the last day for the teaching staff members. The Association opposed this proposed calendar revision; nevertheless, it was adopted unchanged by the Board on March 18, 1975. (A-19) This calendar provided 180 days of school for upperclassmen, 181 days for freshmen and 187 days for teaching staff members. (A-20) The attorney for the Association wrote the Board requesting that it reconsider the revised calendar. The Board thereafter revised the calendar at its regular meeting on May 19, 1975 by setting Friday, June 27, 1975 as the last working day for teaching staff members and Friday, June 20, 1975 as the last day for pupils. (A-22) The Association then filed a grievance which was terminated on October 29, 1975.

Although petitioners seek pay for the extra days they claim, together with a directive from the Commissioner that the Board may not alter its calendar without a valid educational basis, the only issue advanced in the Motion is the question of laches. Since the essential facts are not in dispute, the Commissioner denies the Motion to Dismiss and will entertain the other questions raised.

In regard to petitioners' claim for pay for extra days worked, there is nothing in the record which reveals that petitioners worked more days than they agreed to work as disclosed in their collective negotiations' agreement with the Board. Article VII – Calendar of the agreement, contains, in part, the following language:

> "A. The in-school work year of teachers employed on a ten (10) month basis (other than new personnel who may be required to attend an additional two (2) days of orientation) shall not exceed one hundred eighty-seven (187) days . . . . The in-school work year shall include days when pupils are in attendance, orientation days, or any other days on which teacher attendance is required." (A-4)

The record shows that teachers actually worked 186 days. (Compare A-20 and A-22, Board minutes of March 18 and May 19, 1975.) The latter minutes disclose that the Board shortened the work year calendar for the teaching staff by one day making the last working day Friday, June 27, instead of Monday, June 30, 1975, as the March Board minutes reflect. It is noticed that this change was made unilaterally by the Board in violation of the provision in its agreement with the Association which holds that calendar changes will be made after *consultation* with the Association. (A-15-16) Petitioners' allege that it was traditional to work only one day after the end of the pupils' school year. Since the last day for pupils was Friday, June 20, 1975 (A-22), petitioners allege that tradition would hold that Monday, June 23, 1975 should have been their last working day. This means that petitioners would have worked 181 days. Such an arrangement would have been proper if the Board had elected to do so; it did not. Neither is there statute nor case law in this State which would compel the Board to follow tradition in this matter, assuming first that there was such a tradition. The record shows that petitioners worked one day less than their agreement set forth.

There is no proof that the Board sought merely to punish petitioners for asserting their right to celebrate legal holidays as petitioners contend. Nor can the Commissioner conclude, as petitioners contend, that no educational purpose may have been served by causing the teaching staff to work after the pupils had left for the year.

It is well settled in this State that the structure of the school calendar is a management prerogative and it is not negotiable. *Evan Goldman et al. v. Board of Education of the Borough of Bergenfield,* 1973 *S.L.D.* 441, aff'd State Board of Education 1974 *S.L.D.* 1391, aff'd Docket No. A-1679-73 New Jersey Superior Court, Appellate Division (1974 *S.L.D.* 1391), *cert.* den. New Jersey Supreme Court, March 11, 1975; *Moldovan, supra; N.J.S.A.* 18A:36-2.

Having determined that the Board alone has exclusive authority to structure the school calendar and having determined further that petitioners did not work extra days during 1974-75, there is no further relief to which they are entitled. Accordingly, the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

October 5, 1977

Anna Brennan,

Petitioner,

v.

Board of Education of the City of Pleasantville, Atlantic County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Starkey, Turnbach, White & Kelly (Edward J. Turnbach, Esq., of Counsel)

For the Respondent, Champion & Champion (Edward W. Champion, Esq., of Counsel)

Petitioner avers she is entitled to a position with the Board of Education of the City of Pleasantville, hereinafter "Board," as a result of certain actions of the Board's agents and servants. Petitioner requests that the Commissioner of Education enter an order directing the Board to place her on its staff at a salary commensurate with that it had agreed to pay her through its agents and that she be reimbursed all back salary to which she is entitled. The Board asserts that it is the only body under Title 18A, Education, which has the statutory authority to employ teaching staff members, and maintains that no contract of employment was offered to petitioner, or existed between petitioner and the Board.

The Board has advanced a Motion to Strike the Petition and dismiss the same for failure to set forth a cause of action. Petitioner has submitted a Brief in Opposition to the Motion to Dismiss. The matter is referred directly to the Commissioner on the record as presented by the parties, including the pleadings, exhibits and Brief of petitioner. The facts relevant and material to this Motion are not in dispute.

In March of 1975, petitioner, a certified special education teacher, applied for a position with the Pleasantville School District for the school year beginning September 1975. (R-1) Thereafter, on July 24, 1975, petitioner was interviewed at the Pleasantville High School by the Assistant Superintendent, Assistant Principal and school psychologist. Petitioner was informed at the interview that the Board would meet on August 5, 1975, and she would then receive notification as to whether or not the position was hers. (Petition of Appeal, at p. 2) The record discloses that no action was taken by the Board at its meeting on August 5, 1975 to employ petitioner for the 1975-76 school year.

During August, petitioner alleges she received two telephone calls from the Assistant Superintendent, during which he advised and assured her that the position in question was hers and that Board approval was merely a formality which would be discharged at a subsequent Board meeting. These allegations have been denied by the Board.

By form letter dated August 7, 1975, and postmarked August 27, 1975, petitioner received information outlining orientation activities at the Pleasantville High School for the school year beginning September 1975. (P-3) A portion of that letter refers to staff changes and reads as follows:

> "Our staff changes this year are minimal.*** Mrs. Brennan will teach Special Education.***" (P-3)

Exhibit P-3 also includes a teaching schedule and room assignment for the 1975-76 school year, with petitioner's name appearing in the upper left-hand corner as the teacher designated for such duties.

On August 29, 1975, petitioner attended the new faculty orientation meeting and was introduced as a new faculty member. Later that day, petitioner was requested to telephone the Assistant Superintendent and was advised that she did not have the position of special education teacher for the school year 1975-76. (Petition of Appeal, at p. 3) The Petition of Appeal herein followed.

In support of its Motion to Dismiss the Petition of Appeal, the Board asserts that inasmuch as no written contract between petitioner and the Board is alleged in the Petition of Appeal, the Petition should be dismissed for failure to set forth a cause of action. The Board relies upon *N.J.S.A.* 18A:27-5 which reads:

> "Every contract between a board of education which has not made rules governing such employment and any teaching staff member shall be in

writing, in triplicate, signed by the president and secretary of the board of education and by such person."

It is argued that only the Board has statutory authority to enter into a contract of employment with its teaching staff applicants and no agent or employee of the Board may usurp that authority.

The thrust of petitioner's argument is grounded in the equitable doctrine of estoppel. Petitioner alleges that she relied, to her great detriment, upon the representations and conduct of the Board's representatives which caused her to forsake an offer of employment elsewhere. Petitioner calls upon the Commissioner to exercise his equitable powers and right the condition in which she finds herself through no fault of her own, and cites *Elizabeth Rockenstein v. Board of Education of the Borough of Jamesburg,* 1974 *S.L.D.* 260, 1975 *S.L.D.* 191, aff'd State Board 199, aff'd Docket Nos. A-3916-74, A-4011-74 New Jersey Superior Court, Appellate Division, July 1, 1976 (1976 *S.L.D.* 1167) and *Juanita Zielenski v. Board of Education of the Town of Guttenberg,* 1970 *S.L.D.* 202, rev'd State Board 1971 *S.L.D.* 664, aff'd Docket No. A-1357-70 New Jersey Superior Court, Appellate Division, February 16, 1972 (1972 *S.L.D.* 692) as matters in which the Commissioner has previously utilized his authority to mold an equitable remedy to correct an injustice.

Petitioner asserts that where a

> "***municipal body has the legal authority to do an act which it refuses to do--and where someone dealing with that body has through good faith relied on representations of that body [and] had (sic) been damaged--the law will require the public body to do the act or preclude it from denying that it has done the act.***" (Petitioner's Brief in Opposition to Motion to Dismiss, at p. 8)

In support of her argument, petitioner cites *Hankin v. Hamilton Township Board of Education,* 47 *N.J. Super.* 70 (*App. Div.* 1957), *cert.* denied 25 *N.J.* 489 (1957); *Palisades Properties, Inc. v. Brunetti,* 44 *N.J.* 117 (1965); *Summer Cottagers' Ass'n of Cape May v. City of Cape May,* 19 *N.J.* 493 (1955).

Finally, petitioner argues that the Board's representatives were cloaked with the authority to do that which they did, that their actions should be attributed to the Board, and that the Board should be bound.

The Commissioner cannot agree that the Board is estopped from asserting that no contract of employment existed between it and petitioner. The law is clear that boards alone can appoint teaching staff members.

> "No teaching staff member shall be appointed except by a recorded roll call majority vote of the full membership of the board of education appointing him." *N.J.S.A.* 18A:27-1

An examination of the record reveals that the Board committed itself not at all to petitioner, but that petitioner mistakenly relied on the opinions and

assurances of the Board's administrators in concluding that a commitment had been made. Such reliance was misplaced, since opinions and assurances cannot stand in the stead of deliberate Board action. The Board alone has the ultimate authority to decide the employment of its teaching staff members. *Harold A. Vandenbree v. Board of Education of the School District of Wanaque,* 1967 *S.L.D.* 4, aff'd State Board January 3, 1968; *Charles Gersie v. Board of Education of the City of Clifton, Passaic County,* 1972 *S.L.D.* 462 As was previously stated in *Esther Boyle Eyler et al. v. Board of Education of the City of Paterson et al.*, 1959-60 *S.L.D.* 68, 71:

> "***By the terms of N.J.S.A. 18:6-20 [now *N.J.S.A.* 18A:25-1 and 27-1], the appointment, transfer or dismissal of principals and teachers and the fixing of their salaries require a majority vote of the whole number of members of the board. *** It is the opinion of the Commissioner that any action under this statute should be taken by a recorded roll call majority vote of the full membership of the board of education in a public meeting of the Board properly called. It is well established that boards of education may not delegate the appointment of school personnel to committees or school officials. *Cullum vs. Board of Education of North Bergen,* 15 *N.J.* 285 (1954). *Taylor vs. Board of Education of Hoboken,* 1938 *S.L.D.* 54 and 55. It is also well established that full compliance with the statutory requirements as to the formalities of employment is essential to the validity of such employment. *McCurdy vs. Matawan,* 1938 *S.L.D.* 298 at 299. Also *LaRose vs. Egg Harbor City,* 1938 *S.L.D.* 377; *Valente vs. Board of Education of Hoboken,* 1950-1951 *S.L.D.* 57; *Landrigan vs. Board of Education of Bayonne,* 1955-1956 *S.L.D.* 91.***"

An early case considering the issue of recovery for the rendering of teaching services under an unauthorized contract was *William Hibbler v. Board of Education of the Township of Dover,* 1939-1949 *S.L.D.* 1, 2 (1940), wherein the Commissioner stated:

> "***A person dealing with a public officer is assumed to know the limitations of the officer's legal authority. Accordingly, the petitioner is assumed to know that the Supervising Principal could not employ him and make such employment binding upon the board of education.***"

Applying this principle to the matter herein, it stands to reason that petitioner likewise was not bound under the circumstances, but was free to negotiate with any other board of education in need of the services of a special education teacher.

Based upon the foregoing, the Commissioner finds and determines that no contract of employment was offered to, or existed between, Anna Brennan and the Board of Education of the City of Pleasantville for the school year 1975-76. Accordingly, for the reasons stated, respondent's Motion to Dismiss is granted and the Petition herein is dismissed.

COMMISSIONER OF EDUCATION

October 5, 1977

Ruth Levitt and Esther E. Sasloe,

Petitioners,

v.

Board of Education of the City of Newark, Essex County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Paul J. Giblin, Esq. (James S. Webb, Jr., Esq., of Counsel)

For the Respondent, Pickett & Jennings (Robert T. Pickett, Esq., of Counsel)

Petitioners Ruth Levitt and Esther Sasloe allege that their employment by the Board of Education of the City of Newark, hereinafter "Board," resulting in one or both of them being assigned as long term substitute teachers during the academic years of 1945-46 and continuing through 1960-61 effectively precluded them from acquiring tenure protection and also denied them proper placement on the teachers' salary guide, longevity increments, leaves of absences and other fringe benefits which should have accrued to them as regular teaching staff members. Petitioners assert that these actions of the Board came to light subsequent to their being offered regular full-time employment by the Board commencing with the 1959-60 academic year for Mrs. Sasloe, and with the 1961-62 academic year for Mrs. Levitt. Petitioners allege further that the Board's actions herein controverted constitute a violation of its own rules, as well as the statutory provisions of *R.S.* 18:13-16 as amended and recodified pursuant to *N.J.S.A.* 18A:28-5 *et seq.*

Petitioners seek a favorable disposition of this matter by the Commissioner of Education establishing their tenure status, pension rights and privileges, together with all compensation, longevity increments, leaves of absence and fringe benefits which they assert are justly due them. The Board avers that its actions with respect to petitioners' employment and compensation were in all ways proper and legally correct. The Board further avers that petitioners' actions are not in good faith and that petitioners are estopped by laches pursuant to the provisions of *N.J.S.A.* 2A:14-1, in seeking the relief requested before the Commissioner.

The pleadings were originally joined before the Commissioner on August 6, 1971. The record reflects a series of protracted delays in moving this matter to conference of counsel and a hearing which was held at the State Department of Education, Trenton on December 4, 1975. The circumstances giving rise to such delays are attributed in part, but not limited to:

1) Cancellation of several conferences of counsel at the request of the parties.

2) Additional time granted to the parties subsequent to the initial conference of counsel on November 26, 1973 for further discovery and the production of pertinent documentation.

3) Attempts by the parties to secure a mutual settlement of the instant matter.

4) The untimely death of counsel for the Board which necessitated further communication between the parties and a second conference of counsel which was scheduled after some delay on October 27, 1975.

The hearing of December 4, 1975 was conducted by a hearing examiner appointed by the Commissioner. The parties rely on the record of these proceedings which includes counsel's Memoranda of Law supporting their respective positions. The report of the hearing examiner is as follows:

At the time of the hearing the parties jointly stipulated that many of the Board's records and personnel data extracted from the Board offices, represented the undisputed facts relating to petitioners' professional preparation and employment experience in the Newark School System. Other pertinent documents submitted in evidence by the parties also supplemented the facts giving rise to the instant matter. Counsel for the Board represented on the record that certain Board minutes pertaining to petitioners' employment, as well as the salary data pertaining to Mrs. Sasloe, could not be located and made part of the record. Counsel stated that it was possible that these missing records were misplaced when the Board offices were relocated or that they may have been inadvertently destroyed. The Board Secretary's testimony establishes that all of the available documents relevant to this matter from petitioners' personnel files were submitted to the Commissioner and opposing counsel. (Tr. 35-40)

The relevant facts of the instant matter do not appear to be in dispute. Mrs. Levitt's Service Record (J-11) and her Limited Teacher's Certificate (P-3) establishes the following with respect to her academic preparation and certification:

1) Mrs. Levitt received her Limited Teacher's Certificate (P-3) upon graduation from Newark Normal School on January 27, 1933. This certificate entitled her to teach grades 1-8, exclusive of kindergarten.

2) On October 7, 1946 she was issued a New Jersey Permanent Teacher's Certificate to teach grades 1-8.

3) On August 23, 1949, Mrs. Levitt obtained an endorsement on her permanent certificate qualifying her to teach kindergarten.

4) Mrs. Levitt obtained her B.S. degree in 1959 from Newark State Teachers' College.

5) The Board granted Mrs. Levitt a Newark Teacher's License in June 1961. (J-11)

The available Board minutes (J-13) and Petitioner Levitt's Service Record (J-11) provide the following facts regarding her employment and assignment by the Board:

Academic Year	Grade or Subject	Type of Vacancy	
1946-47	Kdg.	Open	(J-11)
1947-48	"	B. Pomeroy-ret.	(J-13, 11-27-47)
1948-49	"	New class-inc. enroll.	(J-13, 9-28-48)
1949-50	"	In place of subst. previously employed	(J-13, 8-23-49)
1950-51	"	B. Van Duyne-ret.	(J-13, 8-29-50)
1951-52	"	M. Racquet-ret.	(J-13, 8-28-51)
1952-53	2B	M. Noeth-trans.	(J-13, 9-30-52)
1953-54	Kdg.	L. Fischer-furl.	(J-13, 8-25-53)
1954-55	" (Sept./Jan.)	Kiendel-furl.	(J-11)
	" (Feb./June)	Levin-furl.	(J-11)
1955-56	"	Levin-furl.	(J-11)
1956-57	" (Sept./Jan.)	Levin-furl.	(J-11)
	" (Feb./June)	Levin-furl.	(J-11)
1957-58	"	Levin-furl.	(J-11)
1958-59	(Not employed in Newark School System)		(J-11)
1959-60	Kdg.	K. Ranger-ret.	(J-13, 7-28-59)
1960-61	"	K. Ranger-ret.	(J-13, 7-19-60)

Mrs. Levitt's salary record (J-10) shows that the Board compensated her on a monthly basis as a substitute teacher commencing with the 1946-47 academic year and each succeeding academic year thereafter until April 1951 when her rate of compensation was established on a per diem basis, which continued through the 1960-61 academic year.

On June 22, 1961, Mrs. Levitt received a formal written offer of employment from the Board to begin regular full-time teaching duties as of September 1961 for the 1961-62 academic year. Mrs. Levitt's salary for that year was $6,100 which represented placement on the 5th step of the existing salary guide for teachers. Her salary record (J-10) shows that she was credited with fourteen years of previous teaching experience as of the 1961-62 academic year. The Board's offer was accepted by Mrs. Levitt on June 21, 1961. (J-10)

Mrs. Levitt requested that she be placed on the proper step of the teachers' salary guide during the 1964-65 academic year. She received a written response from the Board secretary which reads in pertinent part as follows:

> "Your request to be placed 'on the proper step' for the number of years of service is inconsistent with the Board Rules.
>
> "The Rules provide that you be granted service credit when you start teaching with the Newark Board of Education.
>
> "You received maximum credit granted in 1961 and placed on the 5th

step. You have progressed on the schedule since that time step by step receiving each adjustment and increment.

"The Board at no time has granted special adjustments based on years of service. Therefore, your request to be placed on a higher salary step because of your years of service must be denied." (J-12)

At the hearing Mrs. Levitt testified that she considered herself a regular teacher in the Newark School System from the time she commenced her employment at the beginning of the 1946-47 academic year. It is Mrs. Levitt's position that her duties and responsibilities during the period of time she was designated as a substitute teacher were, in fact, the same as other teachers who were employed on a regular basis by the Board and compensated on the Board's approved salary schedules. Mrs. Levitt also testified that her appointments as a substitute were on a year to year basis and that she was verbally told at the end of one academic year that she was to return each of the succeeding academic years. Mrs. Levitt stated that the only year she did not work for the Board was during the 1958-59 academic year. (Tr. 17-34) A letter directed to petitioners' counsel from the Director of the New Jersey Division of Pensions, dated November 19, 1975 (P-2), reveals the status of Mrs. Levitt's contributions to the Teachers' Pension and Annuity Fund and provides further information regarding her employment during the 1958-59 academic year:

"***Ms. Ruth Levitt, who was born January 29, 1912, was enrolled in the Teachers' Pension and Annuity Fund as of September 1, 1958. She earned a year of service credit as a teacher of Woodbridge in the 1958-59 school year and apparently did not teach in the public schools and did not earn any service credit in the period from July 1, 1959 to September 1, 1961, at which time she transferred in the Fund from Woodbridge to the Newark Board of Education. As of July 1, 1975, the latest quarterly posting of service and contributions to her account, she had been credited with an additional 13 years and 11 months of service as a teacher in Newark or a total credit in the Fund for service with both boards of 14 years and 11 months. It might be helpful to you to know that her service with Newark apparently was continuous since September 1, 1961 with the exception of one month in the first calendar quarter of 1971. We have not been notified that Ms. Levitt is not still teaching in Newark.***" (P-2)

Mrs. Esther Sasloe, the other party petitioner, had previously retired from the Newark School System prior to the date of the hearing. Her attorney informed the hearing examiner that she was residing in Florida at the time and that she was unable to attend the hearing due to illness.

Mrs. Sasloe's Service Record (J-7) and her Teacher's Certificate (P-1) establish her professional preparation and certification as follows:

1) Mrs. Sasloe was graduated from Newark Normal School and received a Permanent Normal School Certificate on April 14, 1927. This certificate entitled Mrs. Sasloe to teach grades 1-8 exclusive of kindergarten. (P-1)

2) Mrs. Sasloe received her B.S. degree from Newark State Teachers' College in June 1958. (J-7)

3) On June 1, 1959, the Board granted her a Newark Teacher's License. (J-7)

The available Board minutes (J-9) and Mrs. Sasloe's Service Record (J-7) show her assignments to be as follows:

Academic Year	Grade or Subject	Type of Vacancy	
1945-46 (Dec.-June)	4A-5B	[Teacher]-furl.	(J-7, 9, 1-30-46)
1946-47 (Sept.-Jan.)	4A-5B	M. Shanley-furl.	(J-9, 1-28-47)
(Feb.-June)	2A	[Teacher]-illness	(J-9, 2-25-47)
1947-48 No record posted; rating of "B" given for this year			(J-7)
1948-49 (Sept.-Jan.)	2A	I. Lieberman-resigned	(J-7, 9, 10-26-48)
(Feb.-June)	5A	[Teacher]-furl.	(J-7)
1949-50 (Sept.-Jan.)	6B	A. Neal-furl.	(J-9, 8-23-49)
(Feb.-June)	5A	A. Neal-furl.	(J-9, 8-23-49)
1950-51 (Sept.-June)	5A	V. D'Allesandro-furl.	(J-9, 8-29-50)
1951-52 (Sept.-Jan.)	5A	I. Ohlson-furl.	(J-9, 8-28-51)
(Feb.-June)	3B-2A	Froelick-ret.	(J-7)
1952-53 (Sept.-Jan.)	7B-6A	A. Flagg-furl.	(J-9, 8-26-52)
(Feb.-June)	6A	A. Flagg-furl.	(J-9, 8-26-52)
1953-54 (Sept.-Jan.)	4A + B	I. Charnes-trans.	(J-9, 9-22-53)
(Feb.-June)	4A + B	Lizzack-resigned	(J-7)
1954-55 (Sept.-Jan.)	5B	G. Thieme-furl.	(J-9, 7-27-54)
(Feb.-June)	3A	" " "	(J-9, 7-27-54)
1955-56 (Sept.-Jan.)	4B	G. Thieme-resigned (ret.)	(J-7)
(Feb.-June)	4A	" " "	(J-7)
1956-57 (Sept.-Jan.)	4B	" " "	(J-7)
(Feb.-June)	6B-5A	" " "	(J-7)
1957-58 (Sept.-Jan.)	5A-B	" " "	(J-7)
(Feb.-June)	6B-5B	" " "	(J-7)
1958-59 (Sept.-June)	3B	E. Krane-ret.	(J-9, 7-28-59)

On March 20, 1959, Mrs. Sasloe received a written offer of employment from the Board as a regular full-time teacher at the beginning of the 1959-60 academic year. This offer indicated that she would be compensated $5,900 and that her Teachers' Pension and Annuity contributions would be deducted from her contracted salary thereafter. Mrs. Sasloe accepted the Board's employment offer on March 24, 1959. (J-6) Mrs. Sasloe was continued as a regular full-time teacher for each succeeding academic year thereafter through the conclusion of the 1970-71 academic year, subsequent to which she retired and received her pension as of August 1, 1971. (J-7)

In this regard, a letter dated November 19, 1975 (P-2) from the Director of the Division of Pensions, reveals the following with respect to Mrs. Sasloe's pension status:

> "***Mrs. Esther Sasloe, who was born February 24, 1907, was enrolled in the Teachers' Pension and Annuity Fund as a teacher with the Newark Board of Education effective January 1, 1959. She was granted a service retirement allowance from the Fund as of August 1, 1971 based on total credited service of 12 years; the only statutory prerequisite for qualification for a service retirement allowance is the attainment of 60 years of age and Mrs. Sasloe, based on her date of birth, was of course, over age 60 on August 1, 1971, the date of her retirement." (P-2)

The Board filed a Memorandum of Law in advance of petitioners' Memorandum. The Board argues that it could not provide a rebuttal to the testimony of Petitioner Levitt, by virtue of the fact that persons either died or could not be identified who had personal knowledge of this matter, or that the records from 1947 could not be found to shed further light on the question.

The Board's argument therefore is primarily based upon petitioners' alleged failure to make a timely appeal in the instant matter. The Board contends that the Commissioner may not consider an alleged claim of wrongdoing under a contract which predates the commencement of the action by more than six years. The Board grounds its argument on the statutory provisions of *N.J.S.A.* 2A:14-1, hereinafter set forth in pertinent part:

> "***Every action at law for *** recovery upon contractual claim or liability express or implied, not under seal, *** shall be commenced within 6 years after the cause of any such action shall have accrued."

Thus, the Board maintains that petitioners' claim is stale since it was formally instituted on July 26, 1971, and requests relief pertaining to alleged actions of the Board which predate July 26, 1965 thereby exceeding the statute of limitations set forth in *N.J.S.A.* 2A:14-1. The Board relies on the construction of this statute by the New Jersey Superior Court in *Fidelity Deposit Company of Maryland v. Abagnale,* 97 *N.J. Super.* 132 (*Law Div.* 1967), wherein the plaintiff asserted that it should not be deprived of its right to proceed against the respondent by virtue of the fact respondent had admitted his guilt and failed to assert that he had been injured by the passage of time in providing an adequate defense. The Court rejected the plaintiff's argument in *Fidelity* as indicated in the following language of Judge Melvin Antell:

> "It [*N.J.S.A.* 2A:14-1] is a practical device to spare the courts from litigation of stale claims***. That defendant has suffered no actual prejudice resulting from delay is immaterial. Nothing more need be shown beyond the mere lapse of time.***" (at 139-140)

The Board also relies on a similar ruling of the federal court with respect to untimely prosecution of claims. *Page v. Curtiss-Wright Corporation,* 332 *F.Supp.* 1060 (*U.S.D.C.* 1971)

Petitioners reject the Board's contention that their claims for relief before the Commissioner constitute an untimely request to resolve a matter which they aver has been guaranteed to them pursuant to the provisions of *R.S.* 18:13-16

(now *N.J.S.A.* 18A:28-5 *et seq.*), setting forth the specific conditions for the acquisition of teacher tenure during the periods of time controverted herein, namely that:

> "The services of all teachers, principals, assistant principals, vice-principals, superintendents, assistant superintendents, and such other employees of the public schools as are in positions which require them to hold an appropriate certificate issued by the Board of Examiners, excepting those who are not the holders of proper certificates in full force and effect, shall be during good behavior and efficiency, (a) after the expiration of a period of employment of 3 consecutive calendar years in that district unless a shorter period is fixed by the employing board, or (b) after employment for 3 consecutive academic years together with employment at the beginning of the next succeeding academic year, or (c) after employment, within a period of any 4 consecutive academic years, for the equivalent of more than 3 academic years; some part of which must be served in an academic year after July 1, 1940; provided, that the time any such employee had taught in the district in which he was employed at the end of the academic year immediately preceding July 1, 1962, shall be counted in determining such period or periods of employment in that district, except that no employee shall obtain tenure in a position other than as a teacher, principal, assistant superintendent or superintendent prior to July 1, 1964.***"

Petitioners argue that the record of these proceedings clearly establishes that they were in fact certified full-time teachers during the academic years the Board had employed them and improperly assigned them as substitute teachers for succeeding academic years commencing in 1946 through 1961. More specifically, Mrs. Levitt asserts that the academic years commencing in September 1946 through February 1949 afforded her tenure protection as a teacher with all of the lawful rights and privileges attendant thereto.

Similarly, Mrs. Sasloe claims that she acquired a tenure status as a teacher by specifically serving in the Board's employ as a regular teacher from February 1949 through September 1953.

Petitioners argue that they have complied with the precise terms and conditions of the law (*R.S.* 18:13-16, now *N.J.S.A.* 18A:28-5 *et seq.*) as expressed in *Moriarity v. Board of Education of Garfield,* 133 *N.J.L.* 73 (*Sup. Ct.* 1945), aff'd 134 *N.J.L.* 356 (*E.&A.* 1946). Thus, petitioners assert that once the statutory provisions have been adhered to they are automatically entitled to tenure protection. *Canfield v. Pine Hill Board of Education,* 51 *N.J.* 400 (1968) Petitioners further maintain that their acquisition of tenure pursuant to statutory prescription has been previously defined by the courts as a legislative status rather than contractual and that such rights may not be waived while they are employed in such positions. *Greenway v. Board of Education of Camden,* 129 *N.J.L.* 46 (*Sup. Ct.* 1942), aff'd 461 (*E.&A.* 1943); *Lange v. Board of Education of Audubon,* 26 *N.J. Super.* 83 (*App. Div.* 1953)

Petitioners contend that their status as substitute teachers is

distinguishable from the rulings of the courts in *Schulz v. State Board of Education,* 132 *N.J.L.* 345 (*E.&A.* 1945) and *Gordon v. State Board of Education,* 132 *N.J.L.* 356 (*E.&A.* 1945) wherein the differences between substitute teacher and teacher were clearly delineated and the petitioners in those instances did not qualify under the category of teacher.

In support of their tenure claims petitioners rely on *Board of Education of Jersey City v. Wall,* 119 *N.J.L.* 308 (*Sup. Ct.* 1938) and *Seidel v. Board of Education of Ventnor City,* 110 *N.J.L.* 31 (*Sup. Ct.* 1933).

In *Wall, supra,* the Court concluded that a high school teacher who was continuously employed from September 1931 to January 1936 was protected by *R.S.* 18:13-16 (*N.J.S.A.* 18A:28-5 *et seq.*) notwithstanding that she was alleged to have been employed as a substitute teacher on a per diem basis. In that instance the Court concluded that Wall had met the precise terms and conditions to achieve a tenure status, since she was assigned a regular position in the same manner as teachers with tenure.

Finally, petitioners maintain that if the Commissioner determines that they achieved tenure status as regular teachers as of February 1949 (Mrs. Levitt) and June 30, 1959 (Mrs. Sasloe), respectively, then they are entitled to all of the accrued benefits of pension, salary, sabbatical leave and longevity increments heretofore denied them by the Board.

The hearing examiner has reviewed the total record with respect to the facts and arguments advanced by the parties. It is observed from a review of the Board minutes (R-2) pertaining to the salaries of instructional staff that the Board adopted a policy affecting its revised salary schedule on July 1946 which stated that all regular teachers who were initially employed by the Board as of September 1, 1946 must possess a B.S. degree. It is further observed by the hearing examiner that this policy remained in effect during succeeding academic years and has been incorporated in the existing Board rules (C-2) pertaining to teacher recruitment and selection. These rules for teacher selection and recruitment require that all candidates for full-time teaching positions must successfully pass the written and oral examinations administered by the Board in addition to possessing a B.S. degree. Upon meeting these requirements each teacher-candidate is ranked and placed on an eligibility list of the Newark Board of Examiners. Teaching candidates are screened and selected from this list and then recommended to the Board for regular teaching positions as the teaching vacancies occur within the school district. The teachers who are employed by the Board to fill such vacancies are initially appointed on a provisional or temporary basis for the first two years of employment so that the Board can evaluate their teaching performance.

The hearing examiner observes that the circumstances surrounding the instant matter are similar in many respects to a previous matter determined by the Commissioner in *Ruth Z. Yanowitz et al. v. Board of Education of the City of Jersey City, Hudson County,* 1973 *S.L.D.* 57; dismissed on Appeal to the State Board of Education for failure by the Board to proceed in a timely

manner, 1973 *S.L.D.* 79. In *Yanowitz* petitioners alleged that the Jersey City Board of Education improperly placed them on the teachers' salary guide by failing to recognize their total years of teaching experience within the school district.

In arriving at a determination in that matter, the Commissioner commented upon many of the court rulings hereinbefore cited by petitioners pertaining to the distinction between substitute teachers and regular teachers or teaching staff members. The Commissioner in *Yanowitz, supra,* found that there was no distinction between teaching vacancies which required the employment and assignment of full-time teachers for a period of one or several school years as is the case in the instant matter. Thus, the periods of employment of petitioners in that instance was determined to be employment in full-time teaching assignments notwithstanding the fact that the Jersey City Board of Education considered petitioners to be long term substitutes for a period of several years to their appointments to regular teaching positions. The Commissioner in *Yanowitz* grounded his determination on several court decisions which are of particular significance in the instant matter and set forth in pertinent part as follows:

> "***The Commissioner agrees that there is a definite distinction between the conception of the classification 'teacher' and 'teaching staff member' as used in the school law and in school practice, as opposed to the definition of 'substitute teacher.' In the judgment of the Commissioner, petitioners clearly were not 'substitute teachers' during their full-time employment for several school years, under proper State certification.
>
> "The distinction between teachers and substitute teachers had been dealt with on previous occasions by the Commissioner and by the courts of this State. In *Board of Education of Jersey City, Hudson County v. Margaret M. Wall and State Board of Education of the State of New Jersey,* 119 *N.J.L.* 308 (*Sup. Ct.* 1938) the Court affirmed the finding of the State Board of Education that the teacher, Miss Wall, had been continuously employed by the Board in two teaching assignments for a period in excess of four years, and had thereby acquired a tenure status, notwithstanding the Board's attempt to evade the tenure statutes by the device of compensating the teacher on a *per diem* basis and contending that her status was merely that of a substitute teacher.
>
> "In *Madeline L. Schultz v. State Board of Education and Board of Education of the City of Newark, Essex County,* 132 *N.J.L.* 345 (*E.&A.* 1945) the Court pointed out that the Legislature was not a stranger to the distinction between teachers and substitute teachers by citing that the amendment *L.* 1919, *c.* 80, which incorporated the pension fund feature in the general public school statute of 1903 (*L.*1903 2*d Sp. Sess., c.*1) and was previously *N.J.S.A.* 18:13-25 (now *N.J.S.A.* 18A:66-2p.), stated the following in precise language:
>
> > '***No person shall be deemed a teacher within the meaning of this article who is a substitute teacher***.'

"The Court's words are particularly pertinent to the instant matter as follows at pp. 352, 353:

> '***Both the office of the State Commissioner of Education and the State Board of Education have been on record since 1938 (*Waters v. Board of Education of Newark, School Law Decisions,* 1938, *pp.* 623, 624) as construing the tenure statute not to include substitute teachers employed to do particular substitute work for absent teachers.
>
> 'The courts have condemned evasions of the tenure statute and refused to countenance the subterfuge of designating a teacher as a substitute where the service rendered and intended to be rendered was that of a regular teacher. 'It clearly appears from the record that the seven persons designated as special substitute teachers were actually continuously employed, the minutes notwithstanding. The action of the board was the merest subterfuge to defeat the legislative purpose***.' *Downs v. Board of Education of Hoboken,* 13 *N.J. Mis.R.* 853 (1935).***'

"The Court also cited *Board of Education of Jersey City v. Wall, supra,* and then stated the following at p. 353:

> '***The offense in the cited cases was the attempt to conceal the real situation by employing in the guise of substitute teachers those who were really teachers, doing the work of teachers.***'

"The distinction between substitute teachers and teachers was also the basis of the decision of the Court of Errors and Appeals in *Dora Gordon v. State Board of Education and Board of Education of the City of Newark, Essex County,* 132 *N.J.L.* 356 (*E.&A.* 1945).

"The Commissioner also notices that the language of *N.J.S.A.* 18A:66-2p. (formerly 18:13-25), has remained unchanged since 1919, a period of fifty-three years.

"There is no distinction between vacant teaching positions which require the employment and assignment of full-time teachers for a period of one or several school years, as is the case in the instant matter. The Commissioner finds the Board's defensive arguments to be groundless and its policy to be wholly without merit.

"The periods of employment for each of the petitioners, with the sole exception of *per diem* substitute teaching, were full-time teaching assignments. The record before the Commissioner discloses that in each instance petitioners were holders of appropriate State certificates and paid contributions to the Teachers Pension and Annuity Fund. The Board's practice of referring to petitioners as 'teachers-in-training' and 'contract teachers' as opposed to 'appointed teachers' has no meaning, and

constitutes a violation of *N.J.S.A.* 18A:26-6, and the Commissioner so holds.***" (1973 *S.L.D.* at 74-76)

The Commissioner further determined that having found that petitioners were employed as regular full-time teachers in the Jersey City School District, they were not precluded from obtaining the rights and privileges attendant thereto by virtue of the failure of the Jersey City Board of Education to issue local teaching certificates to them.

In this regard the hearing examiner finds that the Commissioner's reliance on the applicable provisions of *N.J.S.A.* 18A:26-5 and 6 in *Yanowitz, supra,* regarding the functions of a district board of examiners is equally pertinent to the matter controverted herein. These statutory provisions read as follows:

N.J.S.A. 18A:26-5

"A district board of examiners shall, under such rules as the state board shall prescribe, and under such additional rules as may be prescribed by the board of education of the district, issue certificates to teach, which shall be valid for all schools of the district."

N.J.S.A. 18A:26-6

"No teaching staff member shall be employed in any of the schools of a district having a district board of examiners unless he shall be issued a certificate by said board and holds an appropriate certificate issued by the state board of examiners or the county superintendent of schools of the county."

The hearing examiner finds and determines that petitioners herein were also employed and assigned as regular teaching staff members by the Board during the academic year they served as substitute teachers excepting the periods of Mrs. Levitt's employment as kindergarten teacher from 1946-47 through 1948-49 when she did not possess a kindergarten endorsement on her Permanent Teacher's Certificate. In all other respects, however, the hearing examiner finds that petitioners did in fact meet the lawful requirements to be considered full-time teaching staff members by virtue of the fact that the Board relied on their continued performance over the succeeding academic years to perform the duties of regular teaching staff members.

It is also clear from the record that petitioners did not enjoy the same rates of salary compensation, pension benefits, or leaves of absence accorded to regular teachers while they were designated by the Board as long term substitute teachers. Moreover, the record reveals that petitioners' periods of service under the guise of long term substitutes prohibited them from being credited with such service toward longevity increments on the teachers' salary guide. The hearing examiner also finds that petitioners were not enrolled in the Teachers' Pension and Annuity Fund nor were any contributions to the TPAF deducted from their salaries until they were offered regular teaching positions by the Board. More specifically, Mrs. Sasloe's pension contributions commenced January 1, 1959 and Mrs. Levitt's began on September 1, 1961. (P-2, *ante*) At this juncture the

hearing examiner's further findings and determinations regarding each petitioner's specific periods of employment by the Board will be individually set forth:

Mrs. Ruth Levitt:

1. It is found and determined that Mrs. Levitt commenced her duties as a regularly certified full-time teacher at the commencement of the 1949-50 academic year subsequent to the time she obtained a kindergarten endorsement on her Permanent Teacher's Certificate.

2. It is further found and determined that Mrs. Levitt continued to perform the duties of a regular full-time teacher for each succeeding academic year thereafter until the 1958-59 academic year when according to the information contained in the letter of November 19, 1975 (P-2), she obtained full-time employment in the Woodbridge School District.

3. The hearing examiner finds and determines further that Mrs. Levitt resumed employment as a regular full-time teacher in the Newark School System at the commencement of the 1959-60 academic year and continues to date to serve in such capacity.

4. It is further found that Mrs. Levitt initially acquired a tenure status in the Board's employ pursuant to the applicable provisions of *R.S.* 18:13-16(b) (now *N.J.S.A.* 18A:28-5(b)) when she commenced her teaching duties at the beginning of the 1952-53 academic year. Such tenure protection however was terminated subsequent to the conclusion of the 1957-58 academic year when she obtained employment in the Woodbridge School System for the following 1958-59 academic year.

5. The hearing examiner finds further that Mrs. Levitt's reemployment by the Board at the commencement of the 1959-60 academic year constituted employment as a regular full-time teacher and again triggered the tenure statutes in tolling her time toward a second period of tenure which became effective when she began her teaching duties at the beginning of the 1962-63 academic year. The hearing examiner observes that in this instance Mrs. Levitt acquired tenure protection for the second time one year and one day after she was formally recognized by the Board as a regular full-time teacher. Mrs. Levitt continues to enjoy such tenure protection at the present time except that the Board considered her time tolling toward tenure acquisition to commence September 1, 1961 when it offered her full-time employment as a regular teacher.

The further findings and determinations of the hearing examiner are similarly set forth below for Mrs. Esther Sasloe:

1. It is found and determined that Mrs. Sasloe's employment as a regular full-time teacher initially commenced on December 1, 1945 during the 1945-46 academic year. Absent any specific finding of fact that Mrs. Sasloe was employed during the 1947-48 academic year, the hearing examiner finds that the

academic year in question represented an interruption of what might otherwise be considered continuous full-time employment rendered by Mrs. Sasloe for each consecutive academic year thereafter through the conclusion of the 1970-71 academic year when she retired from teaching.

2. It is further found that Mrs. Sasloe's certification and years of teaching service commencing with the 1948-49 academic year made her eligible for the acquisition of tenure as a regular full-time teacher after she completed her first day of teaching at the beginning of the 1951-52 academic year. It is also found and determined that Mrs. Sasloe's tenure status remained undisturbed for each of the succeeding academic years until the end of the 1970-71 academic year when she retired from teaching.

The hearing examiner finds no merit in the Board's argument that the provisions of *N.J.S.A.* 2A:14-1 estopped petitioners from asserting their tenure rights as regular full-time teachers by reason that their claims are the result of a contractual agreement entered into with the Board, thereby precluding them from seeking relief from Board actions which predate July 26, 1965. In the hearing examiner's judgment it has been previously established that the acquisition of tenure protection is the result of legislative fiat and not a contractual status. *Greenway, supra; Lange, supra* In this regard the hearing examiner finds that petitioners have met the precise terms and conditions prescribed by law for the acquisition of tenure during the periods of time controverted herein. (*R.S.* 18:13-16(b), now *N.J.S.A.* 18A:28-5(b))

The hearing examiner finds further that the information contained in the record of these proceedings is insufficient to establish the specific emoluments and benefits to which petitioners are entitled from the Board.

Accordingly, the hearing examiner recommends that the Commissioner grant petitioners' prayer for relief in whatever manner and to the extent that the Commissioner deems such relief to be appropriate.

* * * *

The Commissioner has carefully reviewed the record before him including the Board's exceptions to the hearing examiner report. The Commissioner observes that while the Board takes general exception to the entire report, it further requests that the Commissioner limit any back pay which may be due petitioners to two years prior to the filing of this action.

The Commissioner considers the Board's argument in support of its request to be without merit. In the Commissioner's judgment the specific facts and circumstances pertaining to petitioners' employment relationship with the Board clearly establish that Mrs. Levitt was employed as a regular full-time teacher as of the beginning of the 1949-50 academic year when she obtained kindergarten endorsement on her teaching certificate. It is equally evident that Mrs. Sasloe's employment as a regular full-time teacher commenced on December 1, 1945 during the 1945-46 academic year.

Moreover, the record establishes that petitioners, by virtue of their certification and employment, were entitled to have those years of employment service accrue toward a tenure status pursuant to *N.J.S.A.* 18A:28-5 *et seq.* Consequently, taking into account that the employment service of Mrs. Sasloe was interrupted during the 1948-49 academic year, the Commissioner finds and determines that she acquired a tenure status in the Newark School System commencing with her first day of employment in the 1951-52 academic year.

Similarly the Commissioner finds and determines that Mrs. Levitt had acquired a tenure status as a regular full-time teacher as of the first day of employment commencing with the 1952-53 academic year. It is further determined that Mrs. Levitt's initial period of tenure terminated as of the beginning of the 1958-59 academic year when she accepted employment in the Woodbridge School District.

The record further reflects that Mrs. Levitt's second period toward the acquisition of tenure in the Newark School System commenced with her employment on the first day of the 1959-60 academic year and that she acquired a new tenure status at the beginning of the 1962-63 academic year.

The Commissioner further rejects the Board's legal argument with respect to petitioners' untimely claims grounded on the provisions of *N.J.S.A.* 2A:14-1 essentially for the reasons set forth in the report of the hearing examiner. The Commissioner concurs *in toto* with the findings and recommendations set forth therein and adopts them as his own.

Accordingly, having found and determined that petitioners were regular full-time teachers and had acquired tenure protection during the periods of time controverted herein, the Commissioner directs the Board to compensate petitioners for the difference in back wages they would have received, by virtue of their experience and academic years as regular full-time teachers, had they not been improperly assigned as substitute teachers.

The Board is further directed insofar as practicable to compensate or credit petitioners with all of the other fringe benefits to which they may have been entitled as regular full-time teachers during the aforementioned academic years contested herein.

The Commissioner is not authorized to come to any determination regarding the impact of his ruling as it affects petitioners' enrollment or benefits with respect to the Teachers' Pension and Annuity Fund. In this regard, the Commissioner advises that all such inquiries by the parties be made directly to the Director of the Division of Pensions of the State of New Jersey.

COMMISSIONER OF EDUCATION

October 5, 1977

**In the Matter of the Tenure Hearing of John Bicanich,
School District of the Township of Jackson, Ocean County.**

COMMISSIONER OF EDUCATION

DECISION

For the Complainant Board, Russo & Courtney (James P. Courtney, Jr., Esq., of Counsel)

For the Respondent, Joseph N. Dempsey, Esq.

Charges against respondent, a tenured teaching staff member in the employ of the Board of Education of the Township of Jackson, hereinafter "Board," were filed by the Board with the Commissioner of Education on May 10, 1972 but held in abeyance pending action on the same charges by the Ocean County Grand Jury and ultimately a determination by the courts. The charges were that respondent had impaired the morals of minor children and was guilty of moral turpitude. Respondent was found to be innocent of such charges in a trial which concluded on July 28, 1976 in Ocean County and the Commissioner was apprised of this verdict by a letter from counsel dated July 30, 1976. This letter contained the phrase "***hopefully our pending matters can be mutually worked out."

The pending matter of reference was concerned with the payment of salary to respondent for the period of time from the preferment of charges and his suspension without pay by the Board to the date when he was found innocent by the Court. Such retroactive salary payments have remained a source of controversy and a conference was held concerning them on May 31, 1977 at the State Department of Education, Trenton, at which time the following agreements were reached:

1. The long delayed charges were not moved before the Commissioner pending completion of lengthy Court proceedings. However, on June 14, 1976 respondent applied for compensation pursuant to *N.J.S.A.* 18A:6-14. It was stipulated that he was so entitled as of that date but he had not been paid. The argument which has delayed payment was concerned with whether, at the time of eligibility to be placed on the payroll, there was an obligation at that very juncture for respondent to submit, before he was paid, a statement of then current substituted earnings to be used in terms of mitigation. The only real question was whether the Board was entitled to mitigation retroactive to June 14, 1976.

2. It was agreed that respondent would be restored to the payroll effective June 1, 1977.

3. Other issues retroactive to the date of his suspension would be negotiated.

The statute of reference, *N.J.S.A.* 18A:6-14, with respect to the payment of salary to suspended employees of a local board of education provides:

> "Upon certification of any charges to the commissioner, the board may suspend the person against whom such charge is made, with or without pay, but, if the determination of the charge by the Commissioner of Education is not made within 120 calendar days after certification of the charges, excluding all delays which are granted at the request of such person, then the full salary (except for said 120 days) of such person shall be paid beginning on the one hundred twenty-first day until such determination is made. Should the charge be dismissed, the person shall be reinstated immediately with full pay from the first day of such suspension. Should the charge be dismissed and the suspension be continued during an appeal therefrom, then the full pay or salary of such person shall continue until the determination of the appeal. However, the board of education shall deduct from said full pay or salary any sums received by such employee or officers by way of pay or salary from any substituted employment assumed during such period of suspension. Should the charge be sustained on the original hearing or an appeal therefrom, and should such person appeal from the same, then the suspension may be continued unless and until such determination is reversed, in which event he shall be reinstated immediately with full pay as of the time of such suspension."

In the Board's view it was entitled on June 14, 1976 to a statement of all salaries respondent was then earning prior to his placement back on the payroll in order that such salaries might be used as mitigation of salary payable to respondent by the Board. Respondent maintains that:

> "***The Board of Education, in order to get the mitigation they seek, have an obligation to first place him on the payroll.***"
>
> (Letter of Respondent, June 20, 1977)

Respondent also avers in his lettter that "***the employee cannot be expected to anticipate mitigation before he is placed on a payroll.***" He cites in this respect a letter opinion of the Commissioner which was issued on February 13, 1974 wherein the Commissioner had occasion to interpret a decision *In the Matter of the Tenure Hearing of Anthony Polito, School District of the Township of Livingston,* 1974 *S.L.D.* 662 with respect to mitigation. The pertinent part of that interpretation is recited as follows:

> "****In the Matter of the Tenure Hearing of Walter Kizer, School District of the Borough of Haledon, Passaic County,* decided on Motion by the Commissioner [1974 *S.L.D.* 501], the Commissioner opined that the legislative intention set forth in *N.J.S.A.* 18A:6-14, amended by *Chapter* 435, *Laws* of 1971, is to provide financial assistance to individuals who are suspended without pay from their employment with local boards of education, pending the determination of formal charges, and, consequently, find themselves in protracted legal proceedings. Although *N.J.S.A.* 18A:6-14 is clear that boards of education are not required to

provide such financial assistance during the initial 120 days of an employee's suspension, the Commissioner also held in *Kizer, supra,* that it was not the legislative intention to consider that period of time a legislatively imposed penalty upon the suspended employee. However, if the board of education which certified tenure charges to the Commissioner against one of its tenured employees determines to suspend that employee without pay, as it clearly has the authority to do (*N.J.S.A.* 18A:6-14), then that employee, for the first 120 days of his suspension, must seek other means of financial support. If the determination of the charges is not made within 120 calendar days, to which would be added the number of days' delay created at the request of the employee as in the matter *sub judice,* then the financial assistance as intended by the Legislature, *ante,* would begin. At that juncture, it would then be unnecessary for the employee to seek other means of financial support.

"However, *if the employee desired to retain his substituted employment even after he began to receive the benefits* as provided by *N.J.S.A.* 18A:6-14, then those monies earned after that time from substituted employment would mitigate the salary benefits to be afforded him by the Board. The Commissioner furthermore holds that monies earned by a suspended employee during the initial 120 day suspension period are not to be used as a basis for mitigation for purposes of *N.J.S.A.* 18A:6-14; however, should the charges be dismissed against the employee and he is ordered reinstated with full remuneration and benefits that would have inured to him had he not been suspended, then the full salary for the initial 120 day period of suspension would be mitigated by monies he earned during that time from substituted employment.***" (*Emphasis supplied.*) (Letter of the Commissioner, February 13, 1974)

Thus, the Commissioner held that at the time when salary payment to a tenured teaching staff member is scheduled to resume, such payment must in fact be made at a time prior to a decision by the employee with respect to a retention of his "substituted employment." Subsequently, a decision to retain such employment will result in mitigation against salary otherwise payable by the Board.

This procedure has now been followed exactly in this sequence in accordance with the conference agreement, *ante,* from the date of June 1, 1977. It was not so precisely followed from the date of June 14, 1976 when it was stipulated respondent was eligible to be paid, but was not placed upon the payroll. Accordingly, a choice of continuing a substituted employment or abandoning it was not offered him at that time.

The Commissioner determines that this fact, however, is not sufficient to warrant a determination at this juncture that respondent is entitled to the payment of full salary without mitigation retroactive to the date of June 14, 1976. The statute *N.J.S.A.* 18A:6-14 provides that, upon dismissal of charges against suspended tenured employees, the employees are entitled to "***full pay from the first date of such suspension.***" It also clearly mandates that the local board "***shall deduct from said full pay or salary any sums received by

such employee or officers by way of pay or salary from any substituted employment assumed during such period of suspension.***" Accordingly, the Commissioner determines that while respondent is entitled to full pay, at least from the date of June 14, 1976, such pay must be reduced by the amount of money respondent earned during that period from substituted employment.

The Commissioner directs, therefore, that the Board compensate respondent in accordance with this determination after respondent has submitted his statement of earnings to be applied as mitigation. The Commissioner further directs that the remaining details of controversy between the parties herein be settled with expedition in order that this long delayed matter may be finally terminated.

COMMISSIONER OF EDUCATION

October 5, 1977

Parsippany-Troy Hills Board of Education,

Petitioner,

v.

Parsippany-Troy Hills Education Association, Morris County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Murray, Meagher & Granello (Robert J. Hrebek and Malachi J. Kenney, Esq., of Counsel)

For the Respondent, Goldberg, Simon & Selikoff (Jeffrey S. Laden, Esq., and Theodore M. Simon, Esq., of Counsel)

The Board of Education of Parsippany-Troy Hills, hereinafter "Board," seeks a declaratory judgment to the effect that the Board's statutory responsibility to appoint and assign duties to teacher employees may be abrogated neither by terms of a negotiated agreement, by acts or decisions effected by its administrative agents without knowledge or authorization of the Board, nor by award of an arbitrator.

The Parsippany-Troy Hills Education Association, hereinafter "Association," prays for an order dismissing the Board's Petition of Appeal on grounds that the Commissioner of Education is without authority or jurisdiction inasmuch as the matter has been filed (Docket No. CO-76-303) with Briefs and a stipulation of facts before the Public Employment Relations Commission, hereinafter "PERC."

The matter comes before the Commissioner as a matter of educational law in the form of the pleadings, exhibits, and Briefs of counsel. The factual context surrounding the dispute is as follows:

The Board in 1975 directed its Assistant Superintendent to review the status of lunch time supervision in the Board's elementary schools. The subsequent report in February 1975 of a committee headed by the Assistant Superintendent revealed a number of concerns by parents and others over the adequacy of lunch time supervision of pupils. (Board's Exhibit A) When the Board directed that further studies be made, a subsequent report was received which advanced, *inter alia,* six recommendations, the second of which called for the development of a lunch time schedule which would:

> "***provide for maximum effective utilization of the number of currently employed noon time aides and include assignment of at least one member of the teaching staff for each designated area indoors and out so that aides can be appropriately and directly supervised in their duties."
> (Board's Exhibit B)

On July 24, 1975, the Board accepted the report of the committee and directed its administrators to "***proceed on the six recommendations with a quarterly review of progress." (Board's Exhibit C) Thereupon, the Association on October 14, 1975 grieved the Board's action on grounds that the negotiated agreement was violated as follows:

> "Article IV, Section 6
>
> "Additional lunch duty assignments indoors and outdoors. This constitutes a revision of building policy, according to the contract.
>
> "Article X, [Sections A and B]
>
> "Additional lunch duty assignments indoors and outdoors. This constitutes a reduction in teacher benefits***." (Board's Exhibit D)

Article IV, Section 6 of the Negotiated Agreement provides that:

> "The elementary school teacher's day shall be seven (7) hours in duration. Elementary teachers shall be assigned to noon-time supervision for one-half hour (1/2) in accordance with current practices and rotation. Elementary teachers who are not assigned to noon-time supervision on given days shall be granted a preparation-conference period of one-half (1/2) hour." (Respondent's Exhibit 1, at p. 7)

Sections A and B of Article X provide merely that school liaison committees and the Association's executive committee meet periodically with school principals and the Superintendent, respectively, to discuss and review school problems, practices and policies. (*Id.*, at p. 10)

When the Board denied the fifth level grievance and the Association sought to move the matter to binding arbitration, the matter was not accepted by the

American Arbitration Association on grounds that the Board did not jointly request that it be arbitrated. The within Petition of Appeal was then filed by the Board with the Commissioner on April 26, 1976. Thereafter, the Association filed in May 1976 an unfair practice charge against the Board before PERC. (Respondent's Brief, at p. 2)

A second Petition of Appeal filed by the Board, which concerned a dispute over the scheduling of parent-teacher conferences and which has been amicably settled by the litigants and withdrawn by the Board, requires no further attention and is dismissed. (Board's Brief, at p. 1)

The Board argues that it has the legal right to assign its staff as it deems necessary and that this discretionary power can be dismissed or overturned neither by unauthorized actions of its administrative agents nor by an arbitrator. In this regard the Board cites *Herbert J. Buehler v. Board of Education of the Township of Ocean,* 1970 *S.L.D.* 436, aff'd State Board of Education 1971 *S.L.D.* 660, aff'd New Jersey Superior Court, Appellate Division, 1972 *S.L.D.* 664, wherein the Commissioner held that supervisory duties assigned by a school principal to a teacher without formal approval or authorization by the board did not create a tenure entitlement of that teacher to a supervisory position. The Board relies also upon *Long Branch Education Association, Inc. v. Board of Education of the City of Long Branch,* 1974 *S.L.D.* 1191, aff'd State Board of Education 1975 *S.L.D.* 1098, aff'd 150 *N.J. Super.* 262 (*App. Div.* 1976), aff'd 73 *N.J.* 461 (1977). (Board's Brief, at pp. 6-10)

The Board, while conceding that certain factual matters inherent in the controversy lend themselves to arbitration, urges that the Commissioner, and not a labor arbitrator, may most appropriately determine the broader issues arising under education law. Thus it is argued that:

> "***The Legislature has empowered the Commissioner, in recognition of his special expertise in the field, to make decisions of this type. Local Boards of Education look to the Commissioner for guidance. To abdicate these responsibilities in the present case to an arbitrator with no special training or expertise in the School Law would, it is submitted, be an abuse of discretion.***" (Board's Brief, at p. 11)

The Board submits that in no case previously determined by the Commissioner has he rendered an opinion on those matters herein submitted for declaratory judgment. The Board does not ask that the Commissioner hold that no remedy could be rendered by an arbitrator in event of a contractual violation but only that the Board's statutory powers preclude the rescission of its personnel assignments by an arbitrator. (*Id.,* at pp. 12-14)

The Association argues, conversely, that the Commissioner has no jurisdiction over disputes emanating from alleged violations of workload provisions set forth in negotiated agreements. The Association cites, *inter alia, Board of Education of Englewood v. Englewood Teachers Association,* 64 *N.J.* 1 (1973); *Burlington County College Faculty Association v. Board of Trustees,*

64 *N.J.* 10 (1973); *Dunellen Board of Education v. Dunellen Education Association,* 64 *N.J.* 17 (1973). Also cited is *Red Bank Board of Education v. Warrington et al.,* 138 *N.J. Super.* 564 (*App. Div.* 1976) wherein the Court stated:

> "***The New Jersey Employer-Employee Relations Act, *N.J.S.A.* 34:13A-1 *et seq.*, empowers the duly selected representatives of public employees to negotiate agreements with a public employer (a term that includes a school district, *N.J.S.A.* 34:13A-3(c)) on the terms and conditions of employment. Grievance procedures contained in such agreements may provide for 'binding arbitration as a means for resolving disputes.' *N.J.S.A.* 34:13A-5.3.***" (at 569)

And,

> "***The New Jersey Employer-Employee Relations Act evidences a clear legislative intent that disputes over contractual terms and conditions of employment should be solved, if possible, through grievance procedures. *We are convinced, moreover, that where provision is made for binding arbitration of such controversies, recourse for their resolution must be by that means, and not to the Commissioner, for to hold otherwise would effectively thwart and nullify the legislative design expressed in the New Jersey Employer-Employee Relations Act.****" (*Emphasis supplied.*) (at 572)

Similarly cited by the Association is *South Orange-Maplewood Education Association v. Board of Education of South Orange and Maplewood,* 146 *N.J. Super.* 457 (*App. Div.* 1977) wherein it was stated by the Court:

> "***Many disputes may be resolved by binding arbitration if the agreement so provides, without resort to the Commissioner. *N.J.S.A.* 34:13A-5.3; *Englewood Board of Education v. Englewood Teachers Ass'n,* 64 *N.J.* 1 (1973).***
>
> "We see nothing in the dispute over the meaning of the agreement as it pertains to sabbatical leave which involves an interpretation of any specific statute in *Title* 18A (*Education*).***" (at 462-463)

The Association argues that no issue emanates herein from any school law and that "***[i]t is of no concern to the Commissioner or the State Board of Education which assignments are given to individual teachers and there are no state rules with respect thereto.***" (Respondent's Brief, at p. 8) The Association contends that the matter must, pursuant to *N.J.S.A.* 34:13A-5.3, as amended in 1974, proceed to binding arbitration.

The Association avers that the Board by requesting a declaratory judgment has, in disguised form, effectively asked the Commissioner to determine a question regarding the scope of negotiations over which he has no jurisdiction. In this regard is cited *Board of Education of the City of Plainfield v. Plainfield*

Education Association, 144 *N.J. Super.* 521 (*App. Div.* 1976) wherein the Court stated the following:

> "***PERC has been granted primary jurisdiction to determine scope questions–that is, that it is the intent of the Legislature in adopting the act to provide an administrative procedure for the resolution of a dispute over negotiability of a particular issue***." (at 525)

For the foregoing reasons the Association avers that the Petition must be dismissed. (Respondent's Brief, at pp. 3-12)

The Commissioner has carefully considered and weighed the arguments of law advanced regarding the appropriateness of the Board's request and concludes that a declaratory judgment is in order. The promulgation of declaratory judgments is contemplated within the legislative mandate that the Commissioner determine disputes arising under the education laws. *N.J.S.A.* 18A:6-9 *et seq., N.J.S.A.* 52:14B-9

The Commissioner is not unmindful that the resolution of certain disputes that arise in school districts over terms and conditions of employment, as well as disputes over the scope of negotiations and unfair labor practices, have by legislative fiat and judicial interpretation been recognized to be within the jurisdiction of the American Arbitration Association and PERC, respectively. *N.J.S.A.* 34:13A-1 *et seq., Englewood, supra; Red Bank, supra; South Orange-Maplewood, supra*

The Association's averral that the Board seeks a determination of the entire matter by procural of a declaratory judgment, however, does not withstand the scrutiny of the following clear language set forth in the Board's Brief:

> "***The Board does not ask the Commissioner to hold that its authority is such that an arbitrator can offer no remedy in the event a contractual violation were found, only that the Board's statutory powers [preclude] the arbitrator from rescinding the assignments.***" (at pp. 12-13)

Subject to such self-imposed limitation, the Board's request is appropriate. Issuance of a declaratory judgment on the broad issues posed is within the Commissioner's jurisdictional authority. The Commissioner so holds. *Red Bank, supra*

The New Jersey State Constitution mandates that the Legislature provide for the "***maintenance and support of a thorough and efficient system of free public schools***." New Jersey Constitution, *Art.* VIII, *Sec.* IV, *Par.* 1. In fulfillment of its mandate the Legislature has vested authority in local boards of education empowered pursuant to *N.J.S.A.* 18A:11-1 to:

> "***c. Make, amend and repeal rules, not inconsistent with this title or with the rules of the state board, for its own government and the transaction of its business and for the government and management of the

public schools and public school property of the district and for the employment, regulation of conduct and discharge of its employees, subject, where applicable, to the provisions of Title 11, Civil Service, of the Revised Statutes ***; and

"d. Perform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district."

Not the least of the paramount responsibilities in overseeing the operation of the public schools is that which all boards of education share in providing for the orderly conduct and safety of the pupils in their charge. Adequate supervision of pupils in both classroom and non-classroom activities must be provided lest physical or mental harm result to pupils from accidents or abuse. The absence of proper supervision frequently engenders costly litigation and judgments requiring payment of damages from the public purse. Such was the case in *Titus v. Lindberg,* 49 *N.J.* 66 (1967) wherein a board and its principal were deemed negligent in failing to provide proper supervision of non-classroom activities of pupils. It is, in respect to providing for the safety and well-being of pupils, that the instant matter is importantly distinguishable from *South Orange-Maplewood, supra,* wherein the only matter in contention was the interpretation of sabbatical leave provisions of a negotiated agreement.

In the instant matter the Board has deemed it necessary to assign at least one classroom teacher to supervise both pupils and aides hired to assist in the supervision of pupils in each designated area at lunch time. Such reasonable requirement is a facet of major educational policy and within the discretionary authority of the Board. The Board's requirement is wholly consistent with that which was iterated in the Commissioner's opinion recently affirmed by the New Jersey Supreme Court in *Long Branch, supra,* as follows:

"***Such programs do present problems of pupil supervision. Whenever large numbers of pupils, particularly of the ages found in grades one through eight, are grouped in school cafeterias and on playgrounds, the possibility of incidents of disciplinary problems and accidents greatly increases. The fact that supervision of school children during such critical time periods has historically been the responsibility of teachers did not arise either by accident or default. A long history of the teaching and supervising of children in public schools has proven that the teacher, with his/her training, experience and knowledge of children, is the best and most effective person to control such situations. This is the reason why teachers have been relied upon, since the virtual inception of the common school as it was originally known, as the persons best able and most suitable to protect the health, safety and welfare of the tens of thousands of school age children whom parents have entrusted to the care of the public schools. The soundness of this decision and the excellence of the performance by teachers of this duty is clearly attested to by the minimal number of serious consequences which may be marked over a long period of years that teachers have expertly performed this function.***

"***That the total responsibilities of a teacher encompass on occasion duties which may be viewed as less than dynamic or creative is not denied by those who know the institution and processes of education, but such a complaint does not rise to the level of a legal right."
(1974 *S.L.D.* at 1199-1200)

The Board had authority to determine that teachers as well as aides were required in each designated area during lunch time activities.

The Court in *Plainfield, supra,* enunciated the legal principle of a board's authority to carry out statutory mandates, as follows:

"***It is elementary that a grant of authority to an administrative agency is to be liberally construed so as to enable the agency to discharge its statutory responsibilities. *In re Promulgation of Rules of Practice,* 132 *N.J. Super.* 45, 48-49 (App. Div. 1974). In short, the authority delegated to an administrative agency should be construed so as to permit the fullest accomplishment of the legislative intent. *Cammarata v. Essex Cty. Park Comm'n,* 26 *N.J.* 404, 411 (1958). Moreover, when construing a statutory enactment it is fundamental that the general intention of the act controls the interpretation of its parts. *Hackensack Water Co. v. Ruta,* 3 *N.J.* 139, 147 (1949). All statutory provisions are to be related and effect given to each if such be reasonably possible. *Jamouneau v. Harner,* 16 *N.J.* 500, 513 (1954).***" (144 *N.J. Super.* at 524)

The Commissioner deems appropos that which was iterated by the Supreme Court in *Dunellen, supra,* as follows:

"***Surely the Legislature, in adopting the very general terms of *L.* 1968, *c.* 303, did not contemplate that the local boards of education would or could abdicate their management responsibilities for the local educational policies or that the State educational authorities would or could abdicate their management responsibilities for the State educational policies. See *Lullo v. Intern. Assoc. of Fire Fighters,* *** 55 *N.J.* at 440; *Bd of Ed., Tp. of Rockaway v. Rockaway Tp. Ed. Ass'n.,* 120 *N.J. Super.* 564, 569 (1972); *cf. Porcelli v. Titus,* 108 *N.J. Super.* 301, 312 (1969), *certif. denied,* 55 *N.J.* 310 (1970).***" (64 *N.J.* at 25)

"***[W]e are satisfied that the Dunellen Board could not legally have agreed to submit to binding arbitration, the soundness or validity of its determination that it would be educationally desirable to consolidate the Chairmanships of the Social Studies Department and the English Department into a newly created Humanities Chairmanship. We are further satisfied that, when nonetheless the issue was actually raised, it should have been presented to the Commissioner of Education for his determination as a dispute arising under the school laws and that, accordingly, the Chancery Division erred in dismissing the Board's action and in entering summary judgment for the Education Association. Strictly this holding relates only to arbitrability but all that has been said earlier in

> this opinion leads to the conclusion that the consolidation was not a proper subject of either arbitration or mandatory negotiation under *N.J.S.A.* 34:13A-5.3.***" (*Id.* at 31)

Similarly, in the instant matter, the Board may neither abdicate nor be stripped of its essential prerogative to assign teachers to supervise pupils' lunch time activities in order that they be conducted in a safe and orderly manner.

A statutory mandate on a board of education may not be nullified or modified through collective negotiations. This precise view was authoritatively stated by the Supreme Court of New Jersey in *Lullo v. International Association of Fire Fighters,* 55 *N.J.* 409 (1970) wherein it was said:

> "***It is crystal clear that in using the term 'collective negotiations' the Legislature intended to recognize inherent limitations on the bargaining power of public employer and employee.*** And undoubtedly they were conscious also that *public agencies,* departments, etc., *cannot abdicate or bargain away their continuing legislative or executive obligations or discretion. Consequently, absent some further changes in pertinent statutes public employers may not be able to make binding contractual commitments relating to certain subjects.****" (*Emphasis supplied.*) (at 440)

Nor may a board adopt a rule or policy contrary to statutory mandate as stated by the Commissioner in *Margaret A. White v. Board of Education of the Borough of Collingswood, Camden County,* 1973 *S.L.D.* 261:

> "***[*A*] *board may not adopt a rule or policy which would in effect either amend a statute or deny the board's authority conferred by statute.****" (*Emphasis supplied.*) (at 263)

Absent authority in law for a board, through negotiations or adoption of a policy or rule, to nullify or annul a statutory mandate, it defies all logic to assume that a board's administrative agents or an arbitrator possess such authority to thwart the legislative will.

Accordingly, it is the declared judgment of the Commissioner, that the Board herein and all boards of education, subject only to the provisions of other pertinent statutes such as that which guarantees a duty-free half-hour lunch and the rules of the State Board of Education, have authority to assign teachers to classroom and non-classroom duties including lunch time supervision. It is further declared that no agreement emanating from collective negotiations, unauthorized actions of administrative agents, or award of an arbitrator may nullify or void the inherent and essential authority of a board to assign teachers to supervise pupils during lunch time activities. The Commissioner so holds. *N.J.S.A.* 18A:11-1; *Long Branch, supra; Dunellen, supra; Englewood, supra*

Lest there be misunderstanding of the foregoing declaratory judgment, the Commissioner is constrained to state that he fully ascribes to the principle that the matter of unfair practice charges involving alleged breach of collectively

negotiated agreements, and scope of negotiations disputes are properly a matter for the jurisdiction of PERC, and that arbitration is an appropriate avenue for the settlement of disputes over terms and conditions of employment when such is provided for in the grievance procedures enunciated in a negotiated agreement. In the instant matter, the Commissioner, having conducted no plenary hearing to establish all of the relevant facts, is neither called upon to, nor makes, further judgment as to whether there was violation of the terms of the existing agreement. Should the parties continue to disagree, the processes, as specified in the agreement, should be followed in resolving further dispute. Having granted the Board's prayer for relief in the form of the foregoing declaratory judgment, the Commissioner finds it unnecessary to retain further jurisdiction in the matter.

COMMISSIONER OF EDUCATION

October 5, 1977
Pending State Board of Education

In the Matter of the Annual School Election Held in the School District of the Township of Upper, Cape May County.

COMMISSIONER OF EDUCATION

DECISION

Petitioner Rudolph Chiorrazzo was an unsuccessful candidate for membership on the Board of Education of the Township of Upper, Cape May County, hereinafter "Board," at the annual school election conducted on March 29, 1977. He alleges that four other candidates, one of whom was elected to Board membership, violated the provisions of *N.J.S.A.* 18A:14-97 with respect to facsimile sample ballots they caused to be printed and circulated prior to the election. Petitioner prays that the Commissioner of Education afford him appropriate relief.

An inquiry was conducted on April 29, 1977 at the office of the Cape May County Superintendent of Schools by a representative of the Commissioner. The report of the inquiry follows:

Petitioner did not appear at the inquiry to present his own testimony or evidence in support of the written allegation.

The collective testimony of Candidates Thomas H. Griffin, Jr., Micheline M. Lord, Irene Cottrill, and Charles E. Town, Jr. established that they caused to be printed and circulated among the electorate the controverted facsimile sample ballot (C-2) which advocates their respective election to Board membership. The

facsimile sample ballot does not show on its face the name and address of the person or persons causing the ballot to be printed and paid for, nor does the ballot show the name and address of the printer who printed the facsimile sample ballots. Testimony of the witnesses disclosed that the document was printed by the firm of Brooks and Idler in Atlantic City.

N.J.S.A. 18A:14-97 is clear and unambiguous in its direction that:

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

The Board Secretary testified that attached to each nominating petition she distributed to persons seeking entry into the annual school election was a series of pertinent statutes extracted from *N.J.S.A.* 18A:14-1 *et seq.* (C-1) One of the reproduced statutes is *N.J.S.A.* 18A:14-97. Candidate Griffin testified that he did receive the series of extracted statutes governing school elections, including *N.J.S.A.* 18A:14-97. He further testified that through oversight he failed to thoroughly review the statutes. Candidates Lord, Cottrill, and Town testified that they, too, received the series of extracted statutes, including *N.J.S.A.* 18A:14-97, but through oversight failed to thoroughly review them.

It is clear that Candidates Griffin, Lord, Cottrill, and Town violated the provisions of *N.J.S.A.* 18A:14-97 by not having their names and addresses printed on the facsimile sample ballots (C-2) they caused to be printed and distributed. It is also clear that the printing firm of Brooks and Idler, Atlantic City, violated the provisions of *N.J.S.A.* 18A:14-97 by its failure to identify itself on the ballot as the firm which printed the ballots.

The representative observes that of the candidates listed on the facsimile sample ballot, only Candidate Town was elected to Board membership.

The representative finds that while the facsimile sample ballot does not set forth the required declarations pursuant to *N.J.S.A.* 18A:14-97, no evidence was presented that the facsimile sample ballot had a deleterious effect upon the proper conduct of the election. The representative recommends that the Commissioner dismiss the complaint.

This concludes the report of the representative.

* * * *

The Commissioner has reviewed the record in the instant matter including the report of the hearing examiner and the exceptions filed thereto by petitioner.

Petitioner complains that the hearing examiner recommends that the matter be dismissed even though violations of *N.J.S.A.* 18A:14-97 were found. The Commissioner finds this exception without merit. The hearing examiner does recommend dismissal of the matter on the grounds that no evidence was presented to establish that the facsimile sample ballot, the document which stands in violation of *N.J.S.A.* 18A:14-97, had a deleterious effect upon the election. The Commissioner agrees with and adopts as his own this finding of the hearing examiner. As the Commissioner said *In the Matter of the Annual School Election Held in the School District of Manasquan,* 1968 *S.L.D.* 104:

> "***[I]t is well established that an election will be given effect and will not be set aside unless it is shown that the will of the people was thwarted, was not fairly expressed, or could not properly be determined. *Love v. Board of Chosen Freeholders,* 35 *N.J.L.* 269 (*Sup. Ct.* 1871); *Petition of Clee,* 119 *N.J.L.* 310 (*Sup. Ct.* 1838); *Application of Wene,* 26 *N.J. Super.* 363 (*Law Div.* 1953), affirmed 13 *N.J.* 185 (1953) There has been no such showing herein.***" (at 107)

Petitioner next complains that the hearing examiner fails to address the testimony of one witness. The Commissioner has reviewed the transcript of the testimony elicited from the witness and finds such testimony has no probative value to the complaint herein.

The Commissioner finds no basis to intervene in this matter. Accordingly, the complaint is dismissed.

COMMISSIONER OF EDUCATION

October 5, 1977

Donna Frick,

Petitioner,

v.

Board of Education of the City of Newark, Essex County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Paul J. Giblin, Esq. (James S. Webb, Jr., Esq., of Counsel)

For the Respondent, Pickett & Jennings (Gary H. Shapiro, Esq., of Counsel)

Petitioner, a teacher formerly employed by the Board of Education of the City of Newark, hereinafter "Board," in September 1971, was notified by letter dated April 10, 1973 from the Board that she would not be reemployed for the 1973-74 school year. She alleges that the Board wrongfully determined not to reemploy her and refused to give her reasons for her non-reemployment. Petitioner prays for an order of the Commissioner of Education directing the Board to reinstate her to her former teaching position with back pay, benefits and increments or, in the alternative, that she be afforded an appearance before the Board and be provided with a statement of reasons for her non-reemployment.

This matter is submitted to the Commissioner for Summary Judgment. Briefs were filed by the parties.

Petitioner was notified by letter dated April 10, 1973 from the Board advising her of non-reemployment pursuant to *N.J.S.A.* 18A:27-10. Thereafter she filed a grievance against the Board which was ultimately heard by a tripartite arbitration panel. On May 24, 1974, the panel rendered a decision which indicated that the Board had violated Article V, Section 1B of the agreement between the Board and the Newark Teachers Union, Local 481, AFT/AFL-CIO; however, it was "powerless to fashion a remedy under these circumstances.***" On December 2, 1974, petitioner filed an Order to Show Cause in the Superior Court of New Jersey, Chancery Division, Essex County, and on June 12, 1975, the Court awarded Summary Judgment and dismissed petitioner's complaint against the Board. Subsequently, on November 5, 1975, petitioner filed a Petition of Appeal before the Commissioner. The Board filed its Answer with Proof of Service on December 3, 1975.

Prior to the conference held at the Department of Education, Trenton, on February 22, 1976, the Board filed a Memorandum of Law and a Motion for Summary Judgment to Dismiss Petitioner's Appeal for failure to state a cause of action and on the equitable doctrine of laches. Petitioner filed a Memorandum

of Law in Opposition to the Board's Motion for Summary Judgment on March 4, 1976. Subsequently, on June 29, 1976, the Commissioner was notified that the Board had changed counsel in the instant matter.

Oral argument on the Board's Motion for Summary Judgment was heard on October 15, 1976.

The Board asserts that petitioner acknowledges receipt of a timely notice of her non-reemployment pursuant to *N.J.S.A.* 18A:27-10. On the basis of the previously stated chronology of events, the Board avers that petitioner delayed for a minimum of one year and closer to two years before proceeding with an action before the Commissioner and, therefore, her claim must be denied by reason of the equitable doctrine of laches.

Petitioner asserts that she had demonstrated a good faith effort to assert her right to reinstatement, to have an appearance before the Board, and to be provided with a statement of reasons for her non-reemployment. Petitioner does not dispute that *Donaldson v. Board of Education of North Wildwood,* 65 *N.J.* 236 (1974) has been construed to apply prospectively only. Thus, petitioner does not rely upon *Donaldson* for the proposition that she should have been afforded an informal appearance and a statement of reasons for her non-reemployment but, rather, she asserts that this duty was imposed upon the Board through the negotiations process.

With regard to petitioner's latter assertion that she had not been granted a statement of reasons for her non-reemployment, the Commissioner observes that there was no showing that petitioner made such a request of the Board. As the Commissioner held in *Barbara Hicks v. Board of Education of the Township of Pemberton, Burlington County,* 1975 *S.L.D.* 332:

> "******A timely written request must be made by the teaching staff member for the written statement of reasons.* In the Commissioner's judgment, a teaching staff member must make such *request within thirty calendar days* from receipt of the Board's written notification of non-reemployment. Subsequently, the local board of education must present the written statement of reasons to the teaching staff member within fifteen calendar days of its receipt of the formal request.***" (*Emphasis supplied.*)(at 334)

It is further noted that subsequent to the award of the arbitration panel on May 24, 1975, there was no showing that petitioner executed a written request for the written statement of reasons but, rather, some five and one-half months later she filed a complaint before the Court.

The Board avers that the final judgment of the Superior Court, Chancery Division, adjudicated the fact that petitioner had failed to present a genuine question of fact, and that this final judgment bars the relitigation of the issue herein by application of the doctrine of *res judicata*. (Memorandum in Support of Respondent's Motion for Summary Judgment, filed February 6, 1976)

The broad doctrine of *res judicata* embodies two main rules. The first finds

that a final judgment of a court of competent jurisdiction on the merits concludes the right of the parties and privies, and constitutes a bar to a new action or suit involving the same cause of action either before the same, or any other, tribunal. Secondly, any right, fact or matter in issue, and directly adjudicated on, or necessarily involved in, the determination of an action before a competent court in which a final judgment is rendered on the merits is conclusively settled and cannot again be litigated between the parties and privies whether or not the claim or demand, purpose or subject matter of the two suits is the same. 50 *C.J.S. Judgments,* 592 The sum and substance of the whole doctrine is that a matter, once judicially decided, is finally decided. The doctrine is grounded on the two maxims that it is in the interest of the state that there should be an end to litigation, and that no one should be vexed twice for the same cause of action.

The case of *Bragg v. King,* 104 *N.J.L.* 4 (*Sup. Ct.* 1928) describes the doctrine as follows:

> "***The doctrine of *res adjudicata,* as defined by our Court of Errors and Appeals, is that the judgment of a court of competent jurisdiction on a question of law or fact, *when litigated and determined,* is, so long as it remains unreversed, conclusive upon the parties and their privies, not only in the suit in which it is pronounced, but in all future litigation between the same parties or their privies, touching upon the same subject-matter. *In re Walsh's Estate,* 80 *N.J. Eq.* 565.***" (*Emphasis supplied.*) (at 6)

A careful scrutiny of the judgment of the Superior Court finds that petitioner failed to present a material question of fact in the instant matter and that the Court indeed granted the Board's Motion for Summary Judgment and dismissed the matter. Therefore, the Commissioner finds that this matter has been adjudicated by a court of competent jurisdiction and is *res judicata*.

The next item to be considered by the Commissioner is the Board's contention that petitioner failed to file her Petition of Appeal in a timely fashion and, therefore, the equitable doctrine of laches serves to bar consideration of her claim.

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

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

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

> "***has established no specific period of time after which an appeal is

barred. Thus in *Gleason v. Bayonne Board of Education,* 1938 *S.L.D.* 138, nine months' delay by a dismissed mechanic was laches; *Carpenter v. Hackensack Board of Education,* 1938 *S.L.D.* 593, six months' delay by dismissed teacher held laches; *Aeschbach v. Secaucus Board of Education,* 1938 *S.L.D.* 598, fourteen months between teacher's dismissal and appeal in this case did not constitute laches; *Wall v. Jersey City Board of Education,* 1938 *S.L.D.* 614 at 618, eleven months' delay of protest by teacher held laches; *Gilling v. Hillside Board of Education,* 1950-51 *S.L.D.* 61, nine months' delay by re-assigned janitor was laches. That the period of time constituting laches varies with the nature of the issue is also apparent. Thus, in *Jackson v. Ocean Township Board of Education,* 1939-49 *S.L.D.* 206, a delay of two months in protesting the award of a transportation contract was unreasonable; while in *Duncan, et al. – In re Annual School Election, East Rutherford,* 1939-49 *S.L.D.* 89, a delay of only three weeks constituted laches in contesting the results of an election.***

"In *Park Ridge vs. Salimone,* 36 *N.J. Super.* 485, affirmed, 21 *N.J.* 28, the Court said:

> 'The courts have long recognized the need for prompt action by public employees in seeking judicial review of their discharge. The reason is obvious. It is important that public duties be carried on without interruption or with as little interruption as possible. A governing body must be allowed to fill the employment in the public service with all necessary dispatch free from unnecessary risk of double payment of wages.' [36 *N.J. Super.* at 494-495]

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

> 'But, the time must come when the appointing authority can rely upon the conclusion of the issue and proceed to make arrangements in the interest of the public to replace the dismissed employee without fear that its action will be undone. *** Although the statutes there involved' – in *Marjon* [*v. Altman,* 120 *N.J.L.* 16 (*Sup. Ct.* 1938)] – 'concerned tenure, the principle is the same.'***"
>
> (at 144-145)

In *Dorothy L. Elowitch v. Bayonne Board of Education, Hudson County,* 1967 *S.L.D.* 78, aff'd State Board of Education 86, aff'd New Jersey Superior Court, Appellate Division, 1968 *S.L.D.* 260 the Commissioner, in considering the question of laches, wrote:

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

> 'While laches, in its legal signification, ordinarily connotes delay that works detriment to another, the public interest requires that the protection accorded by statutes of this class be invoked with

> reasonable promptitude. Inexcusable delay operates as an estoppel against the assertion of the right. It justifies the conclusion of acquiescence in the challenged action. *** *Taylor v. Bayonne,* 57 *N.J.L.* 376; *Glori v. Board of Police Commissioners,* 72 *Id.* 131; *Drill v. Bowden,* 4 *N.J. Mis. R.* 326; *Oliver v. New Jersey State Highway Commission,* 9 *Id.* 186; *McMichael v. South Amboy,* 14 *Id.* 183.'***" (at 85)

Petitioner's assertion that consideration of laches is inappropriate must fail. The application of laches was raised by the Board as a separate defense in the Answer. The applicability of the equitable doctrine of laches must be determined within the context of the relevant facts in each individual matter. *Bookman v. R.J. Reynolds Tobacco Co.,* 138 *N.J. Eq.* 312, 406 (Ch. 1946) Herein, petitioner delayed filing the Petition of Appeal for a period of nearly thirty-one months after her notification of non-reappointment and eighteen months subsequent to the award of the arbitration panel.

Petitioner's delay in filing was fatal. The lengthy delay in filing the Petition of Appeal was occasioned by her own neglect. The Commissioner determines that this constitutes inexcusable delay within the context of *Park Ridge, supra.* Similarly, it is determined that her neglect worked sufficient detriment to invoke the bar of laches. *Marjon, supra*

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

COMMISSIONER OF EDUCATION

October 5, 1977

Alan DeOld and the Verona Education Association,

Petitioners,

v.

Board of Education of the Borough of Verona, Essex County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Mandel, Wysoker, Sherman, Glassner, Weingartner & Feingold (Jack Wysoker, Esq., of Counsel)

For the Respondent, Parisi, Evers & Greenfield (Irving C. Evers, Esq., of Counsel)

Petitioner contests the action taken by the Board of Education of the Borough of Verona, hereinafter "Board," which established his salary for the 1975-76 academic year at the same rate of pay he received for the 1974-75 academic year. Petitioner's salary will thereafter remain one step below the salary established for teachers at his step on the salary guide until he reaches the maximum level. Petitioner asserts that his rights have been violated and that the Board's determination regarding his salary is arbitrary, capricious and unreasonable. He prays for restoration of his withheld increment.

The Board denies petitioner's allegations stating that petitioner gave his consent to have an increment withheld on mutually agreed-upon restrictions rather than test the Board's earlier determination not to reemploy him.

The facts in this matter were adduced at a hearing held on September 14 and 15, 1976 at the office of the Essex County Superintendent of Schools, East Orange. Numerous documents were received in evidence and Briefs were filed subsequent to the hearing. The report of the hearing examiner follows:

Petitioner was employed for the 1972-73, 1973-74, and 1974-75 academic years. He was subsequently reemployed for the 1975-76 academic year and now enjoys a tenure status. His tenure status is not in question. Rather, the issue of the instant Petition of Appeal is the Board's determination to withhold petitioner's increment for the 1975-76 academic year and subsequent years, and the manner in which this was accomplished.

It is stipulated that petitioner is an excellent teacher. (Tr. II-355) The principal of Verona High School evaluated petitioner in March 1975 and he testified that petitioner is always first to volunteer his services; that he is committed to Verona and the high school; that his loyalty and interest cannot be matched; that he shows mature and good judgment and amicably resolves problems in his department of which he is chairman. (Tr. II-356-357) The

principal (now supervisor of instruction) testified that his opinion of petitioner has not changed and that he considers him a superior teacher. (Tr. II-358)

Petitioner was also advisor to a coin club in the high school. In this capacity he met with club members after school and advised them about the value of coins and coin sets. A coin set is a collection of a certain series of coins which is given a dollar value and reported in the "Red Book," a guide book of United States coins. (Tr. I-8; P-J) As a general practice, he did not buy coins or sets for or from these club members, nor did he sell coins for them. (Tr. I-10-11) Nevertheless, he testified that a high school senior boy, not a club member, hereinafter "G.D.," approached him before and after school on several occasions and tried to sell him several coin sets. Petitioner refused at first, but later told G.D. he would buy them or find buyers for them. (Tr. I-11-13) It was this decision and the resultant developments, *post,* that led ultimately to the Board's determination to withhold his increment.

Petitioner testified that G.D., then seventeen or eighteen years of age, brought ten coin sets to school and that he appraised them for him. G.D., also a coin collector, told petitioner that he paid $2.50 for each set and wished to sell them for $3.00. Petitioner told G.D. that the sets were valued at $5.50 according to the Red Book. He bought them from G.D. for $3.50 per set ($35.00), fifty cents more than G.D. had requested. Petitioner testified that he told G.D. that the Red Book reported the retail guide for coin sets and that the sets are bought and sold at wholesale prices, below the regular price as reported in the Red Book. He testified, further, that he told G.D. he would not profit from the resale of the coin sets since any gain would barely offset his expenses for his time, telephone calls and use of his car to deliver coins. (Tr. I-11-14)

Petitioner thought that was the end of his dealings with G.D. (Tr. I-14-15) A week or so after delivering the ten coin sets to petitioner, sometime in November 1974, G.D. brought an additional fifteen coin sets to petitioner. Petitioner testified that he told G.D. that he was not interested in the sets and that he did not have money in hand for them. G.D. stated that petitioner could pay him anytime if he would just take the sets and sell them for him; moreover, he was afraid the coin sets would not be safe in his school locker. (Tr. I-14-15) Petitioner accepted the coin sets and began contacting other coin dealers in an effort to sell them. He had now received a total of twenty-five coin sets. Petitioner sold eighteen coin sets to one dealer for $4.15 each and had commitments for five of the remaining seven sets. (Tr. I-15-16) Thereafter he sold one of the five committed sets for $5.00. He received $13.20 above the amount he paid G.D. for the coin sets. (Tr. I-16-19)

Petitioner testified that a few days after G.D. delivered the final fifteen coin sets, he sought to have them returned, stating that the man from whom G.D. had purchased them wanted them back. (Tr. I-19) Petitioner returned the two uncommitted sets and told G.D. that he doubted if the others could be retrieved. Petitioner had four committed sets remaining in his possession which, he testified, he considered as sold, a practice followed by coin dealers. (Tr. I-19-21)

Petitioner testified that he was called at his home by G.D.'s mother on December 19, 1974, and that she stated that the coins belonged to her and she wanted them back. He tried to explain to the parent the transactions with G.D. as hereinbefore related, but the mother was unyielding. They talked for two hours. (Tr. I-21-24) Petitioner told the parent he would try to retrieve the original sets but he doubted if that were possible. The parent reported this incident to the school principal who later met with her and with petitioner in an attempt to resolve the problem. It was decided that petitioner would retrieve or replace the coin sets in the interest of good school public relations. (Tr. I-25-30) Petitioner did his best to replace the coin sets and even offered more money than their retail value in an attempt "***to shake them loose from people who had them.***" (Tr. I-27)

At this juncture, the parent began pressuring the school administrators, demanding that the coin sets be returned. In January 1975, petitioner had a meeting with his principal who told him that G.D.'s mother would be satisfied if the coins were replaced. (Tr. I-28-29) The principal testified that the parent was unwilling to accept substitute coin sets. (Tr. II-344) In any event, petitioner retrieved or gathered twenty-three coin sets to return to the parent. (Tr. II-349-350) The principal testified that he had received all twenty-three replacement or original coin sets from petitioner within two and one-half weeks after the parent had complained to him and that he was delighted because he thought the problem was resolved by January 31, 1975. (Tr. II-351; P-P)

The parent sued petitioner for the coin sets she believed were more valuable than appraised and paid for. Over the objection of the Board, the hearing examiner received the court transcript of this suit which discloses that no judgment was made against petitioner and the court directed that the twenty-three coin sets be returned to G.D.'s mother and petitioner be reimbursed $80.50, the total amount he paid G.D. (C-1) When this matter was not resolved and became a problem for the Board, a philosophical difference arose between the Board and petitioner. The Board considered this as a school related matter, interceded through its administrators and attempted to settle the dispute. (Tr. II-345-348; P-K; P-Q) Petitioner maintained that the conflict was private, not school related; therefore, he was reluctant to disclose the names of fellow coin dealers because he believed they would be harassed by G.D.'s mother. (Tr. II-345-348) Because of this philosophical difference and the fact that the dispute with the parent continued unabated, the Board decided, after reviewing the incident in March 1975, that petitioner's contract would not be renewed. The Board President testified that the Board had heard many conflicting stories and the Board concluded that petitioner had not been dealing openly and directly with the school administrators to resolve the problem. (Tr. I-144-148)

After being notified that his contract would not be renewed, petitioner requested and was given an audience before the Board. He was successful in dissuading the Board from terminating his employment; however, the Board President testified that the Board was distressed that petitioner still believed that he had done nothing wrong, and had not exhibited poor judgment in his dealings

with a school pupil. (Tr. I-149-150) As a result of that meeting, the Board decided to issue petitioner a fourth or tenure contract which imposed certain restrictions on petitioner and withheld his increment for the 1974-75 and subsequent academic years. The April 22, 1975 memorandum setting forth these restrictions is the subject of the instant dispute and is set forth in its entirety as follows:

> "Following the informal hearing granted you on Saturday, April 12, the Verona Board of Education reviewed the circumstances leading up to its decision not to issue an employment contract to you for the school year 1975-1976. The Board finds the reasons noted for this non-issuance still valid.
>
> 1. That you made an error in judgment in not being completely open, honest and forthright in discussing the situation of the coins at the outset with Mr. Iuso and Dr. Rainey.
>
> 2. That you withheld relevant information needed to resolve the issue on the sale and amount of profit made on the coins.
>
> 3. That you overreached your position of trust and integrity as a teacher in relationship with a student.
>
> "The Board is concerned that you have not agreed with its findings and thus may continue in like fashion in the future. However, the Board will consider issuance of a contract to you for 1975-1976 providing that you:
>
> 1. Agree to discontinue your past practice of buying and selling items with students.
>
> 2. Agree to accept without challenge, now or in the future, an employment contract for the year 1975-1976 at the same rate of pay as the year 1974-1975; the withholding of this salary increase to be permanent.
>
> "The acceptance of this agreement will assure the Board that you are aware of the seriousness of these actions and that they will not be repeated in the future." (Exhibit C)

Petitioner accepted the Board's offer of a tenure contract with all of its restrictions. (Exhibit D) The instant Petition of Appeal followed and one of the Board's affirmative defenses is that petitioner is estopped from appealing because he wrongfully induced the Board to enter into the agreement setting forth the terms of his tenure contract. (Board's Answer, Separate Defenses; Exhibit D)

The hearing examiner cannot agree. Petitioner accepted the new contract rather than unemployment. In these times of nationwide teaching staff reductions, it is not difficult to understand why petitioner accepted the Board's offer. Petitioner had no viable alternative. The Board did. The Board believed

that petitioner used poor judgment in his dealings with a pupil and it expressed dismay over its inability to so convince petitioner. (Tr. I-149-150)

The hearing examiner believes that the Board's reasons were determined in good faith and that they were sufficient in content to terminate petitioner's employment as the Board initially intended. (See Exhibit C, *ante.*) When the Board relented and decided to offer reemployment, it did so on terms which are untenable, in the hearing examiner's judgment. The fact that its penalty is less severe than termination of employment cannot justify the severity of the penalty it exacted. If fully carried out, petitioner's lost salary will be in excess of $5,000. (Tr. I-58-64) Further, the hearing examiner believes that the Board erred by inducing petitioner to accept its constraints. (Exhibit D) In so doing, it attempted to have petitioner surrender a statutory right, the right to contest a determination to withhold an increment. *N.J.S.A.* 18A:29-14 This right of appeal was pointed out to petitioner by letter from the Board, after he tried to modify the penalty through the district's grievance procedure. (Exhibits H, I)

In the hearing examiner's opinion, petitioner used poor judgment in his financial dealings with a school pupil. His inability to understand a teacher's delicate relationship with pupils in this regard, and the Board's justifiable concern about his actions and the resultant notoriety in the community is unfortunate. As clouded as this issue became before the Board, the hearing examiner is convinced that petitioner was honest and forthright in his answers and dealings with the Board.

Petitioner did everything he could reasonably be expected to do to return the coin sets, and if he withheld certain information from the Board or its agents it was for the protection of other coin collectors rather than an attempt to confuse or evade resolution of the issue.

The Board's assertion that the Verona Education Association lacks standing in this matter is not supported in law. *Winston v. Board of Education of South Plainfield,* 64 *N.J.* 582 (1974) Nor is there a finding that petitioner is guilty of laches. He tried to resolve this matter through the grievance procedure after receiving his first pay in September 1975. He was unsuccessful and he appealed to the Commissioner, as recommended by the Board. (Exhibit I)

The hearing examiner finds and recommends as follows:

1. Petitioner used poor judgment in his dealings with a school pupil.

2. The Board has the statutory and discretionary authority to withhold increments and adjustment increments. *N.J.S.A.* 18A:29-14

3. Petitioner's statutory right to appeal the withholding of his increments cannot be denied by the Board, and Exhibit D is, therefore, *ultra vires. Margaret A. White v. Board of Education of Collingswood, Camden County,* 1973 *S.L.D.* 261

4. The penalty of a permanent withholding of an increment is excessive and disproportionate in the context of the total circumstances of this matter.

5. The hearing examiner recommends that the Commissioner modify the Board's penalty.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record in the instant matter, including the report of the hearing examiner, and has considered the exceptions filed thereto by the litigants.

The Commissioner accepts the findings and recommendations of the hearing examiner with the exception that the Commissioner will not modify the Board's penalty.

In *Thomas v. Morris Township Board of Education,* 89 *N.J. Super.* 327 (*App. Div.* 1965), aff'd 46 *N.J.* 581 (1966) the Court commented as follows:

> "***We are here concerned with a determination made by an administrative agency duly created and empowered by legislative fiat. 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.***" (at 332)

Similarly, it was stated in *James McCabe v. Board of Education of the Township of Brick, Ocean County,* 1974 *S.L.D.* 299, aff'd State Board of Education 315, aff'd Docket No. A-3192-73 New Jersey Superior Court, Appellate Division, April 2, 1975 (1975 *S.L.D.* 1073) that:

> "***The Commissioner has in numerous instances been called upon, in his quasi-judicial capacity, to make determinations regarding the reasonableness of the actions of local boards of education. The Commissioner will, in determining controversies under the school laws, inquire into the reasonableness of the adoption of policies, resolutions, or bylaws, or other acts of local boards of education in the exercise of their discretionary powers, but will not invalidate such acts unless unreasonableness clearly appears. See 62 *C.J.S., Municipal Corporations* § 203. *Cf. Kopera v. West Orange Board of Education* [60 *N.J. Super.* 288 (*App. Div.* 1960)] ***" (at 307-308)

The Commissioner concurs with the hearing examiner's finding that petitioner used poor judgment in his dealings with a school pupil and that the Board exercised its statutory and discretionary authority in withholding his increment. Accordingly, the Commissioner will not interpose his judgment for that of the Board absent a showing that its action was unreasonable. The hearing examiner stated, *ante,* that the Board's reasons were determined in good faith

and they were sufficient in content to terminate petitioner's employment as the Board initially intended. If its reason was sufficient for termination, it was also sufficient for permanently withholding an increment.

The Commissioner affirms the action of the Board; nevertheless, he is constrained to comment on petitioner's excellent record as a teacher and the laudatory comments in his behalf found in the testimony of the supervisor of instruction, his former principal. In this regard, the Commissioner suggests that the Board review its earlier determination in this matter with the view that it might reconsider the penalty imposed.

The Board's action in the instant matter, bearing no taint, was within the scope of its statutory and discretionary authority. *N.J.S.A.* 18A:29-14 Accordingly, petitioner's prayer for relief will not be granted. The Petition of Appeal is without merit and is dismissed.

COMMISSIONER OF EDUCATION

October 5, 1977
Pending State Board of Education

Susan Zink,

Petitioner,

v.

Board of Education of the City of Salem, Salem County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Goldberg, Simon & Selikoff (Joel S. Selikoff, Esq., of Counsel)

For the Respondent, William C. Horner, Esq. (Meyer Silver, Esq., on the Brief)

Petitioner, a nontenure teaching staff member who had been employed for three academic years by the Board of Education of the City of Salem,

hereinafter "Board," alleges that she was not given the true reasons why her employment was not continued by the Board for the 1976-77 academic year and that its actions were arbitrary, capricious, in bad faith and violative of her constitutional rights. On this basis, petitioner demands immediate reinstatement together with compensation she would have received had her employment continued. The Board denies the allegations and asserts that its action with respect to the non-reemployment of petitioner is in all respects proper and legal. The Board seeks dismissal of the matter by way of Summary Judgment on the ground that no sufficient cause exists for an adversary hearing before the Commissioner of Education and that the Commissioner lacks jurisdiction to determine such appeal. Petitioner filed a Cross-Motion for a plenary hearing and to deny the Motions advanced by the Board.

The matter comes directly to the Commissioner on the pleadings, affidavits, exhibits and Briefs filed by the parties in support of their respective positions.

The relevant facts, as stipulated by the parties, are as follows:

Petitioner, a classroom teacher of business education for the 1973-74, 1974-75 and 1975-76 academic years, was notified by the Board by letter dated March 26, 1976 that she would not be offered a contract of employment for the academic year 1976-77.

By letter dated March 30, 1976 petitioner requested a statement of reasons from the Board for its decision not to offer her reemployment which was supplied by letter dated April 6, 1976. On the same date petitioner requested an informal appearance before the Board which was granted by letter dated April 12, 1976 and scheduled for April 26, 1976. Petitioner, along with a representative of her choice, appeared before the Board and submitted documents and other evidence and made a statement on her own behalf. Petitioner was notified, by letters dated April 27 and 28, 1976, that the Board had not altered its determination not to reemploy her for the 1976-77 academic year.

It was further stipulated at the conference of counsel held on November 1, 1976 that the Board afforded petitioner all the procedural steps as provided by *N.J.A.C.* 6:3-1.20. Petitioner further stipulated by letter dated November 2, 1976, that the Board did not replace her with another teacher subsequent to its determination not to renew her employment for the 1976-77 school year.

Petitioner argues that the Board's statement of reasons with regard to her non-reemployment was either false and/or without basis in fact. Petitioner alleges that the Board determined not to renew her contract because she filed a grievance protesting the procedure used to fill a vacancy for a vice-principal position at the high school on the grounds that such procedure was in violation of the negotiated agreement between the Education Association and the Board. (Petition of Appeal, at p. 4)

Petitioner submits that in January 1976 she instituted a grievance

according to the dictates of the agreement at Level One of the grievance procedure which provides, *inter alia,* as follows:

> "***Level One* – a member of the unit shall first discuss his complaint with his principal, with the objective of resolving the matter informally.***" (Petitioner's Brief, at p. 4)

Petitioner alleges in her Petition of Appeal and affidavit that, as a result of having filed the informal grievance, the Board determined not to reemploy her, thus violating her grievant-employee's constitutional rights as provided by Article I, paragraph 19 of the New Jersey Constitution.

Petitioner asserts that, with respect to the United States Constitution, the filing of a grievance may be considered a form of speech or expression protected by the First and Fourteenth Amendments wherein the United States Supreme Court has held that local boards of education may not refuse to reemploy a teacher because of membership in a labor union or exercise of constitutional rights. *Pickering v. Board of Education,* 391 *U.S.* 563, 88 *S.Ct.* 1731, 20 *L.Ed.2d* 811 (1968); *Shelton v. Tucker,* 364 *U.S.* 479, 81 *S.Ct.* 274, 5 *L.Ed.2d* 231 (1960); *Keyishian v. Board of Regents,* 385 *U.S.* 589, 87 *S.Ct.* 675, 17 *L.Ed.2d* 629 (1967); and *Board of Regents of State Colleges v. Roth,* 408 *U.S.* 564, 92 *S.Ct.* 2701, 33 *L.Ed.2d* 548 (1972)

Petitioner alleges that the Board's statement of reasons not to reemploy her was untrue and legally insufficient. She refutes the Board's claim that her non-reemployment was based upon "reduction in force/economy" reasons, and avers that the Board, rather, has used this claim as an afterthought. Petitioner cites paragraph ten of the statement of reasons provided to her by the Board as follows:

> "***In view of the present budget crunch, the business department can survive with one less teacher during the school year 1976-77, thus saving the budget more than $10,000.00." (Petitioner's Exhibit No. 1)

Petitioner argues that had this been a true reason the wording of the paragraph would have been different and suggests that it should have read, "Due to our present budgetary restrictions we have decided to make a reduction in force, therefore***." (Petitioner's Brief, at p. 18)

Finally, petitioner argues that the office of the Commissioner, pursuant to *N.J.S.A.* 18A:6-9, is the appropriate forum for resolution of the Petition of Appeal in the instant matter and, therefore, requires a plenary hearing.

The Board avers that it had no knowledge of petitioner's filing a grievance at Level One of the negotiated agreement prior to her filing the instant Petition of Appeal before the Commissioner. Petitioner failed to advance her theory of "retaliation due to grievance filing" at the time of her informal appearance before the Board. If such a claim was within the knowledge of petitioner, neither she nor her designated representative made such a claim or conveyed such knowledge to the Board at the appearance, asserts the Board. Additionally, the

Superintendent of Schools in paragraph thirteen of his affidavit states that neither he nor the Board was aware of any grievance having been filed by petitioner. The Board argues, therefore, that petitioner should be estopped from raising such an allegation subsequent to her informal appearance and for the first occasion in her Petition of Appeal. *Feldman v. Urban Commercial, Inc.*, 70 *N.J. Super.* 463 (*Chan. Div.* 1961)

The Board notes that petitioner has stipulated that it met all the procedural requirements provided by *N.J.A.C.* 6:3-1.20. It argues that petitioner has failed to specifically delineate any actual act or reason by the Board which was proscribed or in violation of her statutory and/or constitutional rights. *Donaldson v. Board of Education of North Wildwood,* 65 *N.J.* 236 (1974); *George A. Ruch v. Board of Education of the Greater Egg Harbor Regional High School District, Atlantic County,* 1968 *S.L.D.* 7, 11, aff'd New Jersey Superior Court, Appellate Division, 1969 *S.L.D.* 202; *Barbara Hicks v. Board of Education of the Township of Pemberton, Burlington County,* 1975 *S.L.D.* 332 In *Claire Haberman v. Board of Education of the Borough of Morris Plains, Morris County,* 1975 *S.L.D.* 848 the board observed that a nontenured teacher was refused a hearing before the Commissioner to contest the alleged arbitrary and untrue reasons for her non-reemployment offered by the board. The Board notes that the Commissioner accepted that board's contention that there was an insufficient basis in the petition of appeal to warrant a hearing before the Commissioner. The Board also cites *Linda McCorkle v. Board of Education of the City of South Amboy, Middlesex County,* 1976 *S.L.D.* 733 and *Mary Ann McCormack et al. v. Boards of Education of the Northern Highlands Regional High School District or the Borough of Fair Lawn, Bergen County,* 1976 *S.L.D.* 754, aff'd State Board of Education January 5, 1977, wherein the Commissioner denied a plenary hearing and held that he would not "***substitute his judgment for that of the board members on matters which are by statute delegated to the local boards.***" (at 760)

The Board argues, therefore, in light of the Commissioner's determination not to substitute his judgment for that of a duly empowered board and absent a clear demonstration of a proscribed action or violation of petitioner's constitutional rights, the Petition of Appeal should be dismissed.

The Board avers that its decision not to reemploy petitioner was based, in part, on its desire to effectuate a reduction in force for economy reasons. It contends that petitioner's affidavit attacked nine of the Board's ten reasons not to reemploy her; however, she failed to respond to or deny the Board's reduction in force/economy justification. In addition, the Board relies upon the Superintendent's affidavit wherein he stated that one staff member from each of the areas of business education and home economics was reduced for reasons of economy and that the positions were eliminated and not reinstated. Petitioner's position in the area of business education was one of those eliminated. The Board argues, therefore, that petitioner's failure to controvert its reduction in force justification is grounds to dismiss the Petition of Appeal.

The Commissioner has considered the total record herein and finds that petitioner has failed to state a cause of action upon which her requested relief

could be granted. Petitioner does not assert that her procedural due process, as provided by *N.J.A.C.* 6:3-1.20, was violated by the Board. On the contrary, she stipulated that she was afforded full compliance with the requirements. In this regard, the Commissioner finds no merit in petitioner's allegation, subsequent to the informal appearance before the Board, that it had violated her statutory and constitutional rights with respect to her filing of a grievance. There was no showing that petitioner entertained such an allegation at the time of her appearance before the Board, nor that the Board had knowledge of her actions. The Commissioner determines that petitioner's assertion of deprivation of her constitutional rights does not rise to the level of the Court's finding in *Winston v. Board of Education of South Plainfield,* 125 *N.J. Super.* 131 (*App. Div.* 1973) for consideration of a full plenary hearing.

The Commissioner is constrained to observe that this Board, as well as other boards of education throughout the State, has been confronted with uncertainties with respect to its fiscal plans. The rising costs of instruction and declining pupil enrollments have compelled boards to effectuate reductions in their teaching force for reasons of economy. The Commissioner finds that in its statement of reasons not to renew petitioner's employment, the Board addressed itself to such a consideration. Additionally, petitioner stipulated that the Board did not replace her subsequent to her dismissal. As a nontenured employee, petitioner has no property right to continued employment. *Roth, supra; Sallie Gorny v. Board of Education of the City of Northfield et al., Atlantic County,* 1975 *S.L.D.* 669

Accordingly, the Commissioner concludes that the Board and its administrative officers, neither in whole nor in part, acted against petitioner in an arbitrary, capricious, or unreasonable manner, nor in illegal reprisal in violation of her constitutional right of free speech. Rather, the Commissioner finds the Board's determination a proper exercise of its discretionary authority conferred by statute. Absent a finding of illegal action of impropriety by the Board or its administrative staff, the Board's determination is entitled to a presumption of correctness. *Robert B. Lee v. Board of Education of Montclair, Essex County,* 1972 *S.L.D.* 5; *Quinlan v. Board of Education of North Bergen,* 73 *N.J. Super.* 40 (*App. Div.* 1962)

Petitioner has failed to sustain the burden of proof required to validate the authenticity of her allegations. Accordingly, the Petition of Appeal is found without merit and is dismissed. Summary Judgment is granted to the Board.

COMMISSIONER OF EDUCATION

October 11, 1977
Pending State Board of Education

Kathryn R. Fox,

Petitioner,

v.

Board of Education of the Watchung Hills Regional High School District, Somerset County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

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

For the Respondent, Buttermore and Mooney (Robert J. T. Mooney, Esq., and William S. Jeremiah, Esq., of Counsel)

Petitioner who was employed as a nontenured teacher of biology from September 1974 through June 1976 by the Watchung Hills Regional Board of Education, hereinafter "Board," alleges that the Board wrongfully and illegally refused to tender her an employment contract for the 1976-77 school year. The Board, conversely, asserts that its non-reemployment of petitioner was a legal exercise of its discretionary authority in conformance with its employment policies.

Both parties to the dispute having filed notice of Motion for Summary Judgment, the matter comes before the Commissioner of Education in the form of the pleadings, exhibits marked into evidence at the conference of counsel of December 29, 1976, affidavits and Briefs. The following uncontroverted facts reveal the contextual setting of the controversy:

Petitioner was in her second year of service as a biology teacher when she was notified by the Board in April 1976 that her contract would not be renewed. When she requested reasons for non-reemployment she was informed by letter from the then Superintendent as follows:

> "***You were recommended to the Board of Education by the administration, but, with reservations. These reservations included the following:
>
> 1. A concern about large percentage of low marks and failing grades to pupils in K classes.
>
> 2. An abnormal pattern of pupil requests to transfer from your classes.
>
> "The Board of Education, in reviewing non-tenure appointments for 1976-77 took the position that no teacher should be reappointed if the

administration held reservations about the performance of a teacher and has adhered to that position. The Board of Education stated that this is an important part of the Board's aim to up-grade the staff of the school."
(J-1)

The Board afforded petitioner an informal appearance on June 21, 1976 but on July 7 confirmed its earlier determination not to reemploy her for the ensuing year. (J-3, 5)

Petitioner's evaluations by the head of the science department and the vice-principal during 1975-76 contained but a single constructive criticism and may only be characterized as laudatory. Therein she was commended for subject matter competency, appropriate teaching techniques, high standards, participation in the science department, professionalism, attention to detail, dedication, and responsiveness to constructive criticism. Both of these supervisors recommended, without reservation, that she be reemployed for 1976-77. (J-6-8) Petitioner's principal evaluated the lesson he observed as satisfactory. (J-9)

A comparison of grades assigned by petitioner with those assigned by the three other biology teachers in the science department to college preparatory biology pupils, as supplied by the affidavit of the principal (now Superintendent), follows:

1974-75 Biology K (College Preparatory)

Grade	Petitioner		Others	
A	5	4.3%	15	8.4%
B	16	13.8%	57	31.8%
C	42	36.2%	84	46.9%
D	38	32.8%	20	11.2%
F	15	12.9%	3	1.7%
	116	100%	179	100%

1975-76 Biology J (College Preparatory, Honors)

Grade	Petitioner		Others	
A	10	25.0%	19	33.9%
B	14	35.0%	26	46.4%
C	10	25.0%	11	19.6%
D	5	12.5%	–	
F	1	2.5%	–	
	40	100%	56	99.9%

1975-76 Biology K (College Preparatory)

Grade	Petitioner		Others	
A	5	7.5%	17	7.6%
B	12	17.9%	51	22.9%
C	23	34.3%	74	33.2%

D	23	34.3%	56	25.1%
F	4	6.0%	25	11.2%
	67	100%	223	100%

The principal also affirmed in the aforesaid affidavit that during the two years of petitioner's employment he had

> "***received from the head of the Guidance Department the written advice that reports from guidance counsellors established that more requests were made, by parents and pupils, for transfer from Mrs. Fox's classes than for transfer from classes of any other teacher in the school."

The Board contends that it legally terminated petitioner's employment and that there is no legitimate issue before the Commissioner for determination. It is argued that, absent a denial of due process, even under the harsh test of construing that the allegations of the petitioner are, for purposes of the Motion, admitted, there is no cause of action for which relief may be granted under existing school law. In this regard the Board cites and quotes extensively dicta from *Donaldson v. Board of Education of North Wildwood,* 65 *N.J.* 236 (1974); *George A. Ruch v. Board of Education of Greater Egg Harbor Regional School District, Atlantic County,* 1968 *S.L.D.* 7; *Barbara Hicks v. Board of Education of Pemberton Township, Burlington County,* 1975 *S.L.D.* 332; *Jo-Ann Krill et al. v. Board of Education of the Borough of Red Bank, Monmouth County,* 1976 *S.L.D.* 245; *Mary Ann McCormack et al. v. Board of Education of Northern Highlands Regional High School District or the Borough of Fair Lawn, Bergen County, et al.,* 1976 *S.L.D.* 754, aff'd State Board of Education January 5, 1977; *Donald Banchik v. Board of Education of the City of New Brunswick, Middlesex County,* 1976 *S.L.D.* 78. (Respondent's Brief, at pp. 4-12)

The Board argues further that petitioner has failed to detail specific instances in support of her allegations that the Board's action was illegal or in violation of her constitutional rights. *Patricia Peters v. Board of Education of the Township of North Brunswick, Middlesex County,* 1977 *S.L.D.*____(decided February 8, 1977), aff'd State Board of Education July 6, 1977; *Sallie Gorny v. Board of Education of Northfield et al., Atlantic County,* 1975 *S.L.D.* 669; *Mary C. Mihatov v. Board of Education of the Borough of Woodcliff Lake, Bergen County,* 1977 *S.L.D.*___ (decided January 5, 1977)

The Board argues that, even if petitioner was not told that her grading practice was unduly harsh, it was not precluded from taking that aspect of her teaching performance into account when considering the matter of her reemployment. It is further contended that petitioner's recommendations by its administrators were not unanimously without reservation and that, even if they were, it would not be bound by those recommendations in exercising its statutory discretion. *Mihatov, supra; McCormack, supra* (Respondent's Reply Brief, at pp. 5-8)

Petitioner argues, conversely, that the Board's grading policies were insufficiently detailed and that she was at no time advised that her grading

system or her teaching methods were inappropriate. She avers that any apparent severity in her grading system resulted only from the laxness and leniency of her fellow teachers. (Petitioner's Brief, at pp. 4-7) It is argued further that, since she was encouraged by her supervisors in her teaching methods and grading system, the Board's criticism for these same factors constitutes sufficient evidence that its determination was arbitrary, unreasonable, and capricious. (*Id.*, at pp. 8-11)

Petitioner cites *Gorny, supra,* to buttress her contention that she was entitled to candid evaluations and timely notice of dissatisfaction which were not revealed to her until after her notice of non-reemployment. Additionally cited are, *inter alia, Moses Cobb v. Board of Education of the City of East Orange, Essex County,* 1975 *S.L.D.* 1047, aff'd State Board of Education 1976 *S.L.D.* 1135; *Banchik, supra; Dee Foster et al. v. Board of Education of the Township of Neptune, Monmouth County,* 1976 *S.L.D.* 693; *Drown v. Portsmouth School District,* 435 *F.2d* 1182 (1 *Cir.* 1961), *cert.* den. 402 *U.S.* 972 (1971); *Bayshore Sewerage Co. v. Department of Environmental Protection,* 122 *N.J. Super.* 184 (*Chan. Div.* 1973); *Gorny, supra.* Petitioner, having moved for Summary Judgment, also contends that if she is denied Summary Judgment she should, in the alternative, be afforded a plenary hearing.

The Commissioner has on various occasions set aside the non-reemployment by boards of education of nontenured teachers when it was determined that their protected rights were violated. *Elizabeth Rockenstein v. Board of Education of the Township of Jamesburg, Middlesex County,* 1974 *S.L.D.* 260, 1975 *S.L.D.* 191, aff'd State Board of Education 199, aff'd Docket Nos. A-3916-74, A-4011-74 New Jersey Superior Court, Appellate Division, July 1, 1976 (1976 *S.L.D.* 1167); *North Bergen Federation of Teachers, Local 1060, American Federation of Teachers, AFL-CIO and Beth Ann Prudente v. Board of Education of North Bergen, Hudson County,* 1975 *S.L.D.* 138 At other times the determinations of boards of education to not reemploy nontenured teachers have been affirmed by the Commissioner when no constitutional or statutory violation or abuse of discretion was proven. *Gorny, supra; Peters, supra*

Petitioner contends that her constitutional rights were violated but fails to detail in her Petition of Appeal or Brief a single instance supportive of a conclusion that such violation may have occurred. *Marilyn Winston et al. v. Board of Education of the Borough of South Plainfield, Middlesex County,* 1972 *S.L.D.* 323, aff'd State Board of Education 327, reversed and remanded 125 *N.J. Super.* 131 (*App. Div.* 1973), aff'd 64 *N.J.* 582 (1974) The Superior Court stated:

> "***It may be acknowledged that the bare assertion or generalized allegations of infringement of a constitutional right does not create a claim of constitutional dimensions. Cf. *Trap Rock Industries, Inc. v. Kohl,* 63 *N.J.* 1 (1973)***" (125 *N.J. Super.* at 144)

In the instant matter petitioner has failed to offer detailed instances which would lend credence to her generalized allegation that her constitutional rights were violated. Nor is there a showing either that her due process rights were denied or that the statutes were violated. The Commissioner determines that

such bare assertion provides no basis or cause of action and proceeds to determine the sole remaining issue of whether the actions of the Board or its agents were arbitrary, unreasonable or capricious.

Petitioner contends that a finding of capriciousness would, *ipso facto,* require that she be reinstated. The Commissioner does not agree. In *David Payne v. Board of Education of the Borough of Verona, Essex County,* 1976 *S.L.D.* 543, aff'd State Board of Education 554, both the Verona Board and its administrators were found to have acted capriciously by executing a teaching contract with Payne prior to April 30 and terminating that contract in June without sufficient reason. In that case the Commissioner stated:

> "***The Board and its administrators, herein, acted in a capricious manner as previously determined, While such action does not divest the Board of the right to terminate the contract it issued to petitioner in March 1974, such action may not be taken with impunity. The Commissioner so holds. Accordingly, it is ordered that the Board pay petitioner the entire amount of his contractual salary for the 1974-75 school year as specified by the contract entered into in March 1974, together with such emoluments and benefits, excepting tenure, which would normally have accrued to petitioner had he been employed by the Board during the 1974-75 school year. Petitioner's prayers for reinstatement and a declaration that tenure accrued therewith are denied." (at 554)

In the instant matter, by contrast, it is clearly shown that the Board did not offer petitioner a contract and notified her in timely fashion of non-reemployment prior to April 30, 1976 in compliance with *N.J.S.A.* 18A:27-10. It is also evident that when reasons and an informal appearance were requested the Board complied, in timely fashion, thus affording due process pursuant to *Donaldson, supra,* and *Hicks, supra.* No further attention to the matter of due process is required.

Nevertheless, it remains to determine whether, for other reasons, petitioner's charge that the Board acted unreasonably, arbitrarily or capriciously has merit. The Board gave as reasons for non-reemployment that she was recommended with reservations because of concern that petitioner assigned a large percentage of low and failing grades and that there was an abnormal pattern of pupil requests for transfer from her classes. The Board further stated that, in an effort to upgrade its staff, it determined not to reappoint any nontenured teacher about whom reservations had been expressed by the administration.

It is apparent that the Board herein, in contrast to *Payne, supra,* neither made an offer of nor executed a contract of employment. Procedurally, the Board acted in timely fashion to notice petitioner in compliance with educational law. Petitioner states as did the petitioner in *Banchik, supra,* that she disagrees with the reasons given by the Board and seeks opportunity to prove that those reasons, when contrasted with her laudatory evaluations by the vice-principal and department head, constitute capriciousness.

The Commissioner finds such procedure unnecessary. Petitioner's assignment of D's and F's to 45.7% and 40.3% respectively of the college preparatory Biology K pupils in 1974-75 and 1975-76 is in itself sufficient to arouse concern of a principal or a board of education regardless of the grades assigned by other teachers to their pupils. Nor may the principal's less than laudatory evaluation, although based on less than a full period of observation, be disregarded. Appropos to the dispute is that which was stated by the Commissioner in *Leroy Lynch et al. v. Board of Education of the Essex County Vocational School District, Essex County,* 1974 *S.L.D.* 1308, aff'd State Board of Education 1975 *S.L.D.* 1098 as follows:

> "***[T]he Board followed its policy with respect to promotions of teaching staff members, and exercised its judgment by recommending several candidates from whom the Superintendent chose one as his recommendation to the Board. The record discloses that the Board did consider the factors of certification, the nature of the position to be filled, the experience of the applicants in regard to the type of position being applied for, seniority, and the potential for success for each individual applicant. Although in most school districts the screening process is usually performed by experienced school administrators, it is not a fatal defect in this instance that the initial screening and interviewing process was performed by a committee of Board members.
>
> "The appointment of teaching staff members, and the pattern of staff utilization are two of the vital factors which influence and determine the quality of the educational program within a given school district. This is so because the ability and competence of the teaching staff members have a higher coefficient of correlation to the instructional process and the achievement of pupils than any other factor such as the schoolhouse, or the materials for instruction. It was an understanding of these principles that caused the court in the case of *Victor Porcelli et al. v. Franklyn Titus, Superintendent, and the Newark Board of Education,* 108 *N.J. Super.* 301 (*App. Div.* 1969), *cert. den.* 55 *N.J.* 310 (1970), to state that:
>
> > '***We endorse the principle, as did the court in *Kemp v. Beasley,* 389 *F.2d* 178, 189 (8 *Cir.* 1968), that 'faculty selection must remain for the broad sensitive expertise of the School Board and its officials.'***' (at p. 312)
>
> "***[T]he Board and all other local boards of education have the responsibility to appoint the most able and competent person to fill any teaching staff position, including all administrative and supervisory positions. This is a basic responsibility which underlies the comprehensive requirement of all local education boards to provide the most thorough and efficient program of education possible, given all the circumstances unique to each school district.***" (at 1315)

The Board, for reasons that are neither frivolous nor without rational basis determined not to reemploy petitioner. Its action is entitled to a presumption of

correctness. As was emphasized in *Michael A. Fiore v. Board of Education of the City of Jersey City, Hudson County,* 1965 *S.L.D.* 177:

> "***The Legislature has committed the operation of local schools to district boards of education. *** The powers of boards of education in the management and control of school districts are broad. *Downs v. Board of Education, Hoboken,* 12 *N.J. Misc.* 345, 171 *A.* 528 (*Sup. Ct.* 1934), affirmed *sub nomine Flechtner v. Board of Education of Hoboken,* 113 *N.J.L.* 401 (*E.&A.* 1934) *** where a board, in the exercise of its discretion, acts within the authority conferred upon it by law, the courts will not interfere absent a showing of clear abuse. 78 *C.J.S., Schools and School Districts,* § 128, p. 920; *Boult v. Board of Education of Passaic,* 135 *N.J.L.* 331 (*Sup. Ct.* 1947), affirmed 136 *N.J.L.* 521 (*E.&A.* 1948). *** In short, we may not substitute our discretion for that of the local board, nor may we condemn the exercise of the board's discretion on the ground that some other course would have been wiser or of more benefit to the parties or community involved. *Boult, supra****" (at 178)

See also *Quinlan v. Board of Education of North Bergen Township,* 73 *N.J. Super.* 40 (*App. Div.* 1962); *Robert B. Lee v. Board of Education of the Town of Montclair, Essex County,* 1972 *S.L.D.* 5, 8.

Boards of education necessarily must be concerned with the grades which pupils in their schools are assigned by teachers. They must similarly be concerned with selection of faculty members attuned to both appropriate academic standards and reasonable expectations of pupil performance. They must also be attuned to pupil-to-teacher and teacher-to-teacher relationships in upgrading faculty.

The Board, herein, having exercised its discretionary authority by considering such valid aspects, has not acted arbitrarily or capriciously. The Commissioner so holds. Absent a showing that petitioner's constitutional rights or rights of due process or statutory rights were violated or that the Board acted arbitrarily or capriciously, there is no relief to which petitioner is entitled. A hearing is not required. Accordingly, Summary Judgment is entered on behalf of the Board and the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

October 11, 1977
Pending State Board of Education

John Makulinski,

Petitioner,

v.

Board of Education of the Town of Harrison, Hudson County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Philip Elberg, Esq., of Counsel

For Respondent, Doyle & Brady (Norman A. Doyle, Jr., Esq., of Counsel)

Petitioner alleges that the action of the Board of Education of the Town of Harrison, hereinafter "Board," by which it abolished his position of employment as an attendance officer is based upon reasons which violate the First and Fourteenth Amendments to constitutional rights of free expression. The Board denies the allegations and asserts that its action with respect to the abolishment of petitioner's position of employment is in all respects proper and legally correct. The Board seeks dismissal of the matter by way of Summary Judgment in its favor.

The matter is referred directly to the Commissioner of Education for adjudication on the record including the pleadings, exhibits, affidavits and Briefs of the parties in support of their respective positions on the Board's Motion for Summary Judgment.

Petitioner has been employed by the Board as an attendance officer since 1968. The Board resolved at a meeting conducted on July 6, 1976 to abolish one of two positions of attendance officer. (C-1) Petitioner had less seniority in his employ with the Board than the other attendance officer. Consequently, the Board further resolved that petitioner be

> "***notified immediately of his termination of employment. It is further resolved that the [Board] Secretary is authorized to pay [petitioner] all earned accrued vacation leave." (C-1)

Petitioner alleges that the reason his position was abolished was his candidacy for election to the position of Mayor of Harrison in opposition to the incumbent Mayor who was supported by Board members. Petitioner in this regard and in opposition to the Board's Motion for Summary Judgment relies on an affidavit filed by the Mayor of East Newark, hereinafter "Mayor." (C-2) The Mayor attests that during the spring of 1976 he sought to gain the support of the Harrison Mayor for a slate of candidates running in the East Newark election.

The Mayor attests that to gain such support he talked with the Board President who is a member of the Harrison Mayor's political organization. The

Mayor attests that during the course of this conversation, when he was seeking support for the East Newark election, the subject of petitioner running against the Mayor of Harrison arose. The Mayor attests that the Board President stated that "***[petitioner] would be taken care of right after the election.***" (C-2, at p. 1) The Mayor further attests that:

> "***Both [the Board President] and I knew this was a reference to [petitioner's] position in the Harrison School system.***
>
> "[The Board President] also stated that he was against [petitioner], that he hated him, that [petitioner] would lose the [Harrison mayoral] election and be taken care of afterwards." (C-2, at pp. 1-2)

Petitioner asserts that in addition to the Mayor's affidavit (C-2) he can produce circumstantial proof at the time of hearing which will establish that he is being deprived of his employment with the Board because of his political affiliation.

The Board, to the contrary, asserts that it acted to abolish petitioner's position of attendance officer solely for reasons of economy. The Board, in this regard, relies on a report dated July 6, 1976 submitted to it by the Superintendent of Schools in which it is recommended that the staff of the attendance office be reduced by one position because of overexpenditure of monies for the responsibilities assigned. (C-3) The Superintendent reports that absenteeism of pupils had been sharply reduced because of the Board's effective program of education thereby eliminating the need for two full-time attendance officers.

The Board also relies on the Cost of Education Index for 1975-76 prepared by the New Jersey School Boards Association which shows that the Board's amount for attendance costs to be $14.35 per pupil while the State-wide cost is $3.19 per pupil and the Hudson County cost is $9.30 per pupil. (C-4, at p. 5) The Cost of Education Index also shows that on a percentage basis the Board expends 1.04 percent of its current expense budget, including transportation, tuition and food services while the State average is .022 of one percent and Hudson County's average is .065 of one percent. (C-4, at p. 6)

The Board explains that as early as 1963 a visiting committee composed of educators throughout the State which reviews the total school program for the purposes of Middle Atlantic States' evaluation recommended that a review of its attendance office be undertaken to determine the necessity for two full-time attendance officers. (C-5, at p. 21)

During 1964, the then Superintendent reported to the Board an overexpenditure of monies because of two full-time attendance officers. (C-6, at p. 1) The Board expended $24,000 during 1974-75 for attendance officers' salaries and the Commissioner has determined from the filed audit report for the 1975-76 school year that this amount was $24,224.

The Commissioner has reviewed the affidavit (C-8) of the Board President

filed in refutation to the affidavit of the Mayor. (C-2, *ante*) Although the Board President admits that the Mayor sought his assistance to gain the Harrison Mayor's support for an East Newark election, and that the two did meet, the Board President categorically denies discussing petitioner's bid for the Harrison mayoralty. The Board President also denies stating that he hated petitioner, that petitioner would lose the election, or that petitioner would be taken care of after the election. (C-8)

The former Superintendent, presently a Board member, also attests that the sole reason for the abolishment of petitioner's position of attendance officer was that of economy. He also attests that at no time relevant to the instant matter were petitioner's political beliefs ever discussed. (C-9)

The Commissioner has reviewed the entire record in the matter and finds that petitioner has failed to state a cause of action upon which a plenary hearing can be demanded. The Board has established that it had sufficient economic reasons to abolish one of the two positions of attendance officer. That its action in this regard occurred soon after petitioner's unsuccessful bid for the mayoralty of Harrison does not establish by itself, that the Board, acting in unison, took such action to punish him or to violate his constitutional rights of free expression. Nor does the affidavit (C-2) of the East Newark Mayor establish that the Board acted surreptitiously in abolishing petitioner's position of employment. It is well established in the record that it has been long recommended that the Board's attendance office was over staffed and the criticism, if any, to be brought against the Board is that it did not act in a timely manner to reduce such expenditures in this regard.

Consequently, the Commissioner finds and determines that petitioner had failed to state a cause of action upon which any relief should be granted. Accordingly, Summary Judgment shall be entered for the Board and the Petition of Appeal shall be dismissed.

Two other matters require some attention by the Commissioner. One, petitioner pleads that he had acquired a tenure status as an attendance officer in the employ of the Board and relies on *N.J.S.A.* 18A:38-33. The Commissioner does not agree. The statute of reference provides as follows:

> "The services of all attendance officers of the public schools of a city district shall, after employment in such district for one year, be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, conduct unbecoming an officer, or other just cause, and only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title."

Harrison is a town, not a city. Consequently, the provisions of the above-cited statute do not apply to attendance officers employed by the Board. (See *Quinlan v. Board of Education of North Bergen,* 73 *N.J. Super.* 40 (*App. Div.* 1962).)

Secondly, petitioner had earlier filed a Motion to Strike the Board's

defense for its failure to strictly follow the direction of the hearing examiner in regard to discovery. The Commissioner acknowledges that the Board failed to appear at the original conference of counsel scheduled for November 18, 1976. It also recognized that the conference was conducted *ex parte* and that certain discovery proceedings were granted petitioner which were to be completed within approximately two weeks. The Board did not submit the documents directed until January 10, 1977. Petitioner seeks to have judgment entered on his behalf for failure of the Board to supply the directed documents in a timely fashion.

The Commissioner has reviewed the executed affidavits (C-10; C-11) of counsel to the parties and finds that no harm has attached to petitioner by virtue of the Board's untimely compliance with the hearing examiner's pre-trial directive for discovery. To hold otherwise would, in the judgment of the Commissioner, place form over substance. Petitioner may not gain through indirection what may not be accomplished on the merits of the issue. The Commissioner so holds.

For all reasons stated above, Summary Judgment is granted to the Board. The instant Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

October 12, 1977

Dismissed State Board of Education, April 5, 1978
Pending Superior Court of New Jersey

**In the Matter of the Tenure Hearing of James Ryan,
School District of the Township of Garfield, Bergen County.**

COMMISSIONER OF EDUCATION

ORDER

For the Complainant Board, Nasarenko & Meola (Nicholas P. Nasarenko, Esq., of Counsel)

For the Respondent, Jack J. DeSalvo, Esq.

This matter having been opened before the Commissioner of Education by the Board of Education of the Township of Garfield, hereinafter "Board," through the filing of certified charges against James Ryan, a custodian with a tenure status in its employ; and

It appearing that respondent has been granted two extensions of time in which to file an answer; and

Respondent having been contacted by telephone on four additional occasions over a period of four months; and

Respondent having been warned by letter of August 23, 1977 from Joseph F. Zach, Assistant Commissioner, Division of Controversies and Disputes, to file an answer by September 3, 1977; and

Respondent having failed to file an answer after such repeated warnings; now therefore

Let it be known that James Ryan is dismissed from his tenured position with the Board as of the date of his suspension;

NOW THEREFORE, IT IS ORDERED that this matter be and is hereby dismissed with prejudice.

COMMISSIONER OF EDUCATION

October 18, 1977

Deborah DeBold,

Petitioner,

v.

Board of Education of the East Windsor Regional School District, Mercer County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Ruhlman & Butrym (Edward J. Butrym, Esq., of Counsel)

For the Respondent, Turp, Coates, Essl & Driggers (Henry G. P. Coates, Esq., of Counsel)

Petitioner was a full-time nontenured teacher of art employed by the East Windsor Regional Board of Education, hereinafter "Board," when she was notified by the Board on June 17, 1976 that she would be assigned to half-time teaching duties effective September 1, 1976. She alleges that the Board's unilateral action reducing her hours of employment and compensation were

violative of her contractual property rights and the statutory provisions of *N.J.S.A.* 18A:27-10 *et seq.* The Board, conversely, asserts that its action was a legal exercise of its discretionary authority to reduce its teaching staff pursuant to *N.J.S.A.* 18A:28-9 and moves for dismissal of the Petition of Appeal.

The matter comes before the Commissioner of Education in the form of the Board's Motion to Dismiss, Briefs and accompanying exhibits. There being no essential relevant facts at issue, no plenary hearing is required, and the matter may proceed directly to a determination. The factual context from which the dispute arises is as follows:

Petitioner was notified by the Board on March 25, 1976 that she would be reemployed for the 1976-77 school year. On March 31, 1976 petitioner accepted the Board's offer of employment. (Exhibits A and B) No notice was given at that time that the Board contemplated assigning her to less than a full-time position. On June 14, 1976 the Board voted to assign petitioner to a half-time teaching position and transferred another half-time art teacher from another school to teach the remaining half time of petitioner's former schedule. (Exhibit I) On June 17, 1976 petitioner was notified by the Assistant Superintendent as follows:

> "At the last regular meeting of the Board of Education, you were reassigned from full time Perry L. Drew School to half time Perry L. Drew School effective September 1, 1976." (Exhibit C)

Petitioner notified the Superintendent in August that she believed that she was still a full-time employee. On September 1, 1976 petitioner was offered a half-time teaching contract which, although she initially refused to sign, was subsequently executed under protest. (Exhibits D through H) Thereupon, petitioner on September 29, 1976 filed the within Petition of Appeal before the Commissioner.

The Board, asserting that it had the right to reduce the number of its teaching staff members at the Walter L. Black School by abolishing the half-time art position there and assigning that teacher with more service in the district to the Perry L. Drew School, cites as its authority *N.J.S.A.* 18A:11-1 which states that a Board may:

> "***Make, amend and repeal rules, not inconsistent with this title or with rules of the state board, for its own government and the transaction of its business and for the government and management of the public schools *** and for the employment, regulation of conduct and discharge of its employees***."

The Board avers that its power to abolish the position of a tenured teacher pursuant to *N.J.S.A.* 18A:28-9 is no less applicable to reduction of the time of employment of a nontenured teacher when adapting to changes in school population and curriculum. (Respondent's Brief, at pp. 2-6)

The Board argues that petitioner on June 17, 1976 received in excess of

sixty days' notice that her employment would be reduced for the 1976-77 school year. The Board contends that petitioner, exercising her freedom of choice, signed a contract which act cannot be construed to be one taken under duress. (Respondent's Reply Brief, at pp. 2-5) The Board relies also on affidavits submitted by petitioner's principal and the Assistant Superintendent in Charge of Personnel and Training who affirmed that petitioner was in fact informed on May 6, 1976 that her employment would be reduced and that she had been advised of and refused additional half-time employment as a teacher assistant on or about June 2, 1976. Thus, the Board maintains that petitioner was afforded ample time to seek employment elsewhere. (Respondent's Reply Brief, at pp. 8-10)

The Board relies also on *Mildred Wexler v. Board of Education of the Borough of Hawthorne,* 1976 *S.L.D.* 309, aff'd State Board of Education 314, wherein the Commissioner upheld the July 8, 1975 action of the Hawthorne Board reducing Wexler's employment to less than full time, although it had in April 1975 offered, and Wexler had accepted, employment for the ensuing year. The Board reasons that, since in *Wexler* and in *John Hyun v. Board of Education of the Borough of Wharton,* 1976 *S.L.D.* 763 the Commissioner upheld the legality of the respective boards' reduction of hours of employment and compensation of teachers long under tenure, its action in the instant controversy, involving a teacher without tenure rights, should be upheld by dismissal of the Petition. (Respondent's Reply Brief, at pp. 7-15)

Petitioner argues, conversely, that the Board's action was contrary to the intent of *N.J.S.A.* 18A:27-10 which requires that:

> "On or before April 30 in each year, every board of education in this State shall give to each nontenure teaching staff member continuously employed by it since the preceding September 30 either
>
> a. A written offer of a contract for employment for the next succeeding year providing for at least the same terms and conditions of employment but with such increases in salary as may be required by law or policies of the board of education, or
>
> b. A written notice that such employment will not be offered."

It is further argued that the Board's tendering and petitioner's acceptance of the offer of reemployment in March 1976 gave rise to a valid and enforceable contract wherewith she was vested with the right to employment for the ensuing year. *Board of Regents of State Colleges v. Roth,* 408 *U.S.* 564; *Linda Wachstein v. Board of Education of the Township of Medford,* 1976 *S.L.D.* 928; *Elaine M. Chianese v. Board of Education of the Township of Bordentown,* 1976 *S.L.D.* 804, aff'd State Board of Education February 2, 1977

Petitioner contends that notification of her employment status in May and June subsequent to the statutorily required date of April 30 was in noncompliance with *N.J.S.A.* 18A:27-10 *et seq.,* thus rendering the Board's action *ultra vires.* (Petitioner's Brief, at pp. 3-8) In this regard is cited *Patricia*

Bolger and Frances Feller v. Board of Education of the Township of Ridgefield Park, 1975 *S.L.D.* 93, aff'd State Board of Education 98, aff'd Docket No. A-3214-74 New Jersey Superior Court, Appellate Division, April 21, 1976 (1976 *S.L.D.* 1122) wherein it was said that:

> "***The primary purpose of these statutes is to provide teachers with timely notice when they are not going to be reemployed so that they may seek employment elsewhere. When local boards of education waited until the months of May or June, or later, to notify teaching staff members that they would not be reemployed, this late action created a hardship for those employees. The new statutes remedied that situation by providing for notice by April 30 of each academic year, sixty days prior to the expiration of standard teacher contracts on June 30.***" (at 95)

Petitioner argues that the Board did not in fact abolish petitioner's position but merely reassigned another nontenured teacher to one half of that position thus dishonoring her vested contractual rights. (Petitioner's Brief, at p. 8) Finally, petitioner argues that the contract which she signed, under protest, in September was an improper recordation and a unilateral attempt to change the tenure of the contractual relationship established in March by the Board's offer and her acceptance of that offer of employment. She argues that only when she was compelled, under duress, by the Board's refusal to pay her salary, did she affix her signature thereto. (*Id.,* at p. 9)

For the above reasons, petitioner requests that the Board's Motion to Dismiss be denied, a plenary hearing set down, or, in the alternative, an order entered directing the Board to reinstate her to her full-time position with lost salary and attendant emoluments. (*Id.,* at pp. 9-10)

The Commissioner finds the Petition of Appeal insufficiently detailed to require a plenary hearing. No alleged incidents or statements indicative of impropriety supportive of a charge of bad faith are adequately set forth therein other than the uncontroverted factual context herein before recounted. Accordingly, petitioner's plea for a plenary hearing is denied for failure to meet the test enunciated in *Barbara Hicks v. Board of Education of Pemberton, Burlington County,* 1975 *S.L.D.* 332:

> "***When a teaching staff member alleges that a local board of education has refused reemployment for proscribed reasons *** or that the board was arbitrary and capricious or abused its discretion, *and is able to provide adequately detailed specific instances of such allegations,* then the teaching staff member may file a Petition of Appeal before the Commissioner which will result in a full adversary proceeding.***" (*Emphasis supplied.*) (at 336)

See also *Donald Banchik v. Board of Education of New Brunswick,* 1976 *S.L.D.* 78. The matter is ripe for determination.

The Commissioner has carefully considered the pleadings, exhibits,

affidavits and the respective arguments of law and finds for the Board. Boards of education are endowed with broad discretionary authority to determine such matters as the professional staffing of their schools. The Board argues rightly that its authority to reduce its professional staff applies equally to nontenured as well as tenured staff members.

A board may not, however, act capriciously or with total disregard of the rights of its employees. Thus, when boards acted capriciously in abolishing certain positions, the Commissioner ordered employees reinstated with lost benefits in *Arthur L. Page v. Board of Education of Trenton et al.*, 1973 *S.L.D.* 704, aff'd State Board of Education 1974 *S.L.D.* 1416 and *John M. Rainey v. Board of Education of Trenton,* 1974 *S.L.D.* 647. Similarly, when a board in *David Payne v. Board of Education of the Borough of Verona,* 1976 *S.L.D.* 543, aff'd State Board of Education 554 capriciously and unilaterally terminated the already executed successor contract of a nontenured teacher in June, but did not concurrently abolish his position, the Commissioner determined that petitioner was entitled to the salary he would have received under that contract for the ensuing year. A similar determination was made in *Chianese, supra.*

The instant matter is importantly distinguishable from the foregoing cases, however, since the Board in fact abolished one half-time art position in its schools. When it did so it had the discretionary authority to determine which nontenured teacher(s) should staff the remaining positions(s). The matter is also distinguishable from *Page, supra,* and *Rainey, supra,* in that the Board herein officially acted in June and gave petitioner greater notice than that which it was required to give in accordance with the termination clause of petitioner's contract. Although it may be reasonably required that a board, which has given promise of employment and thus entered into a contractual relationship with a nontenured teacher who has accepted such offer, must have good cause for the termination of that contract, the termination clause of such contract is not rendered void or ineffectual by *N.J.S.A.* 18A:27-10 *et seq.* Had the Legislature so intended it would have iterated such in the statutory construction. The Commissioner so holds.

Chianese, supra, is also importantly distinguishable from and thus inapplicable to the instant matter in that the board did not abolish Chianese's position to effect a reduction in force.

Wexler, supra, wherein the factual context is essentially parallel, is controlling. Therein, as in the instant matter, the board failed to formally abolish a position but effected a reduction in force by reducing Wexler from full time to half time. The following iteration of the Commissioner in *Wexler* is singularly appropriate to the instant controversy:

> "***Petitioner avers that the Board's failure to formally abolish her full-time position of teacher of French is fatal and requires that she be paid for the entire 1975-76 school year as a full-time employee. Without question, the Board's resolution *** did not forthrightly abolish the full-time position in French. It must, however, be determined whether the Board's action was so procedurally defective as to render it null and void.

"It was said in *Robert T. Currie v. Board of Education of the School District of Keansburg, Monmouth County,* 1966 *S.L.D.* 193 that:

> '***The Commissioner looks rather to the clear intention of the Board than to the technical perfection of its language. Board of education members are laymen, and where their intention is clear, they should not be limited by the legal niceties of language.***'
>
> (at p. 195)

"Herein, the Commissioner finds no evidence that the Board's act was one of subterfuge or designed to compel a resignation as charged by petitioner. Rather, the resolution's clear and open phraseology reveals an intent on the Board's part to reduce its teaching staff by one half of one teacher in the field of French as a result of declining voluntary enrollment in that subject.

"The Commissioner agrees that the Board, when confronted with the fact that three classes in French averaging thirteen pupils each would suffice, was obligated to reduce its teaching staff in that sector. The Commissioner, in recognition of the language of *N.J.S.A.* 18A:28-9, opines that the proper way to effectuate such a change would have been to abolish the full-time position and establish in its place the part-time position, to which petitioner was entitled by reason of her seniority rights. However, the Commissioner finds that the Board's resolution by its clear and unambiguous language reveals an intent which comports with the intent of the Legislature as set forth in *N.J.S.A.* 18A:28-9 *which places no limitation on the time when a board of education may effectuate a reduction in teaching staff for reasons of economy or other good cause.* Accordingly, the Commissioner holds that the Board's July 8, 1975 resolution is legal and valid.***" (*Emphasis in text.*) (at 312-313)

Absent a showing of bad faith, frivolity, capriciousness, statutory or constitutional violation, the Board's determination to effect a reduction in force, by reducing petitioner's employment to one half and reassigning another teacher of art to teach one-half of the full-time position formerly held by petitioner is entitled to a presumption of correctness.

As was said in *Quinlan v. Board of Education of North Bergen,* 73 *N.J. Super.* 40 (*App. Div.* 1962):

> "***When an administrative agency has acted within its authority, its actions will not generally be upset unless there is an affirmative showing that its judgment was arbitrary, capricious or unreasonable.***" (at 46-47)

See also *Thomas v. Morris Township Board of Education,* 89 *N.J. Super.* 327 (*App. Div.* 1965), aff'd 46 *N.J.* 581 (1966); *Boult and Harris v. Board of Education of Passaic,* 1939-49 *S.L.D.* 7, aff'd State Board of Education 15, aff'd 135 *N.J.L.* 329 (*Sup. Ct.* 1947), aff'd 136 *N.J.L.* 521 (*E.&A.* 1948).

There being no relief to which petitioner is entitled, the Board's Motion to Dismiss is granted.

COMMISSIONER OF EDUCATION

October 24, 1977

Linda Glassmith,

Petitioner,

v.

Board of Education of the Township of Hanover, Morris County,

Respondent.

COMMISSIONER OF EDUCATION

ORDER

For the Petitioner, Saul R. Alexander, Esq.

For the Respondent, Riker, Danzig, Scherer & Debevoise (Thomas C. C. Humick, Esq., of Counsel)

This matter having been opened before the Commissioner of Education on April 14, 1977 by the filing of a verified Petition of Appeal relative to the adoption of a resolution by the Board of Education of the Hanover Township Public Schools, hereinafter "Board," on January 20, 1977, which resolution denies re-appointment to Petitioner, effective July 1, 1977, due to a reduction in force; and

The Board having applied on March 28, 1977 to the Department of Education for an Advisory Opinion with respect to Petitioner's tenure and seniority rights with respect to available positions of employment within the district and pursuant to the provisions of *N.J.S.A.* 18A:28-11; and

The State Department of Education by Memorandum dated May 26, 1977 having provided an Advisory Opinion to the Board indicating that the Petitioner nurse has a tenured status and seniority for an available full-time position; and

On June 16, 1977 the Board having adopted the following resolution:

"That the Board of Education rescind its action taken January 20, 1977 denying re-appointment to Mrs. Linda Glassmith for the 1977-78 school year.

"That the Board of Education authorize re-appointment of Mrs. Linda

Glassmith, as School Nurse at Bee Meadow School, for the 1977-78 school year at the annual salary of $12,040.00 (B.A. Step 4)"; and

A Stipulation of Dismissal having been duly executed by the respective parties; and

The Commissioner having reviewed the pleadings, the resolutions hereinbefore detailed and the Stipulation of Dismissal, and having determined that the matter may be withdrawn from litigation before him; now therefore

IT IS ORDERED that this matter be and is hereby dismissed with prejudice.

Entered this 27th day of October 1977.

COMMISSIONER OF EDUCATION

North Bergen Federation of Teachers, Local 1060, American Federation of Teachers, AFL-CIO and Andrew Guddemi,

Petitioners,

v.

Board of Education of the Township of North Bergen, Hudson County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Victor P. Mullica, Esq.

For the Respondent, Joseph J. Ryglicki, Esq.

The North Bergen Federation of Teachers, Local 1060, American Federation of Teachers, AFL-CIO and Andrew Guddemi aver that the Board of Education of the Township of North Bergen, hereinafter "Board," discontinued the teaching services of Petitioner Guddemi in violation of *N.J.S.A.* 18A:28-5 *et seq.*, *N.J.S.A.* 18A:6-10 *et seq.*, and *N.J.S.A.* 18A:27-10, and that its action was procedurally and statutorily defective, arbitrary, capricious and prompted by political reasons. Petitioners request that the Commissioner of Education order the reinstatement of Petitioner Guddemi in his position as teacher with full back pay and all increments and benefits inuring therefrom. Respondent Board has denied petitioners' allegations.

At this juncture, petitioners have moved for Summary Judgment upon that part of the Petition of Appeal asserting that Petitioner Guddemi has

acquired a tenure status. Should petitioners not prevail on the tenure issue, they do not abandon their other averments as set forth in the Petition of Appeal and reserve the right to a plenary hearing on the remaining issues.

Petitioners support their Motion for Summary Judgment by affidavit of Andrew Guddemi and Memorandum of Law. None of the relevant, material facts as set forth by petitioners were contradicted by the Board in the documents and exhibits which it submitted. The facts relevant and material to this Motion are these:

The relevant statute in determining the tenure status of petitioner is *N.J.S.A.* 18A:28-5, which sets forth those criteria which must be met before tenure attaches. It reads in pertinent part as follows:

> "*The services of all teaching staff members including all teachers,* principals, assistant principals, vice principals, superintendents, assistant superintendents, and all school nurses *** and such other employees as are *in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect, shall be under tenure* during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title, after employment in such district or by such board for:
>
> ***
>
> "(c) *the equivalent of more than three academic years within a period of any four consecutive academic years****."
>
> (*Emphasis supplied.*)

It is well established that the right of tenure does not come into being until the precise conditions laid down in the tenure statute have been met. *Ahrensfield v. State Board of Education,* 126 *N.J.L.* 543 (*E.&A.* 1941) Thus, in order to determine whether petitioner has complied with the precise conditions of the tenure statute, a review of his teaching service and credentials as revealed by the record is in order.

Petitioner was initially employed as a teacher in the 1973 Title I Program of the North Bergen Public Schools from April 30, 1973 through either June 20, 1973 (Memorandum of Director of Guidance, February 17, 1977) or June 30, 1973 (Affidavit of Andrew Guddemi, at p. 2).* Notwithstanding a

*At this juncture, two observations may be made concerning the record: for the purposes of this Motion, the discrepancy regarding the June termination dates need not concern us nor the fact that the date of the formal Board resolution authorizing petitioner's employment as a Title I teacher did not take place until June 18, 1973. (Letter of Respondent, February 15, 1977)

characterization of this service as "incidental per diem substitute" service "as well as infrequent tutoring" (Letter of Respondent, February 14, 1977), the official Board resolution formally appointing petitioner to the Title I position recognized him as a "Full Time" teacher. (Board Resolution, June 18, 1973)

> "RESOLVED by the North Bergen Board of Education that the following named persons are hereby appointed to the positions set opposite their respective names on the faculty of the 1973 Title I Program of the North Bergen Public Schools at the salaries listed below.
>
> "PART TIME TEACHERS:
>
> [herein are listed those persons appointed as part-time teachers]
>
> "FULL TIME TEACHERS:
>
> ***
>
> Andrew Guddemi 43.50 per day
>
> ***
>
> "June 18, 1973"

During the time period from April 30, 1973 through June 20 or 30, 1973, petitioner taught "***reading and mathematics to non-classified students***" under the Title I Program. (Affidavit of Andrew Guddemi, at p. 2) The Director of Guidance described petitioner's duties from April 30, 1973 through June 20, 1973, as follows:

> "***1. Administered California Reading Test (Pre and Post).
>
> "2. Administered the Basic Test of Reading Comprehension.
>
> "3. Utilized the Random House High Intensity Learning System to remediate reading deficiencies in small groups."
> (Memorandum of Director of Guidance, February 17, 1977)

For the next three school years, 1973-74, 1974-75, and 1975-76, petitioner was employed by the Board as a special education teacher on a full-time basis. (Affidavit of Andrew Guddemi, at p. 2; Letter of Respondent, February 14, 1977)

The first question which arises in consideration of petitioner's teaching service from April 30, 1973 to June 20 or 30, 1973, while he was employed in the Title I Program, is whether that period may be counted toward the acquisition of tenure. The Commissioner has previously considered the question of the employment status of teachers employed with federal funds in *Jack Noorigian v. Board of Education of Jersey City,* 1972 *S.L.D.* 266, aff'd in part/rev'd in part State Board of Education, 1973 *S.L.D.* 777; *Henry Butler et al. v. Board of Education of the City of Jersey City,* 1974 *S.L.D.* 890, aff'd State

Board of Education 1975 *S.L.D.* 1074, aff'd in part/rev'd in part Docket No. A-2803-74 New Jersey Superior Court, Appellate Division, July 9, 1976 (1976 *S.L.D.* 1124), *cert.* den. 72 *N.J.* 468 (1977); and *Ruth Nearier et al. v. Board of Education of the City of Passaic,* 1975 *S.L.D.* 604. As the Commissioner said in *Noorigian, supra*:

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

Initially, therefore, the Commissioner finds that petitioner may count that period of teaching service from April 30, 1973 to June 20 or 30, 1973, while he was engaged as a full-time Title I teacher, toward the acquisition of tenure. The Commissioner further finds that petitioner was thereafter employed for three consecutive academic years as a full-time special education teacher. In summary, petitioner has met the precise service requirements of the tenure statute, *N.J.S.A.* 18A:28-5, in that he was steadily employed as a full-time teacher for more than the equivalent of three consecutive academic years within a period of four consecutive academic years in positions requiring him to hold appropriate certificates issued by the State Board of Examiners.

The second question to be considered in the disposition of this matter is whether petitioner has satisfied the certification requirement of the tenure statute; namely, was petitioner the holder of a proper certificate in full force and effect at the time tenure would accrue. Petitioner's certification status may be briefly described as follows: petitioner was the holder of appropriate certificates in full force and effect from May 1973 until June 1976, with the exception of a five-month period from September 1973 until February 1974. (Affidavit of Andrew Guddemi, at p. 2; Letter of Respondent, February 14, 1977) During this five-month period, petitioner's application for the Teacher of the Handicapped certificate was within the administrative process of the State Department of Education. It is clear from the record that petitioner applied in timely fashion for the required certification prior to reporting for work. (Affidavit of Andrew Guddemi, at p. 2) While the record discloses that petitioner did not hold a Teacher of the Handicapped certificate in full force and effect for five months while his application was in process, he is not barred from counting that five-month period toward tenure. This principle has been rendered *stare decisis* in several earlier decisions of the Commissioner. See *Mildred Givens v. Board of Education of the City of Newark,* 1974 *S.L.D.* 906; *Veronica Smith and Sayreville Education Association v. Board of Education of the Borough of Sayreville,* 1974 *S.L.D.* 1095, aff'd State Board of Education 1975 *S.L.D.* 1160, aff'd Docket No. A-2654-74 New Jersey Superior Court, Appellate Division, February 27, 1976 (1976 *S.L.D.* 1170); *Joann K'Burg v. Board of Education of*

the Township of Lower Alloways Creek, 1973 *S.L.D.* 636. In summary, petitioner met the certification requirement of the tenure statute, *N.J.S.A.* 18A:28-5, in that he held a proper certificate in full force and effect at the time when the other conditions of the tenure statute were met.

The Commissioner holds that Petitioner Guddemi held a tenured status as a teaching staff member in the School District of the Township of North Bergen in June of 1976 and that he could not be removed from that position except in the manner prescribed by *N.J.S.A.* 18A:6-11. The Commissioner directs that Petitioner Guddemi be restored to his position as a teaching staff member and be given all salary and other benefits which are rightfully due him from September 1, 1976 to the present time, subject only to mitigation resulting from his earnings during that period.

COMMISSIONER OF EDUCATION

October 27, 1977

In the Matter of the Tenure Hearing of Lillian H. Levine, School District of the City of Paterson, Passaic County.

COMMISSIONER OF EDUCATION

DECISION

For the Complainant Board, Robert P. Swartz, Esq.

For the Respondent, Saul R. Alexander, Esq.

The Board of Education of the City of Paterson, hereinafter "Board," certified four charges of inefficiency to the Commissioner of Education for adjudication on January 6, 1977, against Lillian H. Levine, hereinafter "respondent," a teaching staff member with a tenure status in its employ. The Board simultaneously suspended respondent from her teaching duties, without pay, pending a determination on the merits of the charges. Respondent denies the allegations and, in addition, seeks dismissal of the charges for, *inter alia,* failure of the Board to comply with the provisions of *N.J.S.A.* 18A:6-13.

Oral argument on the Motion to Dismiss was heard on February 22, 1977 at the State Department of Education, Trenton, by a representative of the Commissioner. The matter is referred directly to the Commissioner for determination on the record including the pleadings, the stenographic transcript of the argument, affidavits, exhibits and Briefs.

The salient facts of the matter are these. The Assistant Superintendent of Schools notified respondent by letter dated April 28, 1976 that she was

"***hereby charged with inefficiency for the following reasons***." (C-1) There follow seven assertions of inefficient performance by respondent which include her failure to maintain accurate attendance records, failure to submit planbooks and plans for substitute teachers, failure to communicate with the parents of pupils, failure to establish classroom routine, failure to instruct pupils in the proper care of materials, failure to use teaching materials, and failure to provide group and individual instruction. The Assistant Superintendent's notice concludes by advising respondent:

> "You are advised that your failure to correct these deficiencies within ninety (90) days will result in a recommendation that charges be preferred seeking your dismissal from the school system." (C-1)

The Board, at a regular meeting conducted on January 6, 1977, determined to certify four charges of inefficiency against respondent to the Commissioner. The four charges are recited here in full:

> "***1. [Respondent] fails to maintain accurate attendance records as required by law.
>
> "2. [Respondent] fails to establish classroom routines and conditions conducive to acceptable education.
>
> "3. [Respondent] fails to instruct students in the proper care of materials.
>
> "4. [Respondent] fails to provide for group and/or individual instruction as directed by her superiors.***" (C-2)

It appears that respondent corrected three of the original seven areas of inefficiency set forth by the Assistant Superintendent in his notice to her on April 28, 1976. (C-1)

The Commissioner observes at this juncture that the relevant statute with respect to the certification of inefficiency charges against an employee with a tenure status is *N.J.S.A.* 18A:6-11, as amended by *L.*1975, *c.*304, effective February 7, 1976 and is reproduced here in full:

> "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. The board of education shall forthwith notify the employee against whom the charge has been made of its determination, personally or by certified mail directed to his last known address. In the event the board finds that such probable cause exists and that the charge, if credited, is sufficient to warrant a dismissal or reduction of 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. Provided, however, that if the charge is inefficiency, prior to making its determination as to certification, 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. The consideration and actions of the board as to any charge shall not take place at a public meeting."

The amending legislation to *N.J.S.A.* 18A:6-11 also repealed *N.J.S.A.* 18A:6-12 which had provided as follows:

"The board shall not forward any charge of inefficiency to the commissioner, unless at least 90 days prior thereto and within the current or preceding school year, the board or the superintendent of schools of the district has given to the employee, against whom such charge is made, written notice of the alleged inefficiency, specifying the nature thereof with such particulars as to furnish the employee an opportunity to correct and overcome the same."

Finally, the remaining statute applicable to the instant Motion to Dismiss is *N.J.S.A.* 18A:6-13 and provides as follows:

"If the board does not make such a determination within 45 days after receipt of the written charge, or within 45 days after the expiration of the time for correction of the inefficiency, if the charge is of inefficiency, the charge will be deemed to be dismissed and no further proceeding or action shall be taken thereon."

Respondent argues that, by virtue of the Board waiting until January 6, 1977 to certify any of the seven charges of inefficiency she received notice of on April 28, 1976, it violated the precise requirements of *N.J.S.A.* 18A:6-13 and, therefore, she demands dismissal of the charges certified against her.

Respondent asserts that the time for the correction of her alleged inefficiencies began to toll on the precise day she received her notice letter from the Assistant Superintendent on April 28, 1976. (C-1) Respondent contends that she was advised she had a maximum amount of time of ninety days to correct the alleged inefficiencies. Respondent reasons that ninety days from April 28, 1976 is July 28, 1976. Consequently, respondent argues that according to the provisions of *N.J.S.A.* 18A:6-13, the Board was required to certify any of the alleged seven areas of inefficiency, if it desired, no later than September 11, 1976 or forty-five days following July 28, 1976. Respondent asserts that because the Board failed to act by September 11, 1976, the charges are rendered

stale and that the Board's action to certify four of the original seven inefficiencies on January 6, 1976 is *ultra vires.* Respondent demands that the charges against her be dismissed.

The Board argues that *N.J.S.A.* 18A:6-11 requires that it provide a minimum time of ninety days for improvement to one of its employees with a tenured status who is considered inefficient. The Board asserts that it is not limited to ninety days for improvement; rather, it contends that it may grant more than ninety days as it did for respondent. The Board also asserts that the ninety day period for improvement which commences with the date of notice to the employee may not be carried into the summer months when school is not in session.

The Commissioner has reviewed the remaining arguments of the Board with respect to its interpretation of *N.J.S.A.* 18A:6-11, as amended, and finds them inapplicable.

In the first instance, while not argued by respondent, it must be noticed that prior to the amendment of *N.J.S.A.* 18A:6-11 and the repeal of *N.J.S.A.* 18A:6-12, the latter statute provided authority to "***the board or the superintendent of schools***" to serve notice of inefficiency upon a tenured employee. *N.J.S.A.* 18A:6-11, as amended, has specifically deleted the Superintendent's authority to serve notice of inefficiency upon an employee. Such authority is specifically reserved for the employing board of education. In a recent decision the Commissioner held that the board secretary is responsible to act for the board with respect to the serving of charges, inefficiency or otherwise, upon the affected employee. (For the proper application of *N.J.S.A.* 18A:6-11, as amended, see *In the Matter of the Tenure Hearing of Marilyn Feitel, School District of the City of Newark,* decided April 15, 1977.)

Consequently, the notice of inefficiency afforded respondent by the Assistant Superintendent on April 28, 1976, nearly three months after the effective date of *N.J.S.A.* 18A:6-11, as amended, is procedurally defective.

Next, the Commissioner shall consider whether the ninety-day period for improvement is the minimum or maximum amount of time which may be allowed the affected employee for improvement, whether the days allowed are school days or calendar days and whether the time tolls during the summer months while school is not in session.

N.J.S.A. 18A:6-11 requires that charges of inefficiency shall not be certified by a board against one of its employees unless it first had provided "***at least 90 days in which to correct and overcome the inefficiency.***" Clearly, a board may provide more than ninety days for improvement by virtue of the statutory wording that it must provide "at least" ninety days. While a board may provide more than ninety days for improvement, it may not indiscriminately decide to add more time onto the time it advised the affected employee it would originally grant. In the instant matter, assuming the notice (C-1) of April 28, 1976 was valid, the terms of the notice specifically granted the

minimum amount of time, ninety days, to respondent for improvement. Respondent may not have expected more time than was granted, nor could the Board arbitrarily add additional time without advising respondent of such a determination and the period of time it was adding to its original time for improvement.

The Board's argument, that it simply granted more time to respondent for improvement, to support its position that it complied with the forty-five day requirement of *N.J.S.A.* 18A:6-13 is wholly without merit. This conclusion is grounded upon the fact that the Board failed to notify respondent of the alleged time extension.

In consideration of whether the statutory minimum of ninety days for improvement means school days, calendar days, and/or days during the summer recess, the Commissioner holds that the legislative intent of the statute is to allow the affected employee opportunity to establish that his/her work performance can be improved. Employees are designated as either teaching staff members, required to possess appropriate certification, or noncertificated staff members. A teaching staff member's primary responsibility is with respect to pupils. A noncertificated staff member's duties are ancillary to those of the certificated staff. Consequently, the tolling of time for the period of improvement cannot continue during the summer recess for teaching staff members employed on an academic year basis. Thus, if a teaching staff member is served with a notice of inefficiency less than ninety days before the last day of the academic year, and a summer recess intervenes, the allotted period of time for improvement is to be continued into the next academic year. The Commissioner so holds.

During the regular academic year, however, the tolling of time for the minimum ninety day period of improvement shall be construed to mean consecutive calendar days. Any extension of such period shall also be counted as consecutive calendar days.

In the instant matter, respondent was served with notice, found herein to be invalid, on April 28, 1976. Even assuming the summer recess began at the close of June 30, 1976, that allowed for sixty-three days. Twenty-seven days after September 1, 1976 was September 28, 1976; forty-five days thereafter was November 12, 1976. Allowing three days for respondent to be notified that the Board determined to certify four charges of inefficiency, and allowing fifteen days for her answer to be filed, the final date for certification would have been December 1, 1976. (See *Feitel, supra.*) The Board's action to certify charges on January 6, 1977 is untimely and in contravention of *N.J.S.A.* 18A:6-13.

The Commissioner finds no need nor any basis upon which to address respondent's argument that the alleged notice of inefficiency was not precise. Such a finding may only be made on the basis of proofs.

The Commissioner finds that the notice of inefficiency to respondent by the Assistant Superintendent is invalid, that the Board failed to notify

respondent of an extension of the original ninety days afforded her for improvement, and that the Board violated the provisions of *N.J.S.A.* 18A:6-13. Accordingly, respondent's Motion to Dismiss the charges is hereby granted without prejudice to the Board to reopen the matter pursuant to statutory prescription.

The Board of Education of the City of Peterson is hereby directed to reinstate Lillian H. Levine to her teaching position together with all back pay and emoluments which may have been withheld from her, less any appropriate mitigation.

The charges of inefficiency are hereby dismissed.

COMMISSIONER OF EDUCATION

October 27, 1977
Pending State Board of Education

"J.B." and "B.B.," as guardians and natural parents of "P.B.,"

Petitioners,

v.

Board of Education of the Borough of Dumont, Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

ORDER

For the Petitioners, Richard J. Donohue, Esq.

For the Respondent, Aronsohn, Kahn & Springstead (Harold N. Springstead, Esq., of Counsel)

This matter having been brought before the Commissioner of Education (Lillard E. Law, Assistant Director, Division of Controversies and Disputes) by Harold N. Springstead, Esq., of counsel for respondent Board of Education, hereinafter "Board," on a Notice of Motion to Dismiss the Petition of Appeal, Richard J. Donohue, Esq., of counsel for petitioners; and

The arguments of counsel as set forth in Briefs in support of and against the aforesaid Motion having been considered; and

The Commissioner having carefully balanced the arguments with respect to the Motion to Dismiss the Petition of Appeal; and

The Commissioner having determined that the allegations and the material facts thus far presented warrant the further consideration of such testimony and evidence as may properly be set forth in respondent's defense; and

The Commissioner having reached the conclusion that the Motion to Dismiss is therefore premature and contrary to the necessary procedure in arriving at a justiciable decision herein; therefore

IT IS ORDERED that respondent's Motion to Dismiss the Petition of Appeal is denied; and

IT IS ORDERED that the matter proceed to final determination as expeditiously as possible.

Entered this 15th day of April 1976.

COMMISSIONER OF EDUCATION

COMMISSIONER OF EDUCATION

DECISION ON MOTION

For the Petitioners, Richard J. Donohue, Esq.

For the Respondent, Aronsohn, Kahn & Springstead (Roger M. Hahn, Esq., of Counsel)

The parents of "P.B.," a seventeen-year-old twelfth grade pupil in Dumont High School, hereinafter "high school," filed a Petition of Appeal and a subsequent Motion for Interim Relief on April 8, 1976 before the Commissioner of Education contesting P.B.'s required attendance by the Dumont Board of Education, hereinafter "Board," in the Family Living course of study. Petitioners assert therein that the Board's action to change its course of study entitled "Home Nursing and Modern Health" to "Family Living" is violative of and contrary to the provisions of *N.J.S.A.* 18A:33-1. Petitioners pray that the Commissioner order the Board to suspend its required Family Living course of study or, in the alternative, issue an order to excuse "P.B." from further participation in the required course pending a final determination by the Commissioner in the instant matter.

Oral argument on the Motion was presented before a hearing examiner at the State Department of Education, Trenton, on April 20, 1976, and the transcript of the above proceedings together with Memorandum, Briefs, exhibits and affidavits are before the Commissioner for his determination.

Petitioners allege that the Board's action at its regular meeting of July 17, 1975, wherein it changed a course of study title from "Home Nursing and Modern Health" to "Family Living" violated the statutory provisions of *N.J.S.A.* 18A:33-1 by virtue of the fact that only six members of the nine member board were present at the meeting for the alteration of the course of study title. *N.J.S.A.* 18A:33-1 provides, *inter alia*:

> "***no course of study shall be adopted or altered except by the recorded roll call majority vote of the full membership of the board of education of the district."

Petitioners argue that the vote of six members of a nine member board of education did not meet the legislative intent of the statute of a "majority vote of the full membership of the board." Petitioners assert that the controverted course should, therefore, be set aside.

The Commissioner observes that the courts have taken a different view from that of petitioners with respect to a majority vote of the full membership of a board. It is a well-established principle of law that when the number of a public body is specifically set, a quorum is a majority of that number. *Morgan v. Saslaff et al.*, 123 *N.J. Super.* 35 (*App. Div.* 1973) This principle was also set forth in *Beckhusen et al. v. Rahway Board of Education,* 1973 *S.L.D.* 167 wherein it was stated as follows:

> "***The general rule, in the absence of specific provision, is well settled, and is that when the body empowered to act consists of a definite number of individuals, a majority of that number will constitute a quorum for the transaction of business***.' (at 173)

> "***The Court also determined that the charter requirement, *ante,* meant that at least six of the ten members of the city council had to be present in order to duly convene a meeting and transact business, and furthermore, action taken by a bare majority of six of the ten had to receive the unanimous consent of the quorum of six to succeed.***" (at 175)

The Commissioner has carefully reviewed the minutes of the Board's regular meeting held July 17, 1975, and observes that six members were present and unanimously approved the curriculum changes of the names of certain courses offered at the high school, *inter alia,* the change of the course title from "Home Nursing and Modern Health" to "Family Living." Accordingly, the Commissioner determines that a majority vote of the full membership of the Board was recorded in compliance with the provisions of *N.J.S.A.* 18A:33-1.

Additionally, the Commissioner finds no evidence of shocking abuse of discretion or an exercise of bad faith on the part of the Board in its action to alter it curricular offerings. Therefore, absent a clear showing of irreparable harm, the Commissioner will not restrain the continuation of the course of study approved by the Board. It has been said by the Commissioner and affirmed by the State Board of Education and the Courts that:

> "***We are here concerned with a determination made by an administrative agency duly created and empowered by legislative fiat. 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.***" (*Thomas v. Morris Township Board of Education,* 89 *N.J. Super.* 327, 332 (*App. Div.* 1965); aff'd 46 *N.J.* 581 (1966))

Petitioners' prayer for relief that the Commissioner order the Board to suspend its duly adopted required course of study of Family Living is, therefore, denied.

The Commissioner, having considered the criteria set forth by the courts for the exercise of discretion in the issuance of a restraint, *pendente lite* (*United States v. Pavenick,* 197 *F.Supp.* 257, 259-60 (*D.N.J.* 1961) and *Communist Party of the United States of America v. McGrath,* 96 *F.Supp.* 47 (*D.D.C.* 1951)) as follows:

> "***Issuance of a preliminary injunction is a matter within the sound discretion of the court. That discretion is traditionally exercised upon the basis of a series of estimates: the relative importance of the rights asserted and the acts sought to be enjoined, the irreparable nature of the injury allegedly flowing from denial of preliminary relief, the probability of the ultimate success or failure of the suit, the balancing of damage and convenience generally.***" (96 *F.Supp.* at 48)

And,

Although the Board is entitled to a presumption that its actions have been correct, in this instance the Commissioner, having carefully considered and balanced the respective aforementioned arguments and determined that no permanent irreparable harm may result to respondent by the issuance of a temporary restraint excusing "P.B." from the Family Living course of study for the 1975-76 academic year with an alternate assignment to meet the requirements of the New Jersey State Board of Education and the Dumont Board of Education; now therefore

IT IS ORDERED that petitioners' request for interim relief, *pendente lite,* is granted until a final determination is made by the Commissioner; and

IT IS FURTHER ORDERED that this matter proceed to final determination as expeditiously as possible.

Entered this 29th day of April 1976.

COMMISSIONER OF EDUCATION

COMMISSIONER OF EDUCATION

AMENDED ORDER

For the Petitioners, Richard J. Donohue, Esq.

For the Respondent, Aronsohn, Kahn & Springstead (Harold N. Springstead, Esq., of Counsel)

This matter having come before the Commissioner of Education upon the receipt of an Order issued by the Honorable Theodore I. Botter, J.A.D. (Superior Court of New Jersey, Appellate Division, May 7, 1976) to modify and amend the Commissioner's previous Order of April 29, 1976, granting interim relief, *pendente lite,* to excuse P.B. from respondent's required Family Living course of study for the 1975-76 academic year; and

It appearing that petitioners have agreed with respondent to engage and participate in the following portions of the required Family Living Course: (1) Introduction; (2) Drug Unit; (3) Cancer Unit; (4) V.D. Unit; (5) Marriage; (6) Parenthood; (7) Pregnancy; (8) Care of Newborn; (9) Birth Defects; (10) Family Law; and (11) Death Education; and

It having been determined by both parties that no irreparable harm may result to P.B. to participate in the above-mentioned units of study of the Family Living Course; and

Taking full cognizance and consideration of the action of the Court in the instant matter that the application to vacate the Commissioner's Stay in its entirety is denied; now therefore

IT IS ORDERED that the Commissioner's Order of April 29, 1976, excusing P.B. from respondent's Family Living course of study is hereby modified and amended to include P.B. in the Family Living course of study units as follows: (1) Introduction; (2) Drug Unit; (3) Cancer Unit; (4) V.D. Unit; (5) Marriage; (6) Parenthood; (7) Pregnancy; (8) Care of Newborn; (9) Birth Defects; (10) Family Law; (11) Death Education; and

IT IS FURTHER ORDERED that this matter proceed to final determination as expeditiously as possible.

Entered this 24th day of May 1976.

COMMISSIONER OF EDUCATION

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Olson and Donohue (Richard J. Donohue, Esq., of Counsel)

For the Respondent, Aronsohn, Kahn & Springstead (Harold N. Springstead, Esq., of Counsel)

Petitioners are the parents of pupils enrolled in the Dumont High School. They charge the Dumont Board of Education, hereinafter "Board," with acts that violate their constitutional rights of freedom of religion in regard to a Family Living-Sex Education Curriculum, hereinafter "Program," instituted as a mandatory course requirement for graduation from the twelfth grade in the Dumont High School. The Board denies the allegations and asserts that its actions regarding the Program were proper and legal.

The Board filed a Motion to Dismiss and petitioners filed a Cross-Motion to have the Program declared null and void on the grounds that it was improperly adopted by the Board. Oral argument on the Motion was heard on March 10, 1976 at the State Department of Education, Trenton. On April 15, 1976, the Commissioner of Education determined that the Motions were premature and contrary to the necessary procedure to arrive at a justiciable decision and denied the Motion to Dismiss and petitioners' Cross-Motion.

On April 8, 1976, prior to the Commissioner's Order, petitioners filed a Motion for Interim Relief, *pendente lite,* seeking an Order from the Commissioner to suspend the Board's required Program or, in the alternative, an Order to excuse P.B. from further participation in the Program pending a final determination by the Commissioner in the instant matter. Oral argument was conducted on April 20, 1976 at the State Department of Education, Trenton. On April 29, 1976, the Commissioner determined that no permanent irreparable harm would result to the Board and issued an Order excusing P.B. from the Program for the remainder of the 1975-76 academic year, with an alternate assignment to meet the requirements of the Board, as well as the State Board of Education.

Subsequently, on May 7, 1976, the Board filed a Motion to Modify and Amend the Commissioner's Order of April 29, 1976 before the Honorable Theodore I. Botter, J.A.D., Superior Court of New Jersey, Appellate Division. The Court denied the Board's application to vacate the Commissioner's Order in its entirety, but determined that no irreparable harm or injury would be incurred by P.B. and ordered her to attend those portions of the Program as follows: (1) Introduction, (2) Drug Unit, (3) Cancer Unit, (4) V.D. Unit, (5) Marriage, (6) Parenthood, (7) Pregnancy, (8) Care of Newborn, (9) Birth Defects, (10) Family Law, and (11) Death Education. On May 24, 1976, the Commissioner executed an Amended Order which returned P.B. to those portions of the Program as directed by the Court.

Petitioners asserted that a fair and impartial hearing in the instant matter was not possible inasmuch as the hearing examiner has served as Superintendent of the Westfield Public Schools and was a party in the prior litigation, *Richard L. Preston et al. v. Board of Education of Westfield et al., Union County,* 1974 *S.L.D.* 130. (Tr. I-2-7; Tr. II-2-3; Tr. III-35) The hearing examiner stated that the Assistant Commissioner of Controversies and Disputes was fully aware of his former professional position with the Westfield School District, as well as his involvement in *Preston.* He stated further that, as a hearing examiner appointed by the Commissioner and approved by the State Board of Education, he was qualified to hear the proceedings in the instant matter. (Tr. I-2-7)

Testimony and documentary evidence were adduced in this matter at a hearing conducted on July 7, 8, 9, 19 and August 24, 1976 at the office of the Bergen County Superintendent of Schools before the hearing examiner appointed by the Commissioner. Briefs were filed by counsel. The report of the hearing examiner follows:

At the time of the first day of hearing P.B. had completed the Program as stipulated by the Court and the Commissioner's Amended Order, *ante,* and had also graduated from Dumont High School. Thus P.B.'s prayer for relief was rendered moot. Petitioner's filing of an Amended Petition of Appeal to include J.B., a tenth grade pupil and daughter, compelled the hearing in the instant matter to move forward.

P.B. testified that she understood that she would be required to participate in a course known as Home Nursing during the course of her twelfth grade year at Dumont High School. She stated that subsequent to the beginning of her senior year she learned from friends that she would be required to take the Family Living Program as a condition for graduation. She testified that she discussed the contents of the program with her parents and she did not wish to participate in the Program because it dealt, in part, with abortion and contraception which was counter to her moral and religious beliefs. She testified that she believed abortion to be murder and that birth control, except by natural means, was contrary to her religious teachings. (Tr. III-13-15) P.B. testified that she had no direct knowledge of the Program but, rather, her information was gleened from the notebook of a pupil then enrolled. She testified that she also objected to that portion of the Program which dealt with deviate sex activities. She asserted that she did not want to participate, nor did she believe it was necessary for her to take that portion of the course. (Tr. III-16-19)

P.B. further testified that exposure to the Program would not change her moral concepts nor religious beliefs. She stated that her parents had discussed artificial contraception with her and that she had knowledge of abortion through the news media. (Tr. III-21-23)

Although she did not object to the discussion of the pros and cons of abortion and contraception, she testified that she objected to the mandate that she discuss such topics in a classroom setting in order to obtain a high school diploma. (Tr. III-29)

P.B.'s younger sister, J.B., had just completed her tenth year at Dumont High School and would be required to participate in the Program during her senior year, the 1977-78 school year. J.B. testified that she did not believe she should be compelled to engage in those portions of the Program she found to be objectionable. She testified that, although abortion and artificial birth control were counter to the teachings of the Church and her own religious beliefs, she would express her opinions on these subjects in a classroom setting. (Tr. III-36, 39) J.B. asserted that she believed it was the parents' right to teach their children about birth control and abortion and that children had the right to accept or reject those beliefs; however, it was her opinion that such teaching was inappropriate in the classroom. (Tr. III-39-40)

Petitioners testified that they have instructed their children about sexual behavior following the dictates of the Church, particularly with regard to abortion and contraception. Petitioner B.B. stated that, notwithstanding the United States Supreme Court's decision which legalized abortion in certain instances, she had explained to P.B. that, "***there's a higher law, God's law *** that abortion is still murder, regardless of what the Supreme Court has decided.***" (Tr. III-43) With regard to birth control, she testified that she had discussed the aspects of artificial means of contraception as opposed to the natural methods advocated by the Church. She stated that she had informed P.B. that the Church advocated a natural means of controlling birth and that it was impermissible to use artificial means. (Tr. III-41-43, 77-79)

Petitioner J.B. stated that the subject matter of abortion and contraception are so intertwined with the family's religious beliefs and moral convictions that parents should have the right of forum for authoritative discussion of such matters.

Petitioner B.B. testified that she attended a PTA sponsored program sometime between 1968 and 1970 at which there was a panel discussion with regard to the need for sex education in the schools but that she was not aware of any further discussions with respect to sex education in the Dumont Schools. She learned of the Program in September 1975 through friends whose children had either completed the nine week course or were then enrolled in the senior year program and subsequently met with the Department chairperson to discuss the content of the Program. He informed her that the curriculum was based on a publication of the State Department of Education entitled, "Health Education Curriculum Guidelines, K-12." (Tr. III-49-53, 55; P-2)

She testified that she and her husband attended the regular monthly Board meeting in October 1975 and publicly stated their objections to the Program after which the Superintendent of Schools met with them early in November to discuss the Program. She asserted that the Superintendent informed them that the Program was part of the Board's health, safety and physical education curriculum and was a requirement for graduation by State law. Throughout her testimony, she objected to the mandatory requirement of the Program, particularly those portions dealing with abortion and birth control. (Tr. III-57-74)

Petitioner J.B. proffered extensive testimony with regard to the teachings of the Church as set forth in the "Documents of Vatican II," (P-3) wherein he quoted, *inter alia,* as follows:

> "***Besides, the rights of parents are violated if their children are forced to attend lessons or instruction which are not in agreement with their religious beliefs. The same is true if a single system of education, from which all religious formation is excluded, is imposed upon all.***"
> (at p. 683) (Tr. III-81)

He testified that he told the Board and the Superintendent that it was his responsibility to rear his children in the areas of moral convictions and subject matter relevant to them and that the Program should be made elective with a freedom of choice for the parents to either accept or reject it. (Tr. III-85-86)

Petitioners presented a series of witnesses, two of whom were members of boards of education outside the Dumont School District. Mr. Richard Mech testified that he became a candidate for the Mahwah Township Board of Education because of his opposition to its sex education program and that, prior to his election to the Board, he and other parents in the Mahwah School community were instrumental in having the program changed from a mandatory to an elective course in grades six through twelve. (Tr. III-137, 152, 167) Mrs. Frances Varoli, a former member of the Emerson Board of Education, Bergen County, testified that its sex education program was elective in nature and children could be excused from any portion of the program, based on moral or religious objections, upon submission of a letter to the Superintendent of Schools. She asserted that the Emerson Board had not received any complaints and that it appeared to have parental acceptance. She testified that the Emerson program does not deal with deviant sexual activities and that the legal aspects of abortion, as well as birth control, are covered as a medical matter. (Tr. IV-2, 9-11)

The Superintendent of the River Dell Public Schools appeared at the hearing pursuant to a subpoena served upon him by petitioners. He testified that prior to his appointment in 1974, the River Dell board had a mandatory sex education program which had created a controversy in the community and, as a result, the board instructed him to provide a solution. He invited interested citizens to participate in a study committee which represented a cross-section of the community and included parents, representatives of the three major religious faiths, and medical and psychiatric professions. The River Dell Superintendent testified that the study committee met weekly for a period of seven or eight months and presented its recommendations to the board, which were subsequently approved and adopted. These included that: (1) there should be a program of sex education in grades seven through twelve, (2) the program should be elective, and (3) certain aspects of the program should be taught in segregated sections. (Tr. IV-28-32, 34)

The Very Reverend Monsignor John J. Cleary, ordained in 1918 and Pastor-Emeritus, Saint Mary of the Assumption, Parkridge, Staten Island, New

York, testified that he had studied the religious aspects of sex education in the public schools since 1932 and that the subject has been of major concern since 1967. It was his opinion that the teaching of sex education is a violation of the First Amendment to the United States Constitution, that sex education should be taught totally in the home by the family as the first and primary school of instruction, that abortion is considered a type of murder which should not be taught to Roman Catholic pupils in the public schools, and that those aspects of contraception should not be taught which are counter to the religious beliefs of the pupils. (Tr. IV-54-58)

Dr. Ernest van den Haag, criminologist, sociologist, philosopher, psychologist and a psychoanalyst in private practice, stated that he had reached the conclusion that there was no rational reason for teaching courses in human sexuality because there was no evidence that it increased the useful knowledge of pupils to their advantage. He asserted that his second objection to such courses was that it was damaging to some pupils. His final objection was that it was engaging in immoral indoctrination to which he was principally opposed. It was his position that sex education in the Scandinavian countries had been in existence for the last forty years with an increased rate of illegitimacy and, further, there was no indication that venereal disease or personality disorders had decreased because of sex education. (Tr. IV-65-73)

Dr. van den Haag testified that he was aware that there were differing opinions as to the value of sex education in the schools and that there had been pressure to approve or oppose such programs. He stated that he had taught courses in sociology, entitled "Social Family," dealing with marriage, human reproduction, love, dating, courtship, family planning, contraception and abortion which he dealt with in terms of the psychological and physiological aspects rather than the technical. (Tr. IV-120-124) He stated that, although he was opposed to the Program, it was his opinion that any person responsible for teaching a course of sex education should be well adjusted and have a background in psychology and sociology. (Tr. IV-91-92)

Petitioners assert that the sole issue in the instant matter is the exercise as parents of their freedom of religion guaranteed by the First Amendment to the United States Constitution and cite *Prince v. Massachusetts,* 321 *U.S.* 158, 166 (1944) wherein the Court held:

> "***It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.***"

They do not question the authority of the State to impose reasonable regulations for the control of its responsibility for the education of its citizens but aver that state authority must yield to the rights of parents to provide an equivalent education in privately operated systems, including church operated schools. *Pierce v. Society of Sisters,* 268 *U.S.* 510, 534 (1925) Petitioners argue that the Court established the "balancing test" with respect to an individual's First Amendment rights versus the state interest in those rights in the case of *Wisconsin v. Yoder,* 406 *U.S.* 205 (1972) as follows:

> "***Thus, a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children so long as they, in the words of *Pierce,* 'prepare [them] for additional obligations.' 268 U.S., at 535***" (406 *U.S.* at 214)

As to the issue of compelling an individual to attend class over the practice of a legitimate religious belief, petitioners again cite *Yoder, supra,* wherein the Court stated:

> "***[I]t must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause.***" (*Id.* at 214)

Petitioners contend that to compel one to attend a sex education course which violates sincere religious principles is not the type of state interest of sufficient magnitude considered by the Supreme Court in *Yoder, supra.*

Petitioners note that the Commissioner and the State Board of Education concurred, for the most part, with the "Report to the Legislature by the Senate and Assembly Committees on Education Concerning Sex Education in the Public Schools" dated April 9, 1970. (P-13) Specifically, petitioners referred to the Report and Recommendation 2(g), which stated:

> "Not require any pupil to complete a course in sex education as part of the requirements for promotion or graduation from any school in the district." (P-13)

Conceding the necessity of some form of sexual enlightenment to the youth of New Jersey, petitioners assert that the Legislature's purpose in making its recommendation was to allow parents to exercise certain moral or religious convictions. It was also noted by petitioners that the Commissioner and the State Board of Education did not concur with Recommendation 2(f) of the Report which reads:

> "Permit students to take sex education courses unless a parent or guardian files written objection with the board of education." (P-13)

Petitioners submitted that one's rights as guaranteed by the First Amendment and reemphasized by the Supreme Court in *Yoder, supra,* compel that their religious principles be respected and protected.

The Board denies that it has violated petitioners' First Amendment rights as alleged in their Petition of Appeal. The Board avers that it has complied with New Jersey Education Law embodied in Title 18A, the New Jersey Administrative Code, Title 6, the policies of the State Board of Education and its own policies and regulations.

The Superintendent of the Dumont Public Schools for the past eleven years testified that he had been associated with the school district since 1946, serving as a teacher and administrator. Between the years of 1961 and 1965 the Board adopted courses entitled "Modern Health" for boys and "Home Nursing" for girls for twelfth year pupils. As the result of the "Policy Statement on Sex Education," adopted by the State Board of Education on January 4, 1967 (R-1) the Superintendent testified, the Board established a committee to review the relevant literature. The Board's committee attended programs sponsored by the Rutgers University Extension Service and a panel discussion sponsored by Monsignor Johnson from the Archdiocese at Saint Mary's Church in Dumont. Additionally, the Dumont PTA Council provided a series of programs in five schools which dealt with the subject of human sexuality and the need to place a program in the schools. Subsequently the Committee recommended that the Board adopt a program of sex education and it was the Superintendent's testimony that the program was approved and implemented during the 1968-69 school year. He stated that the boys' Modern Health and the girls' Home Nursing courses were integrated into one program subsequent to the State Board's enactment of *N.J.A.C.* 6:4-1.1 *et seq.* (Equality in Educational Programs) (Tr. VI-30-39)

The Superintendent testified that the Board, prior to adopting the Program, had promulgated a policy with regard to the teaching of controversial subjects and questions. (R-7) The Board had also adopted policies which provided academic freedom to teachers (R-12) and teaching staff members were responsible for the development and implementation of the curriculum guides and course outlines for the specific areas they were assigned to teach. (R-11; Tr. VI-41-49, 80-83) The Superintendent testified that the Board changed the name of the Program in July 1975 from Home Nursing and Modern Health and integrated it into one course entitled Family Living as the result of recommendations from its health curriculum committee. He stated that he had reviewed a working copy of the course of study prior to its adoption by the Board. He could not, however, supply petitioners with copies of the courses of study for the Home Nursing and Modern Health programs which had been taught prior to the adoption of the Program. (Tr. VI-56-59)

Subsequent to petitioners' appearance at the October 1975 Board meeting, the Superintendent testified, he and the President of the Board met with them to discuss their concerns with regard to the Program. (Tr. VI-53-54) He indicated that he understood petitioners' viewpoint with respect to parental rights and religious freedom; however, he did not agree with their opinions. He stated that the Board determined not to excuse P.B. from the Program for the following reasons:

> "***There shall be no differential requirement for completion of course offerings or courses of study solely on the basis of race, color, creed, religion, sex, ancestry, national origin, or social or economic status." (NOTE: *N.J.A.C.* 6:4-1.5(b)) (Tr. VI-78)

The Superintendent testified that the material in the Program adopted by

the Board in July 1975 had little, if any, difference from the previous courses of study in Home Nursing and Modern Health. He indicated that he saw no need for community participation due to the change of the name of the Program. He stated further that the Program was not mandated by statute; however, inasmuch as the Program was an integral part of the health curriculum it therefore was mandated by the Board as provided by *N.J.S.A.* 18A:35-5. (Tr. VI-88-89)

The principal of Dumont High School, testified that since the 1960's there had been two courses required of twelfth grade pupils, Modern Health for boys and Home Nursing for girls. He stated that the two courses were taught by teaching staff members assigned to the physical education department. It was his testimony that the course content of the two courses incorporated the same elements as the Program adopted by the Board in July 1975. He stated that the Board's action merely approved the change of the name of the two courses to integrate them into one program. (Tr. V-3-9, 36-39)

The principal testified that the Program had been approved by the State Department of Education and that the teaching duties had been assigned to two teaching staff members, one of whom was a registered nurse and the other a health specialist. (Tr. V-4) He testified that the Program was implemented in September 1975 and that the two assigned teaching staff members did not have a completed course of study to follow, but taught from a working draft. He testified that the Course of Study for Family Living (P-1) was developed by the two staff members and completed in January 1976. (Tr. V-33, 35) He could not produce copies of the course of study for the former courses in Modern Health and Home Nursing. He stated that they dispose of previous course outlines when new outlines become current. (Tr. V-8, 40-41) The Dumont High School Program of Studies for the school year 1973-74 was introduced into evidence (P-10) and contained the following course descriptions:

> "MODERN HEALTH (Boys – Gr. 12)
>
> "Senior boys meet once a week for the full year. It provides the opportunity for discussion of community and personal health problems, including tobacco, drugs, and narcotics. Sports programs and athletics are discussed. Human sexuality and drug abuse education are course offerings.
>
> "HOME NURSING (Girls – Gr. 12)
>
> "Required at senior level for one marking period. Objectives are to teach students as much as possible how to recognize signs and symptoms of illness, the simple techniques and procedures for the care of the ill patient at home; care of the infant and baby sitting responsibilities, the birth atlas, and first aid in emergencies." (P-10)

The principal asserted that the topics of abortion, contraception, love and dating were taught in the Modern Health and Home Nursing courses but not all of those topics were necessarily covered in any one year. (Tr. V-45-46) To the best of his knowledge, the principal testified that no pupil had been excused from taking the required courses in Modern Health, Home Nursing or Family

Living. (Tr. V-27) He testified further that it was his opinion that pupils should not be excused from any portion of the Program. (Tr. V-67-69)

The principal testified that he was a member of the Roman Catholic Church and that in his opinion the Program did not violate the tenets of the Church. He stated that he knew of no opposition within the Catholic Church that states that people cannot learn about abortion, venereal disease or contraceptives. (Tr. V-76-77)

The teaching staff members assigned to teach the Program testified with regard to the development of the Course of Study. (P-1) Ethna Fitzsimmons, a registered nurse and certificated teaching staff member, testified that she taught Home Nursing for girls prior to her assignment to teach the Program. She stated that she and Carol Ramstedt reviewed a variety of materials and publications, particularly those published by the State Department of Education. (R-2, R-3) Mrs. Ramstedt testified that in addition she referred to materials she had used in her graduate work and course outlines from other schools including one from Bergen Catholic High School. (Tr. V-89-93; Tr. VI-116-120) Both teachers testified that, as a result of their review of the materials and discussions with other staff members, they subsequently developed the Course of Study in January 1976. (P-1) It was stated that the Program was offered to a different group of twelfth grade pupils every nine weeks and that approximately 200 minutes were devoted to the topic of sex education. (Tr. V-94)

Mrs. Fitzsimmons testified that she was a practicing Roman Catholic and that as a moral conviction she believed that abortion was wrong. When the topic of abortion was presented to her class, she provided the viewpoint of the Catholic, Protestant, and Jewish religions, as well as the United States Supreme Court ruling. She asserted that she taught this topic with a clinical approach and did not attempt to instill her opinions or moral convictions upon the pupils. (Tr. V-97-99, 109) Mrs. Ramstedt testified that she taught the section on abortion in only two of the four quarters due to time constraints. (Tr. VI-142)

Both Mrs. Fitzsimmons and Mrs. Ramstedt testified that they discussed the Program with petitioners at the annual Back to School night in October 1975. They had the working draft of the Course of Study with them at the time and allowed petitioners to review it in their presence. (Tr. V-98; Tr. VI-152) Mrs. Ramstedt asserted that when petitioners requested that P.B. be excused from certain unspecified sections of the Program, she stated that she believed it was permissible. (Tr. VI-152-153)

The Board proffered testimony from witnesses outside its school district and in support of its position to offer the Program to its pupils. Mr. William Burcat, an employee of the State Department of Education and formerly a supervising consultant for health and drug abuse education, testified that in 1967 the Department published a booklet entitled, "Guidelines For Developing School Programs in Sex Education." (R-1) He stated that the publication was sent to school districts in the State to assist the schools with the development of curriculum subsequent to the policy statement of the State Board recommending that sex education programs be included in school curriculum.

He stated that the Department published the following additional booklets to aid school districts in the development of health education programs: "Health Education Curriculum Guidelines K-12" (P-2), "A Teaching Reference Guide-Venereal Disease" (R-2), and "Guidelines for Venereal Disease Education." (R-3; Tr. III-123-127)

Mr. Burcat testified that he never recommended that boards of education make sex education programs mandatory; however, if a board adopted such a program it could not segregate boys from girls and comply with *N.J.A.C.* 6:4-1.1 *et seq.* (Tr. III-135-136)

Anthony J. Zitelli, Director of Counseling at Madison Borough Junior High School, Morris County, stated that he was an adjunct Professor of Biology at Fairleigh Dickinson University and taught a course in human sexuality. He testified that the Madison board had a mandatory program, Family Life Education, for its seventh and eighth grade pupils which covered the topics of alcohol and drug abuse, human reproduction, venereal disease, dating, engagement, marriage, parenthood, family planning, pregnancy, care of the newborn, and abortion, similar to the Dumont Program. (Tr. VI-3-7) He testified that the course was coeducational except for the showing of the movies "Boy to Man" and "Girl to Woman" which were shown to boys and girls separately but later reviewed and discussed together. (Tr. VI-7-8) He testified further that, to the best of his knowledge, there had been no requests to exempt any pupil from the seventh and eighth grade course. (Tr. VI-27-28)

The Board declared that there was no testimony elicited that the Program or its contents violated petitioners' right to freedom of religion or their free exercise thereof. Petitioners P.B. and J.B. both testified that they would not change their opinions as the result of any discussions of the issues concerned with abortion and birth control but rather, the Board argued, they objected to the Program on the grounds that they did not believe that they should be required to sit in a classroom and listen to such discussions. With regard to the teaching of sex education in schools and the violation of the First Amendment to the United States Constitution, the Board cited *Citizens for Parental Rights v. San Mateo County Board of Education,* 51 *Cal. App.* 3d 1, 124 *Cal. Rptr.* 68, 73 (*Ct. App.* 1975) wherein a class action was instituted for declaratory and injunctive relief on the basic question of

> "***whether the implementation of family living and sex education programs *** violates the constitutional rights of the individual parents and their children under the First, Ninth, Tenth and Fourteenth Amendments of the U.S. Constitution and the parallel provisions of the California Constitution.***" (Board's Brief, at p. 28)

The Board noted that the course under litigation in *Citizens, supra,* differed from the Program in the instant matter in that pupils were not compelled to attend any part of the course and could summarily withdraw from any part of the Program. The Court dismissed the entire complaint on the grounds that no substantial constitutional issues were presented and the Court found that the course did not impair the Free Exercise Clause, even if it did

indeed infringe on certain religious beliefs. The Board averred that the Court concluded the course of study did not violate the "Establishment of Religion" clause, where it stated, *inter alia*:

> "***As stated in *Epperson v. Arkansas,* 393 U.S. 97, 104, 89 S.Ct. 270: 'Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. *** By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.' The court in the Epperson case pointed out that the state may neither prefer any religion nor prohibit any theory just because it be deemed antagonistic to the principles or prohibitions of any religious sect or dogma."
>
> (Board's Brief, at p. 29)

The Board advanced its argument in *Hopkins v. Hamden Board of Education,* 29 *Conn. Sup.* 397, 289 *A.2d* 914 (Co. Pl. 1971) where the Court denied a temporary injunction and upheld a compulsory health and physical education course that included education in family life and sex education and stated, *inter alia,* as follows:

> "***This case primarily questions the right of the parents to regulate the education of their children in public schools as the parents' religious beliefs dictate, as against the justification of the state for regulating public education in a manner which might in some respects conflict with those beliefs. To permit such interference in the public school system by parents under the circumstances of this case could, unjustifiably, only tend to render a well-regulated public school system vulnerable to fragmentation whenever sincere, conscientious religious conflict is claimed. Cantwell v. Connecticut, 310 *U.S.* 296, 303, 60 S.Ct. 900, 84 L.Ed. 1213, indicates quite clearly that this was not the intent of the guarantees under the first amendment, and that the state's interests must also be weighed and the public protected." (289 *A.2d* at 924)

The Board submitted that in balancing the interests in the instant matter, i.e., the right of parents to regulate the education of the children in the public schools as the parents' religious beliefs dictate as against the right of the Board to provide a thorough and efficient education, the balance should be weighed in favor of the Board and that the mandatory program is a valid exercise of its authority.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record in the instant matter, including the report of the hearing examiner and the exceptions and objections pertinent thereto filed by petitioners. It is noted that petitioners' principal objections are concerned with certain omissions of testimony adduced at the hearing. In the

Commissioner's judgment, these objections and exceptions are peripheral to the essential issue herein, which, concisely stated, is whether the Board's action to adopt a course of study of Family Living-Sex Education as a requirement for high school graduation violates petitioners' guaranteed constitutional rights of freedom of religion.

The Commissioner takes particular notice of petitioners' objection wherein the credibility of the hearing examiner was questioned with regard to his previous involvement as a party litigant in *Preston, supra.* Petitioners make reference to a statement on the record wherein the hearing examiner forthrightly stated that the Commissioner was aware of his involvement in that particular matter and further notes that the hearing examiner's report refers to the Assistant Commissioner of Controversies and Disputes rather than the Commissioner of Education. The Commissioner is constrained to observe *N.J.A.C.* 6:24-1.1 in pertinent part as follows:

> "(a) 'Commissioner' as used in these rules, unless a different meaning appears from the context, shall mean the Commissioner of Education *or the Assistant Commissioner of Education* assigned to hear and determine controversies and disputes or a hearing officer assigned to conduct the proceedings in any case." (*Emphasis supplied.*)

The Commissioner, therefore, finds no merit in petitioners' objection in the circumstances of this case, for the reasons set forth herein.

The Commissioner notices that this record consists almost entirely of expressions of differing points of view of educational philosophy and both personal and professional judgments regarding the role of the public schools, with respect to curriculum offerings in general, and specific concerns regarding the teaching of human sexuality.

By the controversial nature of this case, the Commissioner is constrained to comment with respect to the authority of local boards of education to determine the educational program and policies they shall adopt for their respective schools. *N.J.S.A.* 18A:33-1; *N.J.S.A.* 18A:11-1 It is clear that local boards of education in this State are responsible for the "government and management" of their respective school districts and that such responsibility embraces matters of curriculum content and the services to be performed by school employees. As the Court said in *Michael A. Fiore v. Board of Education of the City of Jersey City,* Docket No. A-429-63 New Jersey Superior Court, Appellate Division, January 14, 1965 (1965 *S.L.D.* 177):

> "***The Legislature has committed the operation of local schools to district boards of education. It has provided a system of administrative appeals from such boards to the Commissioner, *R.S.* 18:3-14, and thereafter to the State Board, *R.S.* 18:3-15. The powers of boards of education in the management and control of school districts are broad. *Downs v. Board of Education, Hoboken,* 12 *N.J. Misc.* 345, 171 *A.* 528 (*Sup. Ct.* 1934), affirmed *sub nomine Flechtner v. Board of Education, Hoboken,* 113 *N.J.L.* 401 (*E.&A.* 1934). Subject to statutes relating to

tenure, they are vested with wide discretion in determining the number of employees necessary to carry out the program, the services to be rendered by each and the compensation to be paid for such services. Where a board, in the exercise of its discretion, acts within the authority conferred upon it by law, the courts will not interfere absent a showing of clear abuse. 78 *C.J.S., Schools and School Districts,* § 128, p. 920; *Boult v. Board of Education of Passaic,* 135 *N.J.L.* 329 (*Sup. Ct.* 1947), affirmed 136 *N.J.L.* 521 (*E.&A.* 1948). Where, however, the board's action is patently arbitrary, without rational basis, or induced by improper motives, the rule is otherwise. *Kopera v. West Orange Board of Education,* 60 *N.J. Super.* 288, 294 (*App. Div.* 1960); *East Paterson v. Civil Service Dept. of N.J.*, 47 *N.J. Super.* 55, 65 (*App. Div.* 1957); *cf. Moore v. Haddonfield,* 62 *N.J.L.* 386, 391 (*E.&A.* 1898); *Peter's Garage, Inc. v. Burlington,* 121 *N.J.L.* 523, 527 (*Sup. Ct.* 1939).***"

Thus, the powers of a local board of education are broad and they encompass the authority to determine the services to be rendered by staff employees. Certainly such authority must include the entitlement of local boards to assign teaching staff members to positions within their certification. *N.J.S.A.* 18A:1-1 The authority must also include, in general terms, the course of study deemed appropriate by the board to be taught. *N.J.S.A.* 18A:33-1; *N.J.A.C.* 6:27-1.3

In the instant matter, the Board on July 17, 1975, adopted a resolution recommended by its administration to change the titles of two required courses, Home Nursing for girls and Modern Health for boys, and combine the two courses into one coeducational required course of study entitled Family Living. The Board's actions, albeit without the benefit of a formal course of study outline, was in compliance with the provisions of *N.J.S.A.* 18A:33-1, which states in pertinent part as follows:

"Each school district shall provide *** courses of study suited to the ages and attainments of all pupils between the ages of five and 20 years, either in schools within the district convenient of access to the pupils, or as provided by article 2 of chapter 38 of this title, *but no course of study shall be adopted or altered except by the recorded roll call majority vote of the full membership of the board of education of the district.*"

(*Emphasis added.*)

In addition to its adoption of the course of study in Family Living, the Board also integrated the program into its course of instruction in health, safety and physical education as provided by *N.J.S.A.* 18A:35-5 *et seq.* In particular, *N.J.S.A.* 18A:35-7 provides:

"Every pupil, except kindergarten pupils, attending the public schools, insofar as he is physically fit and capable of doing so, as determined by the medical inspector, shall take such courses, which shall be a part of the curriculum prescribed for the several grades, and the conduct and attainment of the pupils shall be marked as in other courses or subjects,

and the standing of the pupil in connection therewith shall form a part of the requirements for promotion or graduation."

Thus, the Board's adoption of the Program as a part of its health, safety and physical education instructional course of study compelled each and every twelfth grade pupil to successfully complete the course as a requirement for graduation from its high school.

The Board's action to integrate the two former courses into the coeducational Program was taken to comport with the rules and regulations of the State Board of Education's adoption of *N.J.A.C.* 6:4-1.1 *et seq.*, on May 7, 1975, entitled "Equality In Educational Programs." On August 3, 1977, subsequent to the filing of the hearing examiner's report, the State Board amended certain portions of *N.J.A.C.* 6:4-1.5, *inter alia,* subsection (e) which now reads:

> "No course, including but not limited to physical education, health, industrial arts, business, vocational or technical courses, home economics, music and adult education, shall be offered separately on the basis of race, color, creed, religion, sex, ancestry, national origin, or social or economic status.
>
> > "1. Portions of classes which deal exclusively with human sexuality may be conducted in separate sessions for boys and girls, provided that the course content for such separately conducted sessions is the same."

When the State Board adopted its rules and regulations with regard to equality in educational programs, it set forth its purpose and objectives in *N.J.A.C.* 6:4-1.1 as follows:

> "The New Jersey Constitution and implementing legislation guarantee each child in the public schools equal educational opportunity regardless of race, color, creed, religion, sex, ancestry, national origin, social or economic status. To assure these basic rights the Commissioner of Education and the State Board of Education have developed these regulations which specifically implement *N.J.S.A.* 18A:36-20 and the State Board of Education Resolution concerning sex equality in educational programs. These regulations have also been developed in conformity with relevant Federal and State statutes concerning discriminatory conduct."

The Commissioner holds, therefore, that the Board exercised its authority pursuant to the legislative intent and statutory provisions in the instant matter. The Commissioner observes, however, that the exercise of such authority is not without limitations; *e.g.*, the nondiscriminatory conduct of its educational programs. *N.J.S.A.* 18A:36-20; *N.J.A.C.* 6:4-1.1 *et seq.*

Petitioners contend that the Board violated their State and Federal constitutional rights of freedom of religion when it adopted the Program and

caused such course to be mandatory for all twelfth grade pupils and a requirement for graduation. Petitioners assert that the course imparts instruction in the subjects of abortion and contraception, contrary to their religious beliefs and teachings. The Commissioner takes notice of the similarity of the instant matter to *Hopkins v. Hamden Board of Education, supra,* wherein parents sought to obtain temporary and permanent injunctions against the use of a printed curriculum prepared by the state board of education to authorize a course entitled "Health Education" which required compulsory attendance and included, in addition to physical education, a comprehensive and planned sequential study of reproduction, hygiene, sex education, family life, and growth. The parents claimed, *inter alia,* that the teaching of "sex education" and "family life" in public schools as a mandatory course was in violation of the provisions of the State and Federal Constitutions which prohibit the establishment of religion and interference with the rights to the free exercise of religion, and that the teaching of the course was an unconstitutional invasion of the rights of privacy of the plaintiffs.

The Connecticut Court held that the statute clearly indicated and without condition that local public schools were required to teach courses in "hygiene" and "physical and health education," and that the local board of education, acting within its statutory authority and direction, implemented the physical instruction and health education courses and made attendance compulsory. The Court found that the statute clearly made the teaching of these subjects mandatory with compulsory pupil attendance on the local boards of education and stated:

> "***Since attendance in the courses is compulsory as to all students enrolled in the public schools in Hamden, without discrimination, there appears to be no proof of lack of either equal protection or due process which could be violative of the fourteenth amendment to the constitution of the United States under the allegations of this count.***"
>
> (289 *A.2d* at 919)

The principal objections to the curriculum in the instant matter and in *Hopkins, supra,* were from parents of the Roman Catholic faith. The basis for their opposition was, in part, that their religious beliefs imposed upon parents the primary responsibility for the education of their children and that, particularly in the area of sex education, papal encyclicals and the pronouncements of Vatican II directed parents to instruct their children at home in sexual matters. The parents testified that they had indeed met their religious obligations and instructed their children according to the dictates of the Church.

In both matters the parents claim that the school's teaching of the curriculum denies them the religious freedom guaranteed by the First Amendment and, therefore, the curriculum, as well as the statutory authority under which it is taught, are unconstitutional and void. In *Hopkins, supra,* the Court held that the parents failed to offer any evidence or cite authority for their claim that the constitutional right to teach sexual matters exists only in the home and is therefore prohibited in the schools. The Court further stated:

"***Unless the plaintiffs claim that a secular program was a form of religion, there appears to be no proof, from evaluating the evidence in a light most favorably to the plaintiffs, that the teaching of the curriculum will in fact establish any religious concept or philosophy in the school system. In Everson v. Board of Education, 330 U.S. 1, 15, 67 S. Ct. 504, 511, 91 L.Ed. 711, the Supreme Court of the United States said that the establishment clause meant the following: 'Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.' Further, it is clear from the cases that the first amendment does not mean that in every and all respect there shall be a 'wall' and complete separation of church and state. It is apparent that this is not possible. Zorach v. Clauson, 343 U.S. 306, 312, 72 S.Ct. 679, 96 L.Ed. 954.***" (*Id.*, at 922)

In the instant matter, petitioners did not claim that irreparable harm would result as a consequence of their children's participation in the Program. On the contrary, the pupils testified that they held, or in the alternative could accept or reject, the teachings of their parents; however, they did not believe that they should be subjected to instruction in sexual matters in the public schools as a mandatory requirement for graduation.

The Connecticut Court held that to permit parents to regulate the education of their children in public schools as their religious beliefs dictate, as against the justification of the state to regulate public education in a manner which might in some respects conflict with those beliefs, would constitute an unjustifiable interference with a well-regulated public school system vulnerable to fragmentation whenever sincere, conscientious religious conflict is claimed. It cited *Cantwell v. Connecticut,* 310 *U.S.* 296, 303, 60 *S.Ct.* 900, 84 *L.Ed.* 1213, which clearly indicated that this was not the intent of the First Amendment guarantees and that the state's interests must also be weighed and the public protected. The Court further stated that it had not been established that serious constitutional questions were involved although the parents claim that their rights of control of their children in religious scruples indicated the contrary. It stated that such claims and questions similar to those raised by the parents have been held by the Federal courts to be inadequate to raise constitutional questions based on the First Amendment. *Murdock v. Pennsylvania,* 319 *U.S.* 105, 109, 63 *S.Ct.* 870, 87 *L.Ed.* 1292 (1943); *Cornwell v. State Board of Education,* 314 *F.Supp.* 340, 342 (D. Md. 1969), aff'd 428 *F.2d* 471 (4th Cir. 1970) The Murdock case concerned the balancing of the interests of the individual against the interests of the state. See *Prince v. Massachusetts,* 321 *U.S.* 158, 64 *S.Ct.* 438, 88 *L.Ed.* 645 (1944). The Court, therefore, denied plaintiff's prayer for relief.

The Commissioner will next consider petitioners' alternate prayer for relief, that their children be exempt from participation in that portion of the Family Living course of study relating to sex education. In *Preston, supra,* the Commissioner viewed a proposed "limited excusal program" as completely untenable and without legal justification or authority. Such a policy would give to parents the authority which the Legislature has already vested in local boards

of education. *N.J.S.A.* 18A:33-1 The Commissioner cites *Clinton F. Smith et al. v. Board of Education of the Borough of Paramus et al.*, 1968 *S.L.D.* 62, aff'd State Board of Education, February 5, 1969, as follows:

> "***Certain elements of the curriculum such as United States History, New Jersey history and geography, and physical education are mandated by statute. *N.J.S.A.* 18A:35-1 *et seq.*, 18A:6-2 and 3 But the public school curriculum is not restricted to the few areas of study which the Legislature has prescribed. Boards of education are free to determine whatever other learning experiences are suitable to the pupils to be served and will best achieve the aims and objectives of the schools.***" (at 64-65)

See also *George L. Ulassin v. Board of Education of the Township of Branchburg,* 1972 *S.L.D.* 219. Historically, boards of education are the agencies which have the authority to determine curricula for their pupils. Such power is derived from the Legislature. The powers of boards of education are specifically enumerated in the laws or implied therefrom. *New Jersey Good Humor, Inc. v. Bradley Beach,* 124 *N.J.L.* 162 (*E.&A.* 1939) These powers can neither be increased nor diminished except by the Legislature. *Burke v. Henry,* 6 *N.J. Super.* 524 (*Law Div.* 1949); *Board of Education of Belvidere v. Bosco,* 138 *N.J. Super.* 368, 376 (*Law Div.* 1975) Implied powers extend only as far as is necessary to carry out the purposes of the school law. *Albert D. Angell et al. v. Board of Education of the City of Newark,* 1960 *S.L.D.* 141 Until and unless the Legislature amends *N.J.S.A.* 18A:33-1, the Board has no authority to delegate its responsibility under the law.

The Commissioner finds and determines that the Board's action controverted herein constituted a proper exercise of its discretion according to the law as set forth in prior decisions by the Commissioner and the courts.

Accordingly, the Petition is dismissed.

COMMISSIONER OF EDUCATION

October 27, 1977

COMMISSIONER OF EDUCATION

ORDER

This matter coming before the Honorable Fred G. Burke, Commissioner of Education, State of New Jersey, on an application by the Petitioners to stay the decision of the Commissioner of Education dated October 27th, 1977 pending a final determination by the State Board of Education:

IT IS on this 18th day of November, 1977

ORDERED, the stay is hereby granted from the decision of the Commissioner of Education on behalf of the Petitioner J.B. pending a final determination by the State Board of Education.

COMMISSIONER OF EDUCATION

In the Matter of the Election Inquiry in the School District of the Borough of Fair Lawn, Bergen County.

COMMISSIONER OF EDUCATION

DECISION

For the Complainant, Hauser & Kahn (Richard M. Kahn, Esq., of Counsel)

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

Pursuant to a letter complaint filed by Candidate Nathan Streitman alleging irregularities in the conduct of the annual school election held March 29, 1977 in the School District of the Borough of Fair Lawn, an inquiry was conducted by a representative designated by the Commissioner of Education at the office of the Bergen County Superintendent of Schools on May 23 and June 24, 1977. The report of the Commissioner's representative follows:

The announced results of the balloting for the election of school board members was challenged by Candidate Streitman and a recount of six of the total of twenty-three voting districts was reported in the Commissioner's decision *In the Matter of the Annual School Election Held in the School District of the Borough of Fair Lawn, Bergen County* 1977 *S.L.D.* 648. Additionally, allegations of improper conduct were set forth by Candidate Streitman with the assertion that such conduct could possibly have influenced the election of certain candidates. These charged irregularities are hereinafter considered *seriatim.*

CHARGE NO. 1

Complainant Streitman alleges that his opponent for a two-year unexpired term and a write-in candidate for a full three-year term for the Board of Education ran a joint, allied campaign which was well advertised.

Complainant Streitman admitted that there was nothing illegal about the alleged joint or allied campaign of one of his opponents and a write-in candidate. He asserted, however, that the extensive electioneering caused the uninformed or uncommitted voters to cast their ballots for his opponent. (Tr. I-6-10, 12-13; Tr. II-73-75)

Complainant Streitman's opponent, an incumbent board member, testified that he joined an election campaign with the write-in candidate; however, he asserted that his role was limited to placing an advertisement in the local newspaper and placing campaign posters on utility poles. He stated that the write-in candidate assumed the major responsibility for the joint campaign. (Tr. II-67-69)

There was no testimony or evidence presented to establish that the joint campaign of the incumbent board member and the write-in candidate was illegal and/or improper.

CHARGE NO. 2

Complainant Streitman alleges that on several occasions blank, gummed paper was found pasted over his name on the voting machines.

A voter testified that subsequent to voting for a three year term she intended to vote for Complainant Streitman for the two year term; however, she could not find his name on the voting machine but did find that of his opponent. Upon closer inspection, she stated that there was a blank sticker which she peeled away and saw that it was covering Streitman's name. The voter testified that when she had completed her vote she stepped out of the booth and reported her observation to one of the election workers. (Tr. II-63-64)

Complainant Streitman stated that he made Charge No. 2 based upon a telephone call from the voter subsequent to the day of the election. He had no direct or indirect knowledge of other instances in which blank stickers were used to obliterate his name on the voting machines. (Tr. II-75-77)

The secretary to the Assistant Superintendent in Charge of Business/Secretary of the Board testified that on the day of the election she received a telephone call from a woman who stated that when she had gone to vote there was a blank paper stuck over Mr. Streitman's name and that she had reported the incident to the election workers. The secretary stated that she immediately informed the Board Secretary about the report of the telephone call and he subsequently went to check the matter. (Tr. II-57-58) The Board Secretary testified that he inspected several voting districts while another Board employee surveyed the other voting districts with regard to the alleged blank stickers and that none had been found. (Tr. II-35-36)

The testimony and evidence does not support the charge that blank, gummed paper was found pasted over Complainant Streitman's name at several polling places. The testimony reveals, however, that the allegation is true to the limited extent it did occur at least once at one polling place during the course of the election.

CHARGE NO. 3

It was alleged that Complainant Streitman's name was obliterated by a felt marker pen and that the write-in candidate's name was written near his name on the voting machine.

CHARGE NO. 8

The name of the write-in candidate was written on the face of the write-in slides on the voting machines in several districts.

Subsequent to the election held March 29, 1977, Complainant Streitman testified that he had received a telephone call from a voter in voting district number twenty-three stating that she had observed that the voting machines were defaced with red magic marker pen writing over Candidate Streitman's name and that the write-in candidate's name was written on the voting machine in the same manner. (Tr. II-77-78) An affidavit of the voter's observation was accepted into evidence in lieu of testimony. (C-4:5) An election worker assigned to district twenty-three filed an affidavit and asserted that on two occasions she observed that the voting machines were defaced with red magic marker writing on the write-in candidate's name placed on the voting machine which she subsequently removed. (C-4:13, 16, 21)

The evidence regarding Charges Nos. 3 and 8 is substantially true.

CHARGES NOS. 4 and 7

It was alleged that name stickers for the write-in candidate were pasted on the faces of various polling booths; that when the Board was notified of the accumulation of such name stickers it advised that they should not be removed; that later in the day they were eventually removed; and that name stickers for the write-in candidate were pasted on the face of the write-in slides on several voting machines.

Sixteen election workers and one Board employee filed affidavits attesting to the charges and that they found name stickers of the write-in candidate affixed to the face and sides of the voting machine and/or on the write-in slides of the voting machines. The election workers reported that such incidents took place in voting districts 5, 7, 8, 10, 15, 16, 17, 18, 19, 20, 22 and 23. (C-4:1, 2, 6, 8, 9, 11, 12, 13, 15, 16, 17, 19, 20, 21, 22, 23)

The Board employee who worked with the Board Secretary and inspected the voting machines asserted in his affidavit as follows:

"***In my rounds I found four write in stickers for [the write-in

candidate] pasted on the voting machines. In one polling district I found a *** sticker covering Mr. Streitman's name. In another district I found a *** sticker on the machine's outer door face, left side. In another district I found a *** sticker on the outer door, left side and another sticker on the inner door face left side.***" (C-4:18)

The Board employee asserted that he instructed the election workers to remove the name stickers of the write-in candidate.

The allegations as set forth in Charges Nos. 4 and 7 are true in fact, with the one exception that it was the Bergen County Board of Elections and not the Board of Education which advised the election workers not to remove the name stickers of the write-in candidate from the voting machines. (C-4: 16, 18)

CHARGES NOS. 5 and 6

It was alleged that election workers were instructed by the Board or, of their own volition, offered statements; i.e., "Do you need help to cast a write-in vote?"

The Board Secretary testified that it was his responsibility to obtain ninety-two election workers and to present their names to the Board for its appropriate action to appoint them for the annual school election. He stated that he provided the election workers with a short course of instruction on election procedures as provided in the New Jersey Statutes Titles 18A and 19. He asserted that he had prepared a booklet that explained the basic procedures and one was distributed to each election worker. (C-2) In addition, he stated that he invited the assistant custodian and chief mechanic of the Bergen County Board of Elections to instruct election workers in the use of the voting machines. (Tr. II-31-32)

The Board Secretary testified that he was aware that a write-in campaign was under way for the forthcoming school election and requested that the representative of the Bergen County Board of Elections instruct the election workers with regard to the use of the name stickers on the write-in slides on the voting machines. In addition, he asserted that he reviewed with the election workers the section of the booklet he had prepared entitled, "Write-In Votes." (Tr. II-32-33, 46-48; C-2)

Eight election workers filed affidavits with regard to the charges and seven asserted that they observed some voters who had difficulty in casting their votes and volunteered instructions with the procedure to cast a write-in vote, while two election workers stated that they were notified to ask all the voters if they required aid in casting a write-in vote. (C-4:1, 4, 8, 14, 16, 17, 20, 22, 23) Two voters filed affidavits wherein they stated that the election workers volunteered their assistance with the write-in ballot and one voter asserted that he considered such an inquiry to be an irregularity and reported his concern to the Board. (C-4:3, 10)

Complainant Streitman testified that the election statutes embodied in

Titles 18A and 19 do not provide that an election official may offer aid to a voter with respect to a write-in candidate unless the voter first asks the election officer for such assistance. It was his position that the election workers were campaigning for the write-in candidate by voluntarily raising the question of the write-in procedure before the voter asked for assistance in casting his ballot.

The facts regarding Charges Nos. 5 and 6 disclose that the charges are true.

In summary, the results of the inquiry established the following facts: (1) Complainant Streitman's name was obliterated from view on voting machines by the use of a blank, gummed paper sticker and red felt marker pen; (2) the name of the write-in candidate was written on the face of the write-in slides on several voting machines; (3) printed name stickers on the write-in candidate were pasted on various polling booths; (4) printed name stickers of the write-in candidate were pasted on the face of the write-in slides on various voting machines; and (5) election workers were instructed and/or voluntarily offered voters advice with regard to the procedure of casting write-in votes, prior to the voter seeking such advice.

* * * *

The Commissioner observes that the parties have waived receipt of the hearing examiner report pursuant to *N.J.A.C.* 6:24-1.17(b). The Commissioner has reviewed the record and report of this inquiry and adopts as his own the findings as reported.

The Commissioner is constrained to state that the irregularities proven to have occurred at the annual school election in the Fair Lawn School District disclose a degree of carelessness and disregard for statutory requirements which will not be condoned and may not continue in future school elections. The Commissioner has consistently asserted that school elections are no less important than other elections and they are to be conducted with careful regard for and in strict compliance with every applicable law. *In re Annual School Election in Palisades Park,* 1963 *S.L.D.* 99

The Commissioner points out that defacing a polling booth is prohibited by *N.J.S.A.* 18A:14-72, which reads as follows:

> "If a person shall on any day fixed for any election tamper, deface or interfere with any polling booth or obstruct the entrance to any polling place, or obstruct or interfere with any voter, or loiter, or do any electioneering within any polling place or within 100 feet thereof, he shall be a disorderly person and shall be punished by a fine not exceeding $500.00 or by imprisonment not exceeding one year, or both."

Additionally, *N.J.S.A.* 18A:14-81 is also applicable in the instant matter and provides as follows:

> "If a person shall distribute or display any circular or printed matter or offer any suggestion or solicit any support for any candidate, party or

public question, to be voted upon at any election, within the polling place or room or within a distance of 100 feet of the outside entrance to such polling place or room, he shall be a disorderly person."

While the Commissioner commends the efforts of the Board to instruct its election workers in election procedures, the omission of instructing election officials to periodically inspect the voting machines and the polling booths for unauthorized printed material cannot be overlooked. By means of thorough instruction and preparation, the election workers will properly follow all the statutory requirements which govern school elections.

The evidence of irregularities brought to light by the inquiry, while not condoned in any way by the Commissioner, do not warrant the setting aside of the election results. It is the clear intent of the law that elections are to be given effect whenever possible. It has been held by the courts of this State that gross irregularities, when not amounting to fraud, do not vitiate an election. *Love v. Board of Chosen Freeholders,* 35 *N.J.L.* 269 (*Sup. Ct.* 1871); *Stone et al. v. Wyckoff et al.,* 102 *N.J. Super.* 26 (*App. Div.* 1968) It is clear that irregularities and deviations from election laws by election officials provide insufficient grounds for voiding an election if the will of the people has been fairly expressed and determined and has not been thwarted. *Petition of Clee,* 119 *N.J.L.* 310 (*Sup. Ct.* 1938); *In re Livingston,* 83 *N.J. Super.* 98 (*App. Div.* 1964) It is only when the deviations from statutory procedure are so gross as to produce illegal votes which would not have been cast or to defeat legal votes which would have been counted, so as to make impossible a determination of the will of the people, that an election will be set aside. *In re Wene,* 26 *N.J. Super.* 363 (*Law Div.* 1953) set forth the rule as follows:

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

For the reasons stated, the Commissioner determines that the announced results of the annual school election held in the Fair Lawn School District will stand.

COMMISSIONER OF EDUCATION

October 27, 1977

In the Matter of the Petition of the Township of Mount Olive for Withdrawal from the West Morris Regional School District, Morris County.

DECISION OF THE BOARD OF REVIEW

For the Petitioner, Vogel, Chait & Wacks (Arnold H. Chait, Esq., of Counsel)

For the Respondent West Morris Regional, James, Wyckoff, Vecchio & Thomas (Joseph J. Vecchio, Esq., of Counsel)

For the Respondent Washington Township, Friedman & Greb (Eugene M. Friedman, Esq., of Counsel)

Petitioner, the Board of Education of the Township of Mount Olive, hereinafter "Mt. Olive Board," has filed an application pursuant to law (*N.J.S.A.* 18A:13-51 *et seq.*) with the Commissioner of Education and the Board of Review for permission to submit to the legal voters of the Mt. Olive Township School District and the remaining constituent school districts within the West Morris Regional High School District, hereinafter "Regional District," the question whether Mt. Olive Township shall be permitted to withdraw from the Regional District. The Board of Education of the Regional District or the Boards of other constituent school districts of the Regional District do not oppose the application of the Mt. Olive Board with respect to submission of the question to the electorate but have offered disparate views concerning procedural matters and the necessity to insure an equitable assessment of debt obligations.

The Petition for withdrawal, considered herein, is presented directly to the Commissioner, the State Treasurer and the Director of the Division of Local Government Services, who make up the Board of Review, in the manner set forth in *N.J.S.A.* 18A:13-56 on the pleadings, a report of the Morris County Superintendent of Schools and the record of a hearing conducted on May 16, 1977 at the office of the Morris County Superintendent of Schools, Morris Plains. Such hearing was requested by the Regional Board and was conducted by a representative appointed by the Commissioner and a representative of the State Treasurer and Director of the Division of Local Government Services.

The findings and determinations of the Board of Review are set forth, *post,* in the context of the criteria of the applicable statute, *N.J.S.A.* 18A:13-56, which states:

> "***The board of review shall consider the effect of the proposed withdrawal upon the educational and financial condition of the withdrawing and the remaining districts and shall schedule and hold a public hearing on the petition upon the application of any interested party. In considering the effect of the proposed withdrawal upon the educational and financial condition of the withdrawing and remaining districts the board of review shall:

a. Consent to the granting of the application; or

b. Oppose the same because, if the same be granted–

1. An excessive debt burden will be imposed upon the remaining districts, or the withdrawing district;

2. An efficient school system cannot be maintained in the remaining districts or the withdrawing district without excessive costs;

3. Insufficient pupils will be left in the remaining districts to maintain a properly graded school system; or

4. Any other reason, which it may deem to be sufficient; or

c. Request that if the petition be granted, the amount of debt which the remaining districts would be required to assume, calculated as hereinbefore provided, be reduced for the reason that–

1. Such amount of indebtedness, together with all other indebtedness of the municipalities or school districts would be excessive;

2. The amount of expenditure for debt service which would be required would be so great that sufficient funds would not be available for current expenses without excessive taxation; or

3. Such amount of indebtedness is inequitable in relation to the value of the property to be acquired by the remaining districts and would materially impair the credit of the municipalities or such districts and the ability to pay punctually the principal and interest of their debt and to supply such essential educational facilities and public improvements and services as might reasonably be anticipated would be required of them.

"The board of review shall make its findings and determination, by the recorded vote of at least two of the three members of the board, within 60 days of the receipt of the petition and answers."

The findings and determination of reference have been delayed pending consideration by the New Jersey Legislature of substantial alterations in the statutory scheme with respect to the withdrawal of constituent districts from limited purpose regional districts. Such alterations have now been effected by the Legislature by passage of Chapter 279 of the Laws of 1977 and have rendered moot some of the contentions herein. These contentions will be discussed succinctly following review of the pertinent facts. Such facts with respect to the Regional District as an entity and Mt. Olive, as the district which petitions for withdrawal, are set forth as follows:

The West Morris Regional District is comprised of six municipalities in Morris County and was organized in 1956 as a limited purpose regional district for the provision of educational programs in grades nine through twelve. Its location, approximately fifty miles from the New York metropolitan area and astride Interstate 80, has been in large measure responsible for the district's large population growth in recent years. The constituent districts are Mt. Olive Township, Chester Borough, Chester Township, Washington Township, Mendham Borough and Mendham Township. Chester Borough and Chester Township are separate municipalities organized at the elementary school level as a consolidated school district.

The Regional District is a large one of 132.9 square miles divided as follows:

Municipality	Square Miles
Mt. Olive Township	31.6
Chester (consolidated)	30.9
Washington Township	45.0
Mendham Borough	6.7
Mendham Township	18.7
	132.9

There are three high school buildings to accommodate approximately 3000 pupils within this large district and one of these buildings is located within Mt. Olive Township. The Mt. Olive Board is proposing herein to take this schoolhouse with it as a part of its proposal to sever from the Regional District. The remaining two high school buildings are located in other areas of the Regional District. The statistics pertinent to all three high schools are as follows:

High School	Year Built	Site Size	Square Feet
West Morris (at Mt. Olive)	1973	50 acres	115,000
West Morris (at Mendham)	1970	50 acres	109,200
West Morris Central	1958-64	49 acres	146,250

The Regional District, as an entity, has experienced an accelerated population growth in recent years and the growth in Mt. Olive Township has been of particular significance. It serves as one of the principal reasons for the instant Petition. The population growth rates of the remaining Regional District and of Mt. Olive Township may be summarized as follows:

Year	Population Mt. Olive	Percent of Gain	Population Remaining District	Percent of Gain
1960	3,807	–	11,138	–
1970	10,394	173.0%	19,952	79.1%
1976	17,233	65.8%	25,588	28.2%

It is projected that the population of Mt. Olive Township will increase to 42,000 by 1980 and, if such projection becomes fact, the percentage of increase in the ten year period 1970-1980 will be approximately 304 percent. The corresponding projected population increase for the remaining Regional District as a whole is approximately 119 percent.

The enrollment of the three high schools within the Regional District totaled 2963 pupils on June 30, 1976 and had increased to 3236 pupils in a tabulation on October 1, 1976. Of this total on October 1, there were approximately 1050 Mt. Olive pupils enrolled in the high school in Mt. Olive or in the West Morris Central High School. This total enrollment was divided by high schools as follows:

		Totals
West Morris Central	1408 + 90 Mt. Olive pupils	1498
West Morris, Mendham	866	866
West Morris, Mt. Olive	962	962
		3326

The County Superintendent projects an enrollment increase of Mt. Olive high school pupils in future years to a total of 1448 in 1979-80 and to 1596 in 1981. The remaining Regional District enrollment is projected to increase more slowly to 2434 pupils in 1979-80 and to provide for 2340 pupils in 1981-82. The Mt. Olive Township school district, considered as a kindergarten-grade twelve entity, enrolled 4378 pupils in October 1976 and projects an enrollment of 5433 pupils by 1981-82. In 1976 there were only 12 black pupils or pupils other than white in the West Morris Mt. Olive High School and 19 such pupils in the remaining Regional District. Thus, it is clear that withdrawal of Mt. Olive from the Regional District would have no measurable effect on racial balance in either the withdrawing or remaining districts.

The Mt. Olive Board paid a proportional share of approximately 31.7268 percent of the current expense costs of the Regional District in the 1976-77 year. The total budget for current expenses was $6,580,798. The dollar share of such budget borne by the Mt. Olive Board was $2,087,876.84 and the remaining districts assumed the remainder of $4,492,921.16 or approximately 68 percent of the total current expense cost.

The equalized valuations of the constituent districts of the Regional District have increased in the years 1973-76 as follows:

Equalized Valuation Increase

Municipality	**1973**	**1976**
Mt. Olive Township	$161,351,484	$236,145,135
Chester (consolidated)	93,904,684	132,610,141
Washington Township	103,321,885	157,514,342
Mendham Borough	65,119,967	88,435,909
Mendham Township	87,480,102	121,304,990

Similarly, the average equalized valuations have increased:

Municipality	Average 1973-74-75	Average 1974-75-76
Mt. Olive Township	$188,961,337	$213,892,554
Chester (consolidated)	108,968,597.33	121,870,416.33
Washington Township	121,744.335.33	139,808,487.67
Mendham Borough	74,372,297.67	82,144,278.33
Mendham Township	102,604,110.33	113,879,073
	TOTAL	$671,594,809.33

Thus, the total Regional District has a current borrowing power of $20,147.844.28. (3.0 percent of the total; see *N.J.S.A.* 18A:24-19.) If Mt. Olive is permitted to withdraw, such borrowing power would be reduced to $16,019,578.94 for the Regional District. The borrowing power of Mt. Olive would be $8,555,702.16 (4 percent of $213,892,554; see *N.J.S.A.* 18A:24-19.)

The 1976-77 debt service of the districts was apportioned as follows:

Municipality	Apportionment 1976%	Distribution 1976-77
Mt. Olive Township	31.7268033	$251,257.88
Chester Borough	4.0473375	32,052.56
Chester Township	14.1110999	111,751.73
Washington Township	20.3332465	161,027.52
Mendham Borough	13.5092252	106,985.23
Mendham Township	16.2722876	128,867.08
TOTALS	100.0000000	$791,942.00

Pursuant to *N.J.A.C.* 6:3-3.2(a)9 the Bureau of Facility Planning Services, State Department of Education, furnished the calculation of replacement costs of school buildings, furnishings and equipment for the three high schools of the Regional District as follows:

High School			Percent
Mt. Olive	(111,509 sq. ft.)	$6,690,540	.3057923
Central (combined with)	(141,640 sq. ft.)	8,498,400	
Mendham	(111,507 sq. ft.)	6,690,420	.6942077
			1.0000000 (100 percent)

Such calculation is grounded in an estimation of replacement costs at $60 per square foot and does not take cognizance of the age or condition of school buildings. In its recent enactment of Chapter 279, Laws of 1977 (effective November 1, 1977) the New Jersey Legislature has established this criterion of "replacement cost" as the criterion applicable to the determination of proportion of debt to be assumed. The statute now provides in its entirety:

N.J.S.A. 18A:13-53

> "The county superintendent shall calculate the amount of indebtedness so to be assumed on the basis of the proportion which the replacement cost of the buildings, grounds, furnishings, equipment, and additions thereto of the regional district situated in the withdrawing district bears to the replacement cost of the buildings, grounds, furnishings, equipment and additions thereto situated in the entire regional district. Said replacement cost shall be determined according to rules prescribed by the commissioner with the approval of the State board and in accordance with recognized accounting practices."

It is observed that the statutes, *N.J.S.A.* 18A:13-54 and 56, indicate that the criterion of replacement cost used to determine proportion of debt to be assumed by a withdrawing district is not an inflexible standard. The Board of education of a withdrawing district may request a reduction of the assigned proportion. *N.J.S.A.* 18A:13-54 The Board of Review may, pursuant to *N.J.S.A.* 18A:13-56

> "***[r]equest that if the petition be granted, the amount of debt which the remaining districts would be required to assume, calculated as hereinbefore provided, be reduced for the reasons that–
>
> 1. Such amount of indebtedness, together with all other indebtedness of the municipalities or school districts would be excessive;
>
> 2. The amount of expenditure for debt service which would be required would be so great that sufficient funds would not be available for current expenses without excessive taxation; or
>
> 3. Such amount of indebtedness is inequitable in relation to the value of the property to be acquired by the remaining districts and would materially impair the credit of the municipalities or such districts and the ability to pay punctually the principal and interest of their debt and to supply such essential educational facilities and public improvements and services as might reasonably be anticipated would be required of them.***"

The County Superintendent sets forth the following advantages and disadvantages to the Regional District if the proposed withdrawal of Mt. Olive Township is made effective:

> "***A. Advantages
>
> "1. West Morris Regional will become more compact. The district will be reduced by 31.6 square miles, by approximately 1,000 students, by one high school building, and by approximately seventy-five (75) members (professional and non-professional).

"2. The solutions (alternatives) to a potential overcrowding at West Morris Central will become more feasible.

"3. The opening and closing times (the school day) will become stabilized at the two schools. The type of bus route problems now encountered currently prevent such stabilization of time schedules.

"4. The West Morris Regional annual school budget will be reduced.

"5. The concerns of overcrowdedness at Mount Olive High School will be eliminated.

"6. The regional population growth patterns should stabilize. Mount Olive has been the fastest growing community.

"B. Disadvantages:

"1. The structure of the staffs at the remaining high schools may alter considerably, depending upon how many tenured staff members located at the Mount Olive building will elect to stay in the West Morris Regional District. Currently, there are forty-eight (48) tenured staff members on the Mount Olive staff.

"2. Current flexibilities pertaining to the use of facilities, staff members and curricula will be diminished.

"3. Some highly skilled teachers currently located in the other two high schools may lose their jobs through the 'bumping' process.

"4. The flexibility of being able to accommodate the special needs of students (through transfers) will be lost.

"5. The West Morris Regional District will lose the ratables of Mount Olive. These ratables are considerable."

The County Superintendent lists the following advantages and disadvantages of withdrawal for Mt. Olive Township:

"***A. Advantages:

"1. The district would assume total responsibility for the education of all pupils grades K through 12 from the Township.

"2. The size of the present and projected student population is reasonably certain to allow for a comprehensive high school program.

"3. A K through 12 grade system can generally provide for a better continuity and articulation.

"4. The curriculum can be more responsive to the needs of a single community.

"5. Curriculum decisions affecting Mount Olive Township students would only be determined by Mt. Olive community residents.

"6. Generally a community identifies more closely with a high school, helping to provide total community and school spirit.

"7. Mount Olive Township taxpayers will be the determining factor relative to the finance of the high school program. They would no longer depend upon voter or influences from other communities.

"8. Mount Olive residents will have only one election to vote in a year.

"9. The school district presently has a large bus fleet which, scheduled properly, could possibly be large enough to bus all students K through 12.

"10. Mount Olive Township will take title to the West Morris Mount Olive Regional High School, which was built by the Regional District with all constituent districts sharing in the indebtedness proportionately.

"B. Disadvantages:

"1. The district's cost per pupil will increase as compared to present cost per pupil as an elementary constituent district.

"2. The present West Morris Mount Olive High School will become overcrowded when all township residents will be attending within the district.

"3. Due to possible overcrowding, some type of change in organizational pattern will have to be developed from the present K-6, 7-8 middle school, 9-12 high school.

"4. Mount Olive residents will continue to pay their proportionate share of debt service until the Regional District's original bond indebtedness is paid.

"5. Due to the population projection it becomes apparent that an elementary building program possibly including a high school expansion will be needed soon.

"6. Mount Olive will have to depend upon their own borrowing power and not the total Regional District's when considering a building program.***"

The Regional Board does not oppose the withdrawal of Mt. Olive as a constituent district but avers that use of the replacement cost formula of the

Bureau of Facility Planning Services is inequitable and that proportion of debt to be assumed should be based on a comparison of original costs. In the alternative, the Regional Board maintains that if replacement cost is used as a criterion, and the Legislature has now mandated such criterion, such cost should be related by some formula to actual value. The Regional Board further maintains that:

> "***In the event that the Bureau's 'replacement cost' is used, the remaining district would be left with a 25 year old school and a nine year old school. Mount Olive would have a five year old school. All schools, regardless of age, have been valued [by the Bureau] at $60.00 per square foot.***" (Regional Board's Brief, at p. 19)

The Regional Board avers that such an interpretation of replacement cost is not equitable and that the statutes with respect to the withdrawal of constituent districts from regional districts should not be read to mean that the Legislature intended an inequitable result. The Regional Board further avers that all assets to be apportioned by the County Superintendent pursuant to *N.J.S.A.* 18A:13-62 and the reference contained therein to *N.J.S.A.* 18A:8-24 "***are the assets which have not been acquired through capital outlay or bonded indebtedness.***" (Regional Board's Brief, at p. 21) The statute *N.J.S.A.* 18A:8-24, of pertinence to this argument, is recited in its entirety as follows:

> "The county superintendent in a written report filed by him at the end of the school year preceding that in which the new district is created shall make a division of the assets, except school buildings, grounds, furnishings and equipment, and of the liabilities, other than the bonded indebtedness of the original district, between the new district and the remaining district on the basis of the amount of the ratables in the respective districts on which the last school tax was levied, and in determining the amount of assets to be divided, he shall take into account the present value of the school books, supplies, fuel, motor vehicles and all personal property other than furnishings and equipment. In the case of any vehicle used for the transportation of school children, the original cost of the vehicle, less any state aid appropriated therefor, shall be deemed to be the present value."

The Regional Board further maintains that the statute *N.J.S.A.* 18A:13-62, which invokes by cross-reference *N.J.S.A.* 18A:8-24, *ante*, with respect to the division of assets, also mandates a division of contingent liabilities. It provides:

> "The county superintendent in a written report filed by him at the end of the school year preceding that in which the withdrawal becomes effective shall make a division of the assets and *liabilities* between the withdrawing district and the regional district in the same manner as provided in *N.J.S.* 18A:8-24." (*Emphasis supplied.*)

The Regional Board maintains that such reference to "liabilities" should be interpreted to mean prepaid, accrued and contingent liabilities and, further, that contingent assets not specifically known at the time of severance should be similarly divided.

Finally, the Regional Board avers that the costs of the election which may ensue should be borne by the Mt. Olive Board. It also raises other questions with respect to seniority privileges pursuant to the statute *N.J.S.A.* 18A:13-64 and observes that there are no "cross bumping" privileges for teaching staff members of the Regional District which are parallel to those afforded to teaching staff members of withdrawing districts. The statute provides:

> "All employees of the regional district shall continue in their respective positions in the withdrawing district and all of their rights of tenure, seniority, pension, leave of absence and other similar benefits shall be recognized and preserved and any periods of prior employment in the regional district shall count toward the acquisition of tenure to the same extent as if all such employment had been under the withdrawing district. Any tenured employee in a school located in the withdrawing district who desires to remain in the employ of the regional district, and whose seniority under existing tenure laws so permits, may apply for and shall be granted a transfer to a position with the regional district for which he is certified which is vacant, held by a tenured employee with less seniority or by an employee without tenure; applications for such transfers shall be made within 45 days of the date of the special school election at which the withdrawal was approved."

The Regional Board additionally questions the propriety of the hearing which was conducted in the context of the Open Public Meetings Act, *N.J.S.A.* 10:4-6 *et seq.*, and raises other questions concerned with the substitution at the hearing of representatives for the Commissioner of Education, the State Treasurer and the Director of Local Government Services.

All such questions from the Regional Board are set forth as an attempt to obtain clarity with respect to newly enacted legislation and are not directed in opposition to the basic request for withdrawal which Mt. Olive here proposes.

The Mt. Olive Board avers that the grant of permission by the Board of Review for the conduct of an election concerned with withdrawal, and a favorable vote of the electorate, will have educational and administrative advantages. It maintains that a Mt. Olive kindergarten through grade twelve district will conform with the natural sociological and municipal boundaries and reduce bus and other travel to reasonable distances. It also maintains that there is an adequate financial base for separate programs of education in both the withdrawing and remaining districts. The Mt. Olive Board avers that the hearing held at the Regional Board's request was in conformity with the Open Public Meetings Act and cites the transcript in this respect. (Tr. 13-16) It also avers that costs of the proposed election are properly a district-wide expense and must be assumed by the Regional Board. The Mt. Olive Board further asserts that the Board of Review does not have authority"***to resolve matters of seniority or to determine the rights of employees as set forth in *N.J.S.A.* 18A:13-64.***" (Mt. Olive Board's Brief, at p. 14) It maintains that the Board of Review lacks jurisdiction to perform the function delegated expressly to the County Superintendent pursuant to *N.J.S.A.* 18A:13-62. The Mt. Olive Board argues that the County Superintendent

"***may only divide and apportion assets and liabilities which are known and existing at the time he files his written report. *N.J.S.A.* 18A:13-62. Prepaid expenses and deferred charges would fall within this category.***" (Mt. Olive Board's Brief, at p. 26)

The Mt. Olive Board maintains further that the County Superintendent's report which lists an increase in per pupil costs is misleading because it fails to average present elementary education costs with high school costs for comparison purposes with projected costs of an integrated district. It avers that voter rejection of bond issues in districts other than Mt. Olive is responsible for present overcrowding and indicates that its own budget proposals have been well received in Mt. Olive. The Mt. Olive Board urges approval of its application and an early election in order that withdrawal may proceed with expedition.

The Board of Review has considered all such facts and arguments in the context of the total record and determines that the application of Mt. Olive for severance from the Regional District warrants a submission to the electorate for a final decision. If withdrawal is approved there will be sufficient pupils in both the withdrawing and remaining district for the conduct of a thorough and efficient program of education. Present overcrowded conditions may be relieved in part. Current expense and debt service costs will be reasonable and not excessive.

Accordingly, the Board of Review hereby authorizes the Morris County Superintendent to fix an early date pursuant to law for the election on the proposed withdrawal of Mt. Olive Township from the Regional District. The Board of Review further authorizes the submission of a question therein to the voters of the Mt. Olive district and of the Regional District which shall contain a statement that, subsequent to withdrawal, the Mt. Olive district shall assume an indebtedness of 32 percent of the total debt obligations of the Regional District extant as of the close of business on the last day prior to withdrawal. Such percentage of debt assumption closely parallels the present apportionment for debt service within the Regional District and the apportionment of assets and liabilities which must be made by the County Superintendent. The Board of Review determines that a lesser percentage would be inequitable and would impose an inordinate burden on the remaining districts which cannot be justified in the context of the fact that the Mt. Olive Board proposes to take with it the newest of the three high schools within the Regional District.

Finally, the Board of Review finds the procedural questions raised herein to be without substance. A hearing was conducted by representatives of the members of the Board of Review pursuant to law. Such hearing was advertised extensively in the local media and was well attended. Many citizens of the Regional District were present and expressed their views. The record of this hearing is before the Board of Review as part of the total case record.

The Board of Review further finds no substantive reason at this juncture to interpret the otherwise clear statutory prescriptions with respect to the assumption of costs for the conduct of the election, the division of assets and liabilities or with the seniority entitlement for teaching staff members of the

withdrawing or remaining district. All special elections "***shall be called in the manner provided for the calling of the annual school election.***" *N.J.S.A.* 18A:14-3.2 Tenure of office and rights pertinent thereto are subjects of legislative determination and have received a specific exposition in the context of proposed withdrawals by a constituent district from a regional district. *N.J.S.A.* 18A:13-64 The County Superintendent is authorized to divide assets and liabilities. *N.J.S.A.* 18A:13-62

The effective date of withdrawal of Mt. Olive Township from the Regional District shall be determined, in the event of a favorable vote on the referendum question, by the Commissioner of Education pursuant to the recent enactment of an amendment to *N.J.S.A.* 18A:13-59. The Commissioner shall issue his own directive with respect to such effective date.

COMMISSIONER OF EDUCATION

STATE TREASURER

DIRECTOR, DIVISION OF LOCAL
GOVERNMENT SERVICES

November 1, 1977

COMMISSIONER OF EDUCATION

ORDER

The Board of Education of the Mt. Olive School District has requested permission from the Board of Review created pursuant to law (*N.J.S.A.* 18A:13-51 *et seq.*) to submit to the voters of the Mt. Olive District and the West Morris Regional School District a question wherein it is proposed that the Mt. Olive District shall withdraw as a constituent district of the Regional District. The Board of Review has acceded to the request of the Mt. Olive Board *In the Matter of the Petition of the Township of Mt. Olive for Withdrawal from the West Morris Regional School District, Morris County,* decided November 1, 1977.

There remains a question concerned with the effective date of such withdrawal in the event that the voters of the Mt. Olive District and the remaining Regional District approve it at a special election. The Commissioner of Education has considered this question and in accordance with the statutory authority of *N.J.S.A.* 18A:13-59 determines that withdrawal of the Mt. Olive School District from the West Morris Regional School District shall be effective on July 1, 1978. The Commissioner further determines that on such date title to the Mt. Olive High School and the plot of land on which it is situated shall pass to the Mt. Olive School District and that thereafter the Mt. Olive Board of

Education shall be obligated pursuant to law (*N.J.S.A.* 18A:13-61) for the proportion of debt service costs of the Regional District as determined by the Board of Review.

It is so ordered this 1st day of November 1977.

COMMISSIONER OF EDUCATION

Norman J. Greenberg,

Petitioner,

v.

Board of Education of the Township of Howell, Monmouth County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Kaye & Davison (Duane O. Davison, Esq., of Counsel)

For the Respondent, Bathgate & Wegener (Jan L. Wouters, Esq., of Counsel)

Petitioner, a tenured teaching staff member, alleges that the Howell Township Board of Education, hereinafter "Board," improperly and illegally removed him from his position as assistant principal and reduced him in salary when it determined to place him back in the classroom as a regular teacher. Petitioner alleges that the Board's action violates the provisions of *N.J.S.A.* 18A:28-6 by which he acquired a tenure status in the position of assistant principal. Petitioner also claims that the meeting at which the Board took its action pertaining to his employment status was contrary to the provisions of applicable education law and is therefore null and void. Petitioner prays for an order from the Commissioner of Education reversing the action of the Board and reinstating him in the position of assistant principal, together with reimbursement of back salary, and other emoluments which he claims are due him. The Board avers that its actions were in all ways proper and legally correct.

This matter is submitted to the Commissioner for Summary Judgment on the pleadings, documents and a stipulation of facts filed by the parties. The essential facts of the matter controverted herein are these:

Petitioner was initially employed by the Board as a regular teacher on or about September 1, 1962 and continued in this position for each succeeding academic year until September 1, 1972. At the commencement of the 1972-73 academic year the Board promoted petitioner to the position of assistant principal in the Howell Township School System, a position in which he served through the conclusion of the 1974-75 school year. Petitioner was at all times a properly certified teaching staff member.

On March 25, 1975, the Board, at its regular meeting, took action to remove petitioner from his position as assistant principal and to return him to his former position as a regular teacher in the Howell Township School System commencing with the 1975-76 academic school year. (R-1) Petitioner's salary was also reduced at that time to comply with the salary entitlement set forth on the appropriate step of the teachers' salary guide.

Petitioner alleges in his Brief that the Board's action with respect to his employment status must be set aside by the Commissioner on three counts:

1. Petitioner had acquired a tenure status with the Board by virtue of his certification and years of service as assistant principal pursuant to *N.J.S.A.* 18A:28-6.

Petitioner asserts that the Board could not legally remove him from his position of assistant principal absent any Board action to abolish this position or, in the alternative, without the Board having certified tenure charges against him before the Commissioner, pursuant to *N.J.S.A.* 18A:6-10 *et seq.*, sufficient, if true in fact, to warrant his reduction in salary or his removal from said position.

The Commissioner observes that the statutes of reference upon which petitioner grounds his claim in the first instance read in pertinent part as follows:

N.J.S.A. 18A:28-6

"Any such teaching staff member under tenure *** who is transferred or promoted with his consent to another position covered by this chapter on or after July 1, 1962, shall not obtain tenure in a new position until after:

"(a) the expiration of a period of employment of two consecutive calendar years in the new position unless a shorter period is fixed by the employing board for such purpose; or

"(b) employment for two academic years in the new position together with employment in the new position at the beginning of the next succeeding academic year; or

"(c) employment in the new position within a period of any three consecutive academic years, for the equivalent of more than two academic years***."

N.J.S.A. 18A:6-10

"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, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this sub-article, by the Commissioner, or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this sub-article provided.***"

Petitioner asserts that the facts which have been stipulated by the parties in the instant matter clearly reflect that he had acquired a tenure status as a regular classroom teacher in the Board's employ, and that subsequent thereto, he also acquired a tenure status in the position of assistant principal pursuant to the provisions of *N.J.S.A.* 18A:28-6 and therefore his removal and reassignment from the latter position is *ultra vires.*

Petitioner, in making this claim, relies on pertinent decisions of the courts as well as the Commissioner's rulings in *Zimmerman v. Board of Education of the City of Newark,* 38 *N.J.* 65 (1962), *cert.* den. 371 *U.S.* 956 (1963); *Ahrensfield v. State Board of Education,* 126 *N.J.L.* 543 (*E.&A.* 1941); *Cornelius T. McGlynn v. Board of Education of the Township of Lumberton,* 1972 *S.L.D.* 28, aff'd as *Robert Kolbeck v. New Jersey State Board of Education, Board of Education of the Township of Lumberton and Cornelius T. McGlynn,* Superior Court of New Jersey, Appellate Division, 1973 *S.L.D.* 770; *Francis A. Gana v. Board of Education of Quinton,* 1972 *S.L.D.* 429.

2. The action of the Board at its regular meeting of March 25, 1975 as evidenced in the Board minutes (R-1) violates the provisions of *N.J.S.A.* 18A:10-3 by virtue of the fact that the Board did not officially convene its meeting on or before 8:00 p.m. but, rather, at 8:07 p.m.

3. The Board's actions which resulted in petitioner's transfer from his position of assistant principal and reassignment as a regular classroom teacher were contrary to the provisions of *N.J.S.A.* 18A:25-1 which state that:

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

Petitioner relies on the minutes of the Board meeting (R-1) in support of his contention that the Board did not comply with these statutory provisions when it took its actions regarding his employment status. Petitioner in his Brief also cites *Joseph McKay v. Board of Education of the Borough of Red Bank,* 1972 *S.L.D.* 606 as further support of his claim against the Board.

The Commissioner observes that the Board did not file a supporting Brief in response to the arguments advanced by petitioner herein but rather relies on the pleadings, documents and stipulations of fact as previously set forth. The Commissioner also notices that petitioner, by way of letter dated November 29, 1976, communicated to the Commissioner that the Board had reinstated him to the position of assistant principal on or about April 26, 1976. Accordingly, by virtue of said action, petitioner asserts that the only issue to be decided by the Commissioner at this time is whether or not petitioner, by virtue of his continuing tenure claim to such position, is entitled to receive the difference in salary denied to him for the period of time he was improperly and illegally removed from this position by the Board.

The Commissioner, upon review of the entire record herein, concludes that petitioner had acquired a tenure status in the position of assistant principal prior to the action of the Board on March 25, 1975 to remove him from said position and reassign him as a regular classroom teacher. This finding and determination is grounded on the undisputed facts of the instant matter.

Accordingly, the March 25, 1975 action of the Board reassigning petitioner from the position of assistant principal to regular classroom teacher is hereby set aside by the Commissioner. The Commissioner also directs that petitioner be compensated forthwith by the Board the difference in salary and other emoluments due him.

To this limited extent petitioner's prayer for relief is granted. In all other respects the instant Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

November 9, 1977

In the Matter of the Tenure Hearing of Raymond Bradshaw, School District of the Township of Piscataway, Middlesex County.

COMMISSIONER OF EDUCATION

ORDER

It appearing that the Board of Education of the Township of Piscataway, hereinafter "Board," having filed the charge of abandonment of position against school janitor, Raymond Bradshaw, hereinafter "respondent"; and

It appearing that the Board asserts such charge would be sufficient, if true in fact, to warrant his dismissal; and

It appearing that the Board properly certified said charge to the Commissioner of Education on July 28, 1977; and

It appearing that service of said charge by the Board was attempted unsuccessfully, by certified mail, to respondent's home address on June 22, 1977; and

It appearing that a further service of said charge was made to respondent at his home address by the Commissioner's representative assigned to this matter on August 10, 1977; and

It appearing that respondent did not and has not filed his Answer to the charge herein; and

It appearing that repeated personal, mail and certified mail attempts by the Board to contact respondent have been to no avail; and

It appearing that the charge as certified by the Board against respondent, absent a denial thereto, must be assumed to be true and sufficient in scope to warrant his dismissal; now therefore

IT IS ORDERED on this 9th day of November 1977 that Raymond Bradshaw be hereby dismissed as a school janitor under tenure in the School District of the Township of Piscataway, Middlesex County, effective as of July 18, 1977, the date of his suspension.

COMMISSIONER OF EDUCATION

William C. Poole, A.I.A., t/a Flatt & Poole, Architects,

Petitioner,

v.

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

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Jacob Green (Allan P. Dzwilewski, Esq., of Counsel)

For the Respondent, Francis R. Giardiello, Esq.

Petitioner, an architect in the firm of Flatt & Poole, alleges that he was employed in 1973 by the Board of Education of the Passaic County Regional High School District No. 1, hereinafter "Board," to render architectural service but that the Board subsequently rescinded its agreement to such employment and has refused to compensate him for the services he performed. He requests compensation for such services. The Board denies that it ever formally contracted with petitioner to perform architectural services and moves for dismissal of the Petition of Appeal.

A hearing was conducted on April 5, 1977 by a hearing examiner appointed by the Commissioner of Education at the office of the Bergen County Superintendent of Schools, Wood-Ridge. The report of the hearing examiner is as follows:

The primary facts which are required as prerequisites to a consideration of this dispute may be elicited from a study of documents admitted as exhibits at the hearing. Twenty of these documents were submitted as joint exhibits. The following chronological summary is grounded in this evidence.

The Board began preliminary planning in 1972 with respect to certain renovations and a building addition to the Passaic Valley Regional High School (PR-1, P-1) and contacted petitioner by letter of November 16, 1972. Petitioner was asked to contact school officials in order that the interview might be arranged to discuss his possible employment as architect. (PR-14) In May 1973 petitioner was again contacted and requested to arrange for a walking tour of the High School with the Superintendent of Schools. (PR-15) In the interim between November and May the Board also interviewed other architects and discussed their possible employment.

On June 19, 1973, the Board met in regular session and considered a Motion to appoint petitioner's firm to perform the architectural services. The minutes of the meeting record the following action:

"The firm of Flatt and Poole Architects of Bloomfield, New Jersey were

appointed as the Architects for the planned building renovations with a standard A.I.A. contract at a fee of 10% on motion by Mr. Belding and seconded by Mr. Christiano. Mr. Consales requested that the record show that the Board had interviewed other architects in connection with this project and the Superintendent indicated that all candidates had been taken on a tour of the building by him and the Supervisor of Buildings and Grounds. The motion carried by eight affirmative votes."

(PR-2)

On June 20, 1973, petitioner was notified by letter of the appointment by the Board Secretary and told that a "formal contract" would have to be drafted but that there was an understanding that the fee for the work to be done "***would be 10 percent of the total of the bids that will be awarded." (PR-4) Petitioner responded by letter of July 2, 1973 to the Board's attorney and indicated he was enclosing three copies of an agreement to be executed by the Board after review. (PR-5) The agreement had already been signed by petitioner.

On July 17, 1973, the Board met again and considered a report of its attorney. The minutes of the meeting contain this record:

"*** Mr. Giardiello [attorney] reported that he went over the contract with Flatt & Poole and reported that although the fee would be 10% there were other clauses in the A.I.A. contracts which permit them to go above the 10%, such as supervision, for which they get a specific hourly rate. President Quinn stated that it was his recollection that the 10% fee would include supervision. The Board requested Mr. Giardiello to review the matter with Mr. Poole and change the contract so that the 10% fee would include supervision.***" (PR-16)

In the interim between June 19 and July 17 petitioner had commenced the work he was told he had been appointed to do and on July 20, 1973, he toured the High School with the Superintendent and the architectural supervisor of the State Department of Education. (PR-6) The purpose of the tour was a specific discussion of the details of minor renovation. Other work subsequent to July 20, 1973, was detailed by petitioner in testimony and will be reported, *post.*

On October 4, 1973, the Board Secretary addressed a letter to the Board's attorney and indicated therein that plans for the work which petitioner had been told in June he was appointed to do would "be abandoned." (PR-17) There followed a work session of the Board on October 9, 1973, and on October 10, 1973, the following letter was sent to petitioner by the Board Secretary:

"The three copies of Standard Form of Agreement Between Owner and Architect, in connection with proposed renovations and building additions to the Passaic Valley High School, which you had forwarded to Mr. Giardiello previously for review, were discussed at the work session of our Board on Tuesday, October 9, 1973.

"It appears almost certain that the Board will not continue with these

plans. Therefore, since no contract was ever signed between our Board and your firm, we assume that no work has been done by your firm on this project.

"If you have any questions regarding this matter, please contact me." (PR-7)

Petitioner contested the assumption that "no work" had been done on the project and forwarded a bill for services rendered to the Board on November 12, 1973. (PR-8) The bill contained an itemization of conferences, field trips and office design time totaling 59 hours of work by petitioner at a cost of $35 per hour ($2065), and a similar itemization of work by petitioner's staff which totaled 58 1/2 hours of work at a cost of $25 per hour. ($1462.50) The total amount due was listed as $3527.50.

The Board did not pay the bill and on January 10, 1974, petitioner again requested payment. (PR-9) Other correspondence followed between the parties on March 26, 1974 (PR-18), March 27, 1974 (PR-10), May 6, 1974 (PR-11), May 29, 1974 (PR-19), May 31, 1974 (PR-20) and June 4, 1974. (PR-12) Petitioner noted that an illness of the Board's attorney may have delayed the anticipated payment. (PR-11) The Board requested petitioner to submit "design work and schematic plans" as substantiation for petitioner's statement that the work had in fact been performed. (PR-20) Petitioner replied by letter of June 17, 1974, as follows:

"I am in receipt of your letter of June 4th 1974 wherein you ask to be given 'more explicit documentation of field trips, who made them, what was done and a copy of the design work which you did'. The only further breakdown I can give you is for the 42-1/2 hours spent by my staff members, which I have noted on the copy of my letter of March 27th in red ink, the names of the gentlemen and the number of hours individually put into the project.

"As to design work, it is obvious from the hours involved that the project was in its embryo stage and our work consisted exclusively of field trips, inspections, meetings with administration, to ascertain the requirements. The only drawing done was thumb nail sketches which we did for our own information to try to determine what direction the project should take.

"I hope the foregoing will be satisfactory, however, again, we are willing to meet with you to discuss the project if it is required." (PR-13)

This concludes a summary recital of the documentation. Testimony was elicited at the hearing from petitioner, the Superintendent and Board Secretary. In petitioner's view, however, the documentation is sufficient even standing alone to establish the essential facts: that he had been lawfully appointed as architect for the Board, and had been notified of such appointment and, subsequently, relying on that notification, had begun preliminary work toward project completion. (Tr. 9-10) His prayer in the instant matter is that the Commissioner determine that petitioner had a legally binding contract with the

Board in order that at a future time, if the abandoned project goes forward toward completion, petitioner will be the architect of record. He also requests compensation for the work he allegedly performed in good faith in the weeks between his appointment by the Board on June 19, 1973 and the Board's abandonment of the project in October 1973. (Tr. 11-12)

Petitioner's testimony at the hearing was primarily concerned with a recital of the work he did during the summer months of 1973. Petitioner testified he was told by the Superintendent in May 1973 that petitioner's firm would be engaged to perform architectural services and that itemization of work contained on his bill for the days of May 9 and June 14, prior to the time of the Board's appointment, was appropriate in such a context. (Tr. 19) He testified that the building to be enlarged and renovated had many varied structural components and that evaluation of it required many hours of preliminary planning and investigation. (Tr. 20) He testified that this preliminary work involved many members of his staff and school officials in an effort "***to try to find the direction***" which the project should take. (Tr. 12) Petitioner testified that by September 1973 he and his staff had decided on this direction and were about to start composite drawings to reflect their recommendations. (Tr. 25) He testified that the $25 per hour fee for outside consultants was the agreed upon fee for such services. (Tr. 26) Petitioner testified that the consultant's bill for 16 hours of work was based on what petitioner had been told by the consultant and that most of his work "***was spent over the drawings.***" (Tr. 27) Petitioner admits that the work he says he performed in the summer months was performed without a contract signed by the "owner." (Tr. 33) His testimony with respect to each of the days contained as a billing for his own work is a recital of meetings with the Board and the Superintendent and on a field trip of inspection to the Rumson Fairhaven High School. (Tr. 33-40) He testified he had made "thumbnail sketches" on "onion skin paper" and had shown them to the Superintendent but that they had then been discarded. (Tr. 41) Petitioner testified that it was reasonable to continue his work without a contract because the Board's attorney was ill and could not review the contract and because "***I was asked to continue working and be patient waiting for my contract.***" (Tr. 42-43) Petitioner testified that his billing was based in part on time sheets submitted to him by members of his staff. (Tr. 47)

The Superintendent testified that the Board and school administrators had reached a general consensus in May 1973 that there should be a rapid escalation of effort leading to the submission in September 1973 of a referendum question concerned with additions and renovations to the High School. (Tr. 63-65) He testified that petitioner had been apprised of this decision. (Tr. 64) He testified further that prior to the appointment of petitioner there had been a work meeting of the Board and that the question of the appointment of petitioner had been discussed at that meeting. (Tr. 66) The Superintendent testified that the Board, the Board's building committee and he himself had knowledge of the fact that petitioner was working during the summer of 1973 on the building project. (Tr. 68-69) He testified that during that period petitioner did show him "thumbnail sketches" of work that had been done. (Tr. 71) The Superintendent testified that the inspection trip to Rumson Fairhaven High School had been

taken with petitioner on September 13, 1973. (Tr. 73) The Superintendent testified he had discussed the contract with petitioner in the summer of 1973 and had told him that "***when [the Board's attorney] recovers, I suppose we'll get at it [the contract]." (Tr. 75) The Superintendent testified that he had worked with petitioner in another school district and had first "***brought him to the attention of the Board.***" (Tr. 79)

The Board Secretary testified that subsequent to petitioner's appointment in June 1973 the Board had begun to have serious reservations in July about proceeding with the building project. (Tr. 93) He testified that one specific aspect of the proposed contract between petitioner and the Board, namely the 10 percent of construction cost fee, had been discussed by the Board in June 1973. (Tr. 98)

Thus, a primary issue herein is concerned with whether there was a legally binding contract or agreement between the parties during the period from June to October 1973 and, if so, is there a requirement for an evaluation of the services rendered pursuant thereto. Assuming there was no contract which was firmly understood, is petitioner nevertheless entitled to some recovery from the Board? The Board also raises the question of the Commissioner's jurisdiction to hear and decide this matter on its merits.

The hearing examiner has reviewed such issues and questions in the context of the total record and concludes that the Commissioner does have jurisdiction over this controversy and in fact has on at least one prior occasion considered a controversy precisely similar to it. *Sergey Padukow v. Board of Education of the Township of Jackson, Ocean County,* 1967 *S.L.D.* 251, aff'd State Board of Education 1968 *S.L.D.* 263 While the State Board had in its affirmance in *Padukow* raised questions about the Commissioner's jurisdiction, similar to those raised by the Board in the instant matter, it is noted that the claims of Petitioner Padukow were advanced at a time when the school for which architectural services were to be supplied was nearing completion. This is not the case herein. The rationale of *Padukow* on its merits would appear not to be impinged.

In *Padukow, supra,* as herein, there was a decisive motion of the Board to employ (appoint) petitioner. There was a contention that there had been a "meeting of the minds" on contractual terms and therefore a valid, binding and enforceable contract of employment. Petitioner Padukow, and petitioner herein, rejected any contention that an integrated contract formally drawn is a necessary prerequisite to the establishment of a legal obligation.

The Commissioner determined in *Padukow, supra,* that there must be an offer and acceptance of a specific contract document and all its terms before there can be held to be a legally binding agreement. He founded such determination on the opinion of the Court in *American Heating and Ventilating Company v. Board of Education of the Town of West New York,* 81 *N.J.L.* 423 (*E.&A.* 1911). The Commissioner said in *Padukow*:

"***The circumstances present in the case before the Commissioner, while

not identical with those involved in the *American Heating* case, are similar enough to dictate, in the Commissioner's judgment, a like result. The respondent's action of November 1 was in the nature of a broad statement of intent, was not based upon a previously drawn agreement, and was not specific as to any essential terms of the contemplated contractual arrangement. Absent evidence of any deliberation or discussion by the Board as to the essential terms which it would insist be incorporated in a contract presented to it, it cannot be said that a 'contract' even existed. It is undisputed that neither prior to the motion, nor thereafter, were the salient features of a formal contract negotiated. While petitioner insists that such matters were raised during his August interview it is clear from the record, and the Commissioner so finds, that the Board members treated this discussion in general terms only, subject to future negotiations. The language of the motion itself, as well as the statements by the Board members as to the reasons for their votes, as reflected in the minutes, gives no indication whatever that the Board had finally determined upon the terms of the contemplated contract.

"In the Commissioner's judgment the wording of the November 1 motion was extremely inartful and left much to be desired. It would have been preferable had the Board more precisely articulated their true intent, as revealed by the testimony, that employment of petitioner was subject to negotiation and eventual presentment of a formal, integrated contract. However, boards of education represent the public and their actions must be gauged in that light. While public bodies, merely because of their public nature, will not be permitted to visit inequity and unfairness upon private persons with whom they deal, *cf.* 405 *Monroe Co. v. City of Asbury Park,* 40 *N.J.* 457 (1963), their actions must be evaluated with a view to the overall public interest which is involved. *N.J.S.A.* 18:7-63 [now *N.J.S.A.* 18A:18-1] was apparently designed as a safeguard against hasty, intemperate board action and to foster complete knowledgeable deliberation prior to committing the expenditure of public funds. Where, as here, a board of education is considering the awarding of a contract of a substantial nature, and one which would presumably be binding beyond the life of the board itself, *cf. Board of Education of Vocational School v. Finne,* 88 *N.J. Super.* 91 (*Law Div.* 1965), it was incumbent that the statutory requisites be met. In this case, they were not.***"

(1967 *S.L.D.* at 254)

It is as clear herein as in *Padukow, supra,* that petitioner's initial appointment of June 19, 1973, was in general terms only and that future negotiation as the result of a review of specific contractual terms might be required. While there was discussion of a 10 percent fee as one part of the standard A.I.A. contract, petitioner himself recognized that there was to be a review of the contract (PR-5) before execution by the Board. There was a tentative, conditional agreement in the Board's appointment of petitioner to perform architectural duties but, in the context of *Padukow,* petitioner's performance of such duties in the absence of a formally executed contract were

ones he was free to perform but at a risk; namely, that after review the proposed contract would be rejected. The hearing examiner so finds.

Accordingly, the hearing examiner recommends that the Petition be dismissed.

* * * *

The Commissioner has reviewed the report of the hearing examiner and the exceptions, objections and replies thereto filed by petitioner. Petitioner avers that the Board's resolution of June 19, 1973 (PR-2, *ante*) did create a legally enforceable and binding contract and that such resolution must be differentiated from that of the Board in *Padukow, supra,* which the Commissioner had held was only a broad statement of intent, lacking in specificity. Petitioner further maintains, *arguendo,* that even if it is held that no enforceable contract existed, petitioner is entitled to quasi-contractual relief because the Board itself and its agents requested him to perform the services he did perform. He avers that:

> "***The Board should be considered to have ratified the Contract to the extent of the services performed with its knowledge and at the request of its agent, the Superintendent, and representatives of the Building Committee." (Petitioner's Exceptions, at p. 6)

The Commissioner finds merit in part in this latter contention since, as the hearing examiner stated, there was in the circumstances, *sub judice,* a tentative conditional agreement between the parties that petitioner was to perform architectural services. Petitioner was clearly appointed by the Board to perform such services and at least one of the principal terms of the appointment was specifically set forth. (PR-2) The Commissioner holds, therefore, that the portions of the bills submitted by petitioner to the Board, which are itemized and documented sufficiently to provide a rational basis to conclude that the services were rendered, are payable.

There remains a question concerned with such itemization and in this respect the Commissioner finds petitioner's documentation incomplete. While the evidence concerned with petitioner's personal performance of services is itemized, reasonable, and adequately buttressed by testimony at the hearing, no such itemization is found with respect to other services. Neither, in this latter respect, are there documents or architectural drawings to serve as the basis for the skeletal itemization which petitioner submitted to the Board. (PR-8)

Accordingly, the Commissioner determines that the extent of the incurred obligation herein is limited to the 59 hours of work billed by petitioner for his services at a cost of $2065. The Commissioner directs that this portion of the bill be paid by the Board.

Finally, the Commissioner finds the other claims of this Petition to be without merit for the reasons set forth by the hearing examiner. There is no continuing contract in force and effect beyond the limited determination here set forth. The Commissioner so holds.

The Petition, with the exception hereinbefore determined, is dismissed.

COMMISSIONER OF EDUCATION

November 10, 1977
Pending State Board of Education

John A. Smith III,

Petitioner,

v.

Board of Education of the City of Jersey City, Hudson County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, John A. Smith, *Pro Se*

For the Respondent, Louis Serterides, Esq.

Petitioner, a tenured teacher of English employed by the Jersey City Board of Education, hereinafter "Board," alleges that by reason of his graduate credits in law and attainment of a Juris Doctor degree he has been entitled to, but improperly denied, advanced standing on the Board's salary scale. The Board denies that petitioner is entitled either to additional compensation for his past services or to advanced standing on its salary scale.

The matter comes before the Commissioner of Education in the form of the pleadings, a Stipulation of Facts, exhibits in evidence, Brief of petitioner and transcript of oral argument of August 2, 1977 before a representative of the Commissioner on petitioner's Motion to Consider the Merits of the Matter without Benefit of Respondent's Brief. The aforesaid Motion and oral argument resulted from the Board's failure to adhere to the agreed upon time schedule for briefing which specified that respondent would brief the matter by April 14, 1977. (Conference of Counsel, February 4, 1977) At the close of the oral argument petitioner moved for summary judgment. The relevant facts are as follows:

It is stipulated that petitioner had completed graduate level credits in law studies as follows:

June 1, 1973	BA+42
June 1, 1974	BA+65
June 6, 1975	BA+93

On June 6, 1975, petitioner qualified for the Juris Doctor degree. It is also stipulated that certain teaching staff members employed by the Board presently or in recent years were compensated by the Board for advanced degrees in areas other than the subject field of their assignments. It is further stipulated that between 1954 and 1968 at least four persons employed by the Board were granted equivalency salary scale status by reason of their attainment of degrees in law. (Stipulation of Facts)

In 1973 and again in 1974, petitioner was advised by the Board that he would not be accorded advanced placement on the salary scale for his studies in law or the attainment of the J.D. degree. (P-1, 3) The reason given was that his date of appointment as a teacher was later than September 1, 1963 and that the salary guide negotiated by the Board and the Jersey City Education Association restricted placement on either the master or bachelor plus 32 or the master or bachelor plus 64 level as follows:

> "***This phase of the equivalency program is restricted to teachers appointed prior to September 1, 1963. Teachers appointed on or after September 1, 1963 must possess a master's degree to be eligible for advanced salary standing.***
>
> "Increase of Salaries of Teachers with Higher Degrees or their equivalents shall be set by regulations established under Board Policy 703-01 through 703-09.***" (P-2(b), 10)
>
> The Board's Policy 703-01(3), adopted October 17, 1966 states:
>
> "***Teachers employed on or after September 1, 1963, must possess a Master's degree to be eligible for advanced salary standing.***" (P-6)

Petitioner contends that he possesses and has possessed, since 1973, the requisite credits for advanced standing on the Board's salary scale and that such advanced standing is mandated by *N.J.S.A.* 18A:29-6 and 7. Those statutes provide that persons with a master's degree or its equivalent of thirty additional semester hours in graduate courses beyond the bachelor's degree and those with a doctoral degree or a master's degree plus 30 additional graduate credits shall be entitled to advanced placement on the State's minimum salary schedule.

Petitioner contends that his 93 graduate level credits in law exceed the normal requirements of a doctoral program and entitled him to be paid at the doctorate level since June 1975. (Petitioner's Brief, at pp. 1-5) *George Cafarelli et al. v. Long Beach Island Board of Education, Ocean County,* 1976 *S.L.D.* 989; *William J. Convery v. Perth Amboy Board of Education et al.,* 1974 *S.L.D.* 372; *Robert J. Cusack v. Board of Education of the Borough of West Paterson,* 1970 *S.L.D.* 144

Petitioner contends that the Board's imposition of a regulation requiring that a teacher with credits beyond a bachelor's degree but without a master's degree be hired prior to 1963 in order to be eligible for standing on its advanced

scales of salaries is arbitrary, discriminatory and without rational basis. He avers that this is patently unfair to a teacher enrolled in a program of studies, such as law, in which a master's degree is not available as an intermediate step to the doctorate. Accordingly, petitioner alleges that such policy requirement is void *ab initio*. (Petitioner's Brief, at pp. 5-6)

Petitioner asserts that he "***has used his legal training both within and without the classroom for the betterment of his students.***" (*Id.*, at p. 8; P-8) He further asserts that the Board's past practice, exercised as recently as 1968, when law studies were recognized for advanced standing, renders its present refusal arbitrary and capricious. (Petitioner's Brief, at p. 10)

Petitioner prays for an order of the Commissioner directing the Board, *inter alia,* to compensate him retroactively for his academic credits and degree in law together with costs and counsel fees.

The Board argues conversely that a J.D. degree does not, within the profession of law, confirm the status of a doctorate as it is commonly understood in most professions and that it does not automatically accord the privilege to which petitioner lays claim. (Respondent's Answer)

It is noted that the Board offers no defense to petitioner's Motion to Consider the Merits of the Matter without Benefit of Respondent's Brief. Accordingly, that Motion is granted and the Commissioner proceeds to a determination of the matter in the light of relevant statutory and decisional law.

Petitioner's argument that the provisions of *N.J.S.A.* 18A:29-6 and 7 supersede the stated policy of the Board and the provisions of the negotiated agreement must fail. It has been conclusively determined that, where a local salary guide exceeds the State minimum salary schedule, the rules of a local board of education govern the placement of a teacher on that guide. *Board of Englewood v. Englewood Teachers,* 64 *N.J.* 1, 7 It was stated in *Francis M. Starego v. Board of Education of the Borough of Sayreville et al.,* 1964 *S.L.D.* 100:

> "***In [*Zelda*] *Goldberg v. Board of Education of West Morris Regional High School District* [1964 *S.L.D.* 89], the Commissioner determined that when the salaries provided under a local salary guide are higher than those set forth in the Minimum Salary Law, the Board is not bound by the terms of *R.S.* 18:13-13.7.***" (at 101)

In the instant matter, a review of the Board's salary schedules reveals that its minimum salaries in every instance exceed those set forth in *N.J.S.A.* 18A:29-7. Accordingly, the Board's negotiated salary policies set forth in its policy manual must control. The Commissioner so holds. Policy 703-01(3) which has been in effect since its adoption on October 17, 1966, provides that:

> "***Teachers employed on or after September 1, 1963, must possess a Master's degree to be eligible for advanced salary standing." (P-6)

Policy 703-01(7-a-1) provides that:

> "All degrees or academic credits must be in the field of education, except that degrees or credits earned in other fields will be accepted if they are closely related to the field in which the teacher is certified." (P-6)

Policy 703-01(7-b-1) states:

> "All courses and services and the Advanced Standing therefor shall be subject to the recommendation of the Superintendent of Schools and the approval of the Board of Education." (P-6)

The above cited policies of the Board have had the effect and weight of law since their adoption in 1966. While there is no evidence in the record that each of those policies was incorporated *in toto* into the Board's negotiated agreements with its teachers, it is clear that the essential thrust of Policy 703-01(3) was also a stated contingency in the negotiated agreements in effect during 1972-73 and 1976-78. (P-2, 12) The omission of such stated proviso from the printed salary schedules governing the 1974-75 and 1975-76 school years in no way negates the applicability of the provisions of Board Policy 703-01. The record is devoid of evidence that the policy was modified or rescinded by Board action. Nor does the Commissioner find those policy provisions unreasonable or arbitrary as petitioner alleges.

The right of a Board to establish policies which do not recognize, for salary purposes, a J.D. degree was upheld in *Cafarelli, supra,* and *Convery, supra.* It was similarly determined in *Brick Township Education Association and Donald Cook v. Board of Education of the Township of Brick,* 1975 *S.L.D.* 521, aff'd State Board of Education 524, set aside/rem. Docket No. A-718-75 New Jersey Superior Court, Appellate Division, October 1, 1976 that a board of education is not compelled, except as its own policies may require, to recognize for salary purposes the degree of a chiropractic physician as the equivalent of a doctorate in the field of education.

In the instant matter there is no evidence that the Board ever equated a J.D. degree with a master's degree, as in *Convery, supra*. Its stated policy is clear that advanced status on the salary scale for a teacher hired after September 1, 1963 is contingent upon possession by that teacher of a master's degree. In this respect petitioner did not qualify since he has never been awarded a master's degree.

Petitioner argues that such a requirement is capricious and unreasonable in the face of the Board's approval as late as 1968 of credits and degrees in law studies with advanced standing for one individual on the salary schedule. (Stipulation of Facts) Petitioner, however, has failed to submit credible proof that that individual was appointed subsequent to 1963. Absent such proof, capriciousness is unproven.

While in no way deprecating the worth of his knowledge of law as reflected in petitioner's exemplary participation in Student Career Day, the

Commissioner opines that a teacher's study of law is peripheral to the subject of English which petitioner is assigned to teach. Accordingly, while a Board may legally recognize a J.D. degree or law courses for advanced salary standing, a salary policy that does not recognize such studies, other than education law, is not without rational basis. In any event those negotiated agreements which further memorialize the text of Board Policy 703-01(3) are as much attributable to those who were petitioner's representatives at the negotiating table as to the Board. (P-2, 12) The provisions thereof must be interpreted in accord with the ordinary meaning of the language utilized. *Harry A. Romeo, Jr. v. Board of Education of the Township of Madison,* 1973 *S.L.D.* 102 The common significance of that clear and explicit language bars petitioner from the relief which he seeks. *Lane v. Holderman,* 23 *N.J.* 304 (1957)

The matter is importantly distinguishable from *Cusack, supra,* wherein the West Paterson Board's stated policies clearly embraced the provisions of *N.J.S.A.* 18A:29-6 and 7 by use of the phrase "***all as provided for in *Chapter* 164 of the *Public Laws* of 1963.***" *Cusack,* at 146 No such language has been shown to have been adopted herein. Accordingly, the Commissioner finds *Cusack* inapplicable.

The Board has established salary guides and policies affecting staff members in harmony with the statutes. Absent evidence that the Board has administered its salary policies in a discriminatory manner, the Commissioner finds no reason or authority to substitute his discretion for that of the Board either in regard to the formulation, interpretation, or application of those policies. *Quinlan v. Board of Education of North Bergen,* 73 *N.J. Super.* 40 (*App. Div.* 1962)

Absent credible evidence that the Board has acted capriciously or compelling arguments of law sufficient to conclude that the Board has abused its discretionary authority, the Commissioner determines that the Board's actions must be accorded a presumption of correctness. Petitioner has not proven entitlement to the relief which he seeks. Accordingly, the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

November 10, 1977
Pending State Board of Education

Board of Education of the Borough of Lavallette,

Petitioner,

v.

Borough Council of the Borough of Lavallette, Ocean County,

Respondent.

COMMISSIONER OF EDUCATION

ORDER

For the Petitioner, Doyle & Oles (John Paul Doyle, Esq., of Counsel)

For the Respondent, Sim, Sinn, Gunning, Serpentelli & Fitzsimmons (Kenneth B. Fitzsimmons, Esq., of Counsel)

This matter having been opened before the Commissioner of Education by the filing of a Petition of Appeal on May 7, 1977 by the Board of Education of the Borough of Lavallette alleging that the reduction of $52,687 by the Borough Council of the Borough of Lavallette of the Board's current expense budget for 1977-78 subsequent to its defeat at the polls by the voters on March 29, 1977, would prevent the implementation of a thorough and efficient program of education; and

A timely answer having been filed by the respondent Borough Council; and

The parties having reached an amicable settlement of the controverted matter and submitted to the Commissioner a signed stipulation of dismissal and withdrawal specifying that the Board appropriate $21,000 from the unappropriated balance in its current expense account and that the Borough Council certify the additional amount of $31,687 to the Ocean County Board of Taxation, thus restoring to the Board's use in its 1977-78 budget the entire amount of the aforesaid reduction of $52,687; and

The Commissioner having determined that the terms of the amicable settlement are appropriate; now therefore

IT IS ORDERED that the matter be and is withdrawn from litigation before the Commissioner.

Entered this 15th day of November 1977.

COMMISSIONER OF EDUCATION

Board of Education of the City of Asbury Park,

Petitioner,

v.

City Council of the City of Asbury Park, Monmouth County,

Respondent.

COMMISSIONER OF EDUCATION

ORDER

This matter having been opened before the Commissioner of Education through the filing of a formal Petition of Appeal by the Board of Education of the City of Asbury Park, Monmouth County, hereinafter "Board," (McOmber and McOmber, Richard D. McOmber, Esq., appearing) which challenges the reduction imposed upon the capital outlay portion of its 1977-78 school budget by the Mayor and Council of the City of Asbury Park, hereinafter, "Council," (Norman Mesnikoff, Esq., appearing); and

It appearing that, subsequent to the defeat by the electorate of the Board's proposed amount of $234,500 to be raised by local taxation for capital outlay purposes, Council imposed a reduction of $234,500 on the Board's capital outlay budget for 1977-78; and

It appearing that, subsequent to the Board filing the instant challenge to the controverted action of Council, the parties of interest have executed and filed a Stipulation of Settlement (J-1) the terms of which provide that Council has certified an additional amount of $75,000 to the Monmouth County Board of taxation for capital outlay purposes for 1977-78; and

It appearing that the Board accepts these terms as the basis for settlement; and

It appearing that no further justiciable issue exists in the matter; now therefore

IT IS ORDERED that the Petition of Appeal be and is hereby dismissed with prejudice on this 16th day of November 1977.

COMMISSIONER OF EDUCATION

Board of Education of the Rumson-Fair Haven Regional High School District,

Petitioner,

v.

Mayor and Council of the Boroughs of Fair Haven and Rumson, Monmouth County,

Respondent.

COMMISSIONER OF EDUCATION

ORDER

This matter has been opened before the Commissioner of Education through the filing of a formal Petition of Appeal by the Board of Education of the Rumson-Fair Haven Regional High School District, hereinafter "Board," Zager, Fuchs, Leckstein & Kauff (Abraham J. Zager, Esq., of Counsel), which challenges the reductions imposed by the Mayor and Council of the Borough of Fair Haven and Rumson, hereinafter "governing bodies," Parsons, Canzona, Blair & Warren (William R. Blair, Jr., Esq., of Counsel). The principal facts are these:

At the annual school election held March 22, 1977, the Board submitted the following proposal for the amount to be raised by local taxation for the 1977-78 school year:

Current Expense	$2,677,998

The proposal was defeated. Thereafter, the Board and the governing bodies consulted and the governing bodies adopted a resolution determining that a lesser amount was necessary to be raised by local taxation as follows:

	Board's Proposal	Governing Bodies' Resolution	Reduction
Current Expense	$2,677,998	$2,577,998	$100,000

Subsequently, the parties entered into a Stipulation of Settlement and Dismissal which provides for the following amount in current expense to be raised by local taxation for the 1977-78 school year:

Current Expense	$2,602,998

The Stipulation of Settlement and Dismissal provides for current expenses in the amount of $25,000 to be added to the amount previously certified by the governing bodies to the Monmouth County Board of Taxation to be raised for current expense for the Rumson-Fair Haven Regional High School District for the 1977-78 school year.

The Commissioner concurs with the Stipulation of Settlement. The Petition of Appeal is hereby dismissed this 21st day of November 1977.

COMMISSIONER OF EDUCATION

Board of Education of the Borough of Union Beach,

Petitioner,

v.

Mayor and Council of the Borough of Union Beach, Monmouth County,

Respondent.

COMMISSIONER OF EDUCATION

ORDER

This matter has been opened before the Commissioner of Education through the filing of a formal Petition of Appeal by the Board of Education of the Borough of Union Beach, hereinafter "Board," Newell & Cassidy (Paul E. Newell, Esq., of Counsel), which challenges the reductions imposed on its 1977-78 school budget by the Mayor and Council of the Borough of Union Beach, hereinafter "governing body," Patrick D. Healy, Esq. The principal facts are these:

At the annual school election held March 29, 1977, the Board submitted the following proposals for the amounts to be raised by local taxation for the 1977-78 school year:

Current Expense	$915,320
Capital Outlay	30,000

The current expense proposal was defeated. Thereafter, the Board and the governing body consulted and the governing body adopted a resolution determining that a lesser amount was necessary to be raised by local taxation as follows:

	Board's Proposal	**Governing Body's Resolution**	**Reduction**
Current Expense	$915,320	$865,320	$50,000

Subsequently, the parties entered into a Stipulation of Settlement and Dismissal which provides the following amount in current expense to be raised by local taxation for the 1977-78 school year:

Current Expense	$915,320

The Stipulation of Settlement provides for current expenses in the amount of $50,000 to be added to the amount previously certified by the governing body to be raised for the Union Beach School District for the 1977-78 school year.

The Commissioner concurs with the Stipulation of Settlement. The Petition of Appeal is hereby dismissed this 21st day of November 1977.

COMMISSIONER OF EDUCATION

Board of Education of the Black Horse Pike Regional School District,

Petitioner,

v.

Borough Councils of the Boroughs of Runnemede and Bellmawr and Township Committee of the Township of Gloucester, Camden County,

Respondent.

COMMISSIONER OF EDUCATION

ORDER

This matter has been opened before the Commissioner of Education through the filing of a formal Petition of Appeal by the Board of Education of the Black Horse Pike Regional School District, hereinafter "Board," Hyland, Davis & Reberkenny (William C. Davis, Esq., of Counsel), which challenges the reductions imposed by the Borough Councils of the Boroughs of Runnemede and Bellmawr and the Township Committee of the Township of Gloucester, hereinafter "governing bodies," (Borough of Runnemede, Florio and Maloney (James F. Maloney, Esq., of Counsel); Borough of Bellmawr, Joseph Asbell, Esq.; Township of Gloucester, Charles G. Palumbo, Esq.). The principal facts are these:

At the annual school election held March 22, 1977, the Board submitted the following proposal for the amount to be raised by local taxation for the 1977-78 school year:

Current Expense	$2,782,155

The proposal was defeated. Thereafter, the Board and the governing bodies consulted and the governing bodies adopted a resolution determining that a lesser amount was necessary to be raised by local taxation as follows:

	Board's Proposal	Governing Bodies' Proposal	Reduction
Current Expense	$2,782,155	$2,484,013	$298,142

Subsequently, the parties entered into a Stipulation of Dismissal which provides that the following amount for current expense be raised by local taxation for the 1977-78 school year:

Current Expense	$2,632,155

The Stipulation of Settlement and Dismissal provides for current expenses in the amount of $148,142 to be added to the amount previously certified by the governing body to be raised for the Black Horse Pike Regional School District for the 1977-78 school year.

The Commissioner concurs with the Stipulation of Settlement. The Petition of Appeal is hereby dismissed this 21st day of November 1977.

COMMISSIONER OF EDUCATION

Board of Education of the School District of South Orange-Maplewood,

Petitioner,

v.

Board of School Estimate of the School District of South Orange-Maplewood, Essex County,

Respondent.

COMMISSIONER OF EDUCATION

ORDER

This matter has been opened before the Commissioner of Education through the filing of a formal Petition of Appeal by the Board of Education of the School District of South Orange-Maplewood, hereinafter "Board," Kimmelman, Lieb, Wolff & Samson (Ronald E. Wiss, Esq., of Counsel), which challenges the reduction imposed by the Board of School Estimate of the School District of South Orange-Maplewood, hereinafter "Board of Estimate," Mortimer Katz, Esq., Township of Maplewood and Donal C. Fox, Esq., Village of South Orange. The principal facts are these:

At a meeting of the Board of Estimate on March 14, 1977, the Board submitted the following proposal for the amount to be raised by local taxation for the 1977-78 school year:

Current Expense	$12,086,206

The Board of Estimate adopted a resolution determining that a lesser amount was necessary to be raised by local taxation as follows:

	Board's Proposal	**Board of Estimate's Resolution**	**Reduction**
Current Expense	$12,086,206	$11,941,206	$145,000

Subsequently, the parties entered into a Stipulation of Settlement and Dismissal on October 17, 1977 which provides that the following amount for current expense be raised for the 1977-78 school year:

Current Expense	$12,013,706

This Stipulation of Settlement and Dismissal provides for the certification of an additional amount of $72,500 to be added to the amount previously certified to the Essex County Board of Taxation by the governing bodies of the Township of Maplewood and the Village of South Orange for current expenses of the School District of South Orange-Maplewood for the 1977-78 school year.

The Commissioner concurs with the Stipulation of Settlement. The Petition of Appeal is hereby dismissed this 21st day of November 1977.

COMMISSIONER OF EDUCATION

Board of Education of the Township of Greenwich,

Petitioner,

v.

Township Committee of the Township of Greenwich, Gloucester County,

Respondent.

COMMISSIONER OF EDUCATION

ORDER

This matter has been opened before the Commissioner of Education through the filing of a formal Petition of Appeal by the Board of Education of the Township of Greenwich, hereinafter "Board," Albert J. Zamal, Esq., which challenges the reductions imposed upon its 1977-78 school budget by the Township Committee of the Township of Greenwich, hereinafter "governing body," Kenneth A. DiMuzio, Esq. The principal facts of the matter are these:

At the annual school election held March 29, 1977, the Board submitted to the electorate the following proposals for the amounts to be raised by local taxation for the 1977-78 school year:

Current Expense	$1,613,841
Capital Outlay	129,000

These proposals were defeated. Thereafter the Board and governing body consulted and the governing body adopted a resolution determining that lesser amounts were necessary to be raised by local taxation as follows:

	Current Expense	Capital Outlay
Board's Proposal	$1,613,841	$129,000
Governing Body's Proposal	1,580,041	–0–
Amount Reduced	$ 33,800	$129,000

Subsequently, the parties of interest entered into a Stipulation of Settlement and Dismissal which states that the governing body shall provide an additional $33,800 for current expense by increasing its previous certification to the Gloucester County Board of Taxation in the amount of $33,800. The Stipulation of Settlement did not provide any funds for capital outlay.

The Commissioner concurs with the Stipulation of Settlement. The Petition of Appeal is hereby dismissed this 21st day of November 1977.

COMMISSIONER OF EDUCATION

Board of Education of the Borough of National Park,

Petitioner,

v.

Borough Council of the Borough of National Park, Gloucester County,

Respondent.

COMMISSIONER OF EDUCATION

ORDER

This matter having been opened before the Commissioner of Education by the filing of a formal Petition of Appeal by the Board of Education of the Borough of National Park, hereinafter "Board," Shpeen and Weber (Alvin G. Shpeen, Esq., of Counsel), which challenges the reduction imposed by the Borough Council of National Park, hereinafter "governing body," Harold L. Crass, Esq. The principal facts are these:

At the annual school election held March 29, 1977, the Board submitted the following proposals for amounts to be raised by local taxation for the 1977-78 school year:

Current Expense	$210,322
Capital Outlay	$ 5,000

Both proposals were defeated. Thereafter, the Board and the governing body consulted and the governing body adopted a resolution determining that a lesser amount was necessary to be raised by local taxation as follows:

	Board's Proposal	Governing Body's Resolution	Reduction
Current Expense	$210,322	$190,322	$20,000

Subsequently, the parties entered into an agreement which provides, as reflected in their respective resolutions filed with the Commissioner, that the following amount for current expense be raised by local taxation for the 1977-78 school year:

Current Expense	$210,322

This agreement provides that the amount of $20,000 be added to the amount previously certified by the governing body for the Borough of National Park School District for the 1977-78 school year.

The Commissioner observes from the record that the governing body has subsequently adopted a resolution directing the Gloucester County Board of Taxation to increase the amount of the original current expense local tax levy by $20,000 for the Borough of National Park School District for the 1977-78 school year.

The Commissioner concurs with the stipulation of the parties effecting a settlement of the instant matter. The Petition of Appeal is hereby dismissed this 22nd day of November 1977.

COMMISSIONER OF EDUCATION

Harry D. Whittley, Jr.,

Petitioner,

v.

Board of Education of the Township of Wall, Monmouth County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Morgan and Falvo (Peter S. Falvo, Jr., Esq., of Counsel)

For the Respondent, Mirne, Nowels, Tumen, Magee & Kirschner (William C. Nowels, Esq., of Counsel)

Petitioner, a tenured teaching staff member in the employ of the Board of Education of the Township of Wall, hereinafter "Board," alleges that he was called to active duty for field training by the armed services in two successive academic years and that such service entitles him to be paid his full salary as a teacher without deduction for military earnings. He demands judgment to this effect and an order restraining the Board from any attempt to effect any deduction of other earnings as mitigation. The Board denies that petitioner performed military service which constituted field training and/or entitled him to be paid both by the Board and the government of the United States.

A hearing was conducted on September 16, 1976 at the office of the Monmouth County Superintendent of Schools, Freehold, by a hearing examiner appointed by the Commissioner of Education. Briefs were filed thereafter by the parties. Brief submission was completed in February 1976. The report of the hearing examiner is as follows:

Petitioner completed a period of eight years of service in the United States Navy in 1959. He was discharged in that year and was without military commitments until July 21, 1973 when he reenlisted in the Naval Reserve. (Tr. 10) He testified that as a reservist he was required to attend 48 drills per year with his assigned unit and also to serve for 15 consecutive days in "active duty for training." (Tr. 10) He testified that in his initial year as a reservist this period of approximately two weeks of training was directed to be served in June 1974 at a time when there was no conflict with his duties as a teacher in the Board's employ. This service is not at contest herein. (Tr. 12)

The active duty periods petitioner served during the 1974-75 and 1975-76 academic years are the subject of the Petition of Appeal since these periods occurred in conflict with petitioner's duties as a teacher.

Petitioner testified that in the spring of 1975 he received orders to report with his assigned unit to the Lakehurst Naval Air Station for active duty training during the period April 7 through 20, 1975, and that he requested "time off"

from his teaching duties. (Tr. 13, P-1) He testified that the Superintendent attempted to have the military assignment period changed but was not successful and that the Board did grant him a leave of absence. (Tr. 15) He also testified that he did in fact report to his assigned duty station at Lakehurst with his "entire unit" and that the unit performed services with respect to aircraft maintenance. (Tr. 17) He testified that his own duties were those of a supervisor of personnel and that the maintenance unit with which he worked was the same one he had worked with in weekly drills. (Tr. 18, 29)

Subsequent to this period of active duty with the Naval Reserve, petitioner requested and received a discharge and enlisted in the United States Army Reserve. This discharge and enlistment occurred in August 1975 and petitioner was assigned to Headquarters Company, Fourth Brigade, 78th Division. (Tr. 20) He testified that the service requirements in the Army were the same as those for the Navy and that in April 1976 he was required to report for two weeks of active duty to the Major General Weigel Edison Reserve Center. (Tr. 21) He testified he was again granted a leave of absence by the Board and served with the same unit as he had in weekly drills. (Tr. 22, 24) He testified there was no choice of dates afforded him with respect to the two weeks' active duty training period (Tr. 25) and that he was never aware that such a choice was possible. (Tr. 33)

Subsequent to petitioner's first active duty training period, the Board directed that deductions of military earnings be made from petitioner's salary as a teacher, as mitigation, and one such deduction of twenty dollars was made. (Tr. 26) Deductions were then suspended or held in abeyance pending the determination to be made in the instant litigation. Petitioner agreed at the hearing to furnish for the record an accounting of his military service pay for each of the two years in question and the following certification was made in a letter dated January 4, 1977 to the hearing examiner:

"April 7-20, 1975

Pay	$293.62
Quarters	73.92
Rations	32.28
	$399.82 (less taxes)

1975-76 for ten days training

Pay	$208.30
Quarters	52.60
Rations	22.32
	$283.22 (less taxes***)"

Such certification is not a concession by petitioner that a determination in favor of the Board by the Commissioner should result in restitution by petitioner of payments for quarters and rations as mitigation. (See Tr. 36 *et seq.*)

The Superintendent testified that the two weeks of active duty training

can be changed upon request of the reservist but that he, the Superintendent, was not able to effect a change although he had made such an effort. (Tr. 44-45) Counsel for the Board represented at the hearing that he had also attempted to obtain a policy statement from the military services with respect to personal requests for change in active duty assignments but had been unable to obtain one. (Tr. 48)

The Board did not, prior to or during the hearing in this matter, advance a claim that the Commissioner lacked jurisdiction to hear it. The Board has raised it now in its Brief. It asserts that the Public Employment Relations Commission has jurisdiction, that petitioner has failed to exhaust administrative remedies and that the Petition should be dismissed. In support of such assertion the Board cites *Apostolico et al. v. County of Essex,* 142 *N.J. Super.* 296 (*App. Div.* 1976) and *Patrolman's Benevolent Association v. Montclair,* 70 *N.J.* 130 (1976). The Board further avers that petitioner's military service periods here in question did not qualify as "field training" in the context of the statutory prescription controlling released time privileges for military service and the interpretation of the phrase by the Court in *Lynch v. Borough of Edgewater,* 8 *N.J.* 279 (1951). The Board distinguishes the facts of *Walter E. Reutter v. Board of Education of the Borough of Roselle, Union County,* 1975 *S.L.D.* 532 from those of the matter, *sub judice,* and maintains the determination therein is inapplicable.

Petitioner, by reply Brief, avers that the Commissioner does have primary jurisdiction herein since the Board's contemplated action to claim a sum of money from petitioner in mitigation against his salary as a teacher would, if given full effect, deprive him of a statutory entitlement. Petitioner further avers in this respect that the Board's delay in advancing the jurisdictional argument must be considered a waiver of the question. More substantively, petitioner maintains that the primary facts of petitioner's military service are similar to those considered in *Reutter, supra,* and that such service was the kind of field or unit training contemplated by the statute *N.J.S.A.* 38:23-1. Petitioner also cites *Parks v. Union County Park Commission,* 7 *N.J. Super.* 5 (*App. Div.* 1950) in support of his views.

The applicable statute, *N.J.S.A.* 38:23-1, is cited in its entirety as follows:

> "An officer or employee of the State or a county, school district or municipality, who is a member of the organized reserve of the Army of the United States, United States Naval Reserve, United States Air Force Reserve or United States Marine Corps Reserve, or other organization affiliated therewith, shall be entitled to leave of absence from his respective duty without loss of pay or time on all days on which he shall be engaged in *field training.* Such leave of absence shall be in addition to the regular vacation allowed such employee." (*Emphasis supplied.*)

The decision of the Court in *Lynch, supra,* resulted in an interpretation of this statute and the Court said:

> "***[W]e hold that *R.S.* 38:23-1, *supra,* must be construed to intend by

> 'field training' only that training which consists of participation in *unit training* in field operations.***" (*Emphasis supplied.*) (at p. 285)

And,

> "***[R]eferences to state and federal legislation are not exhaustive. They serve, however, to illustrate the clear distinction, made in both realms of legislative effort between 'field' training or instruction and other types of military or naval duty, service or instruction. There is no doubt that the Legislature of this State had this distinction in mind when *L.*1931, *c.*347, *secs.* 1, 2, now R.S. 38:23-1, was enacted and while we may not be certain as to the motivation of the Legislature in applying that distinction, it is probable that at least one consideration was that the organized units of the National Guard and other reserve forces are those primarily to be considered as necessary to the defense of the State, ready to fight on very short notice and *required [emphasis in text]* by law to undergo field training, i.e., *training for battle as a unit,* without the consent of the individual serviceman to support or prepare for that defensive effort.***" (*Emphasis supplied.*) (at p. 290)

It was this decision with respect to the interpretation of the statute *N.J.S.A.* 38:23-1 that the Commissioner considered in *Reutter, supra,* and therein he determined that petitioner was entitled to classify his military service as "field training." He further determined that petitioner was entitled to a leave of absence to perform such service "***without loss of pay or time.***" *N.J.S.A.* 38:23-1

The facts of the instant matter are in all essential respects identical to those in *Reutter, supra,* and in fact more compelling in favor of petitioner. Petitioner was required to and did perform service in military reserve units for periods of approximately two weeks in each of three consecutive years. He performed such services, unlike *Reutter,* in the same unit wherein he served in weekly drills. These services are more clearly within the parameter of the Court's definition in *Lynch, supra,* of field training as "training for battle as a unit."

Accordingly, the hearing examiner concludes that petitioner is entitled to the benefits of the statutory plan, a leave of absence "without loss of pay," and that the plan in its clear language does not envision mitigation from salary payable to petitioner by the Board as the result of military service earnings. *Parks, supra; Reutter, supra*

Finally, the hearing examiner finds no merit in the tardy claim that the Commissioner lacks primary jurisdiction herein. The Appeal is one of statutory construction and is a controversy arising under the school laws between the Board and a teaching staff member.

Accordingly, the hearing examiner recommends that the Commissioner direct the Board to restore to petitioner the one salary deduction it made as mitigation of military earnings and direct that petitioner be otherwise

compensated without loss of contracted salary benefits for the periods of his leave to perform military service.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and it is observed that no exceptions, objections or replies have been filed. The Commissioner concurs in all respects with the findings and recommendations as set forth in the report and adopts them as his own. He determines that petitioner is entitled to his full salary as a teaching staff member in the employ of the Board during the 1974-75 and 1975-76 academic years without mitigation pertinent thereto as a result of compensated military service.

Accordingly, the Commissioner directs the Board to pay petitioner the sum of money which has been withheld from his salary entitlement.

COMMISSIONER OF EDUCATION

December 7, 1977

Point Pleasant Beach Teachers Association,
Ruth O'Neil, Elaine Hennessy and Marjorie Watson,

Petitioners,

v.

Dr. James Callam and Board of Education of the Borough of Point Pleasant Beach, Ocean County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Anton and Ward (Martin B. Anton, Esq., of Counsel)

For Petitioner Elaine Hennessy, Bernard Kannen, Esq.

For the Respondents, Harold Feinberg, Esg.

Petitioners are teaching staff members employed by the Board of Education of the Borough of Point Pleasant Beach, hereinafter "Board," and are assigned to the Title I, Elementary and Secondary Education Act instructional program which is operated by the Board. Petitioners seek an adjudication that

they have acquired a tenure status pursuant to *N.J.S.A.* 18A:28-5 and further seek an order which would require the Board to place them at the appropriate level of the salary guide to include credit for previous teaching experience and to afford them the same fringe benefits and seniority status afforded other teaching staff members in the school district not assigned to the Title I program. The Board asserts that petitioners have not acquired a tenure status and further asserts that it abolished the Title I program in good faith.

A hearing was conducted in this matter on November 8 and 29, 1976 at the office of the Ocean County Superintendent of Schools, Toms River, by a hearing examiner appointed by the Commissioner of Education. Thereafter, the Board filed a Memorandum of Law in support of its position and petitioners filed a Reply Brief. The report of the hearing examiner is as follows:

Petitioners assert that they hold valid teaching certificates issued by the New Jersey State Board of Examiners and have taught within the scope of their teaching certificates for a sufficient length of time to acquire a tenure status. Individually, Petitioner Hennessy was initially engaged by the Board during January 1969, as a supplemental instruction teacher until June 1969. She was employed from October 1, 1970 and annually thereafter until June 1976 as a teacher assigned to the Title I program. (Tr. I-88-89) She testified that her daily teaching hours were four hours in 1972-73, four hours in 1973-74, five hours in 1974-75, and five hours in 1975-76. (Tr. I-95, 105)

Petitioner Watson asserts that she has been continuously employed by the Board since February 1972 as a teacher assigned to the Title I program. (Tr. I-140) She testified that she was employed by the Board from October 1972 until June 1973 to teach in a program for Saint Peters parochial school pupils in the Borough of Point Pleasant Beach. (Tr. I-140-141) She testified that her daily teacher hours were two hours in 1972-73, three hours in 1973-74, four hours in 1974-75, and four hours in 1975-76. (Tr. I-141)

Petitioner O'Neil testified that she commenced employment with the Board on October 1, 1969 and was continuously employed as a teacher assigned to the Title I program until June 1976. She further stated that she was employed as a coordinator in the Title I program for the 1975-76 school year. (Tr. I-119-120) She testified that her daily teaching hours increased from three in the beginning of her employment to four hours and subsequently to six daily hours when she was appointed coordinator. (Tr. I-119, 124-125)

Petitioners' collective testimony shows that their duties required them to execute weekly lesson plans, schedule pupils to be served, order supplies and materials, arrange and conduct parent conferences twice each year, maintain individual progress folders for each pupil, report individual pupil progress to the homeroom teachers and attend such PTA meetings and staff conferences as required by the school administration. (Tr. I-90-94, 120-122, 141) They testified that during their employment they worked on the same daily basis as other teachers in the district but their working hours varied and increased year to year from two hours to six hours per day. (Tr. I-95-96, 122, 141) They testified

further that their responsibilities did not include homeroom or playground duties nor were they afforded a duty free lunch period. (Tr. I-94, 122)

Petitioners contend that the Board abolished the Title I teaching positions as the result of, and subsequent to, a conference they had with the Superintendent of Schools in December 1975. They testified that they sought clarification of their respective positions with regard to tenure status, sick leave, pension rights and eligibility for the sickness and accident insurance program. They testified that the Superintendent informed them there was a limited amount of Title I moneys and that deductions from their pay would provide them less than the $7.50 per hour they were then receiving. They asserted that the Superintendent stated that if they continued to pursue a course of action requesting employment benefits, petitioners could possibly lose their Title I positions. They stated that the Superintendent opined that petitioners might have tenure status in part-time positions. (Tr. I-114-115, 123-124, 146) Subsequently, on December 30, 1975, the Superintendent sent a letter to the President of the Teachers Association which stated, *inter alia,* as follows:

> "The Title I program as presently set up and approved by the ESEA Title I office of the Department of Education in Trenton does not include fringe benefits for the Title I teachers.
>
> "There presently exists part time tenure status for Title I positions involving varying hours per school day, not exceeding six hours per day.
>
> "The following people probably have part time tenure.
>
> Ruth O'Neil
> Marge Watson
> Elaine Hennessy – according to our records there may be some question as to her certification
>
> "***None of the Title I teachers has taught a continuous year in the Point Pleasant Beach school system as a Title I teacher. The foregoing evaluation is unofficial and further information would be necessary for additional clarification of their status if needed.***" (P-2)

Petitioner Hennessy testified that the Board did not notify her that she would not be reemployed for the subsequent school year. She stated that on October 1, 1976, she and Petitioners O'Neil and Watson reported to the school where they were previously employed and were informed that Title I funds were not available, that the program had been discontinued and that there were no positions for petitioners at that time. (Tr. I-109-110)

The Board argues that petitioners were employed as "supplementary teachers," at an hourly rate of pay with a limited number of hours per year, subject to the approval of the State Department of Education. The Board asserts further that petitioners did not hold written contracts nor perform the same duties as regularly employed teachers in the district. Furthermore, the Board

argues that each year of employment was for a specific term and never carried over to a succeeding year as continuing employment. (P-1; R-1; R-2)

The Board avers that it determined to abolish its Title I program and accordingly no teachers were hired. It asserts that petitioners have attempted to have the Board retain a course of study to provide teaching positions for petitioners.

Notwithstanding the arguments of the Board that it does not acknowledge the tenure status of petitioners, the hearing examiner observes that it is well established that a tenure status is acquired by teaching staff members who meet the precise conditions set forth in the statutes. *Zimmerman v. Board of Education of the City of Newark,* 38 *N.J.* 65 (1962), *cert.* den. 371 *U.S.* 956, 83 *S.Ct.* 508 (1963); *Ahrensfield v. State Board of Education,* 126 *N.J.L.* 543 (*E.&A.* 1941); *N.J.S.A.* 18A:28-5 It is legally immaterial whether or not an employing board of education chooses to "acknowledge" the acquisition of tenure. In *Ruth Nearier et al. v. Board of Education of the City of Passaic, Passaic County,* 1975 *S.L.D.* 604, the Commissioner stated, *inter alia,* as follows:

> "***Petitioners' employment by the Board may not be categorized as something other than 'teaching staff members' as defined in the statutes (*N.J.S.A.* 18A:1-1) and their service entitles each of them to the emoluments and benefits afforded all other teaching staff members employed by the Board *and to the protection of tenure.****" (*Emphasis supplied.*) (at 611)

The Commissioner found that in the matter of *Nearier, supra,* the source of funds used to compensate teaching staff members may not be used to set one group apart from others similarly qualified and with similar professional duties. The Commissioner held that the matter in *Nearier* had been rendered *stare decisis* by prior decisions, particularly *Jack Noorigian v. Board of Education of Jersey City, Hudson County,* 1972 *S.L.D.* 266, aff'd in part/rev. in part State Board of Education 1973 *S.L.D.* 777, wherein the Commissioner held:

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

The hearing examiner also observes that in *Josephine De Simone v. Board of Education of the Borough of Fairview,* 1966 *S.L.D.* 43 it is stated:

> "***The Commissioner has already determined that part-time teachers enjoy the protection of tenure in the case of *Fox v. New Providence Board*

of Education, 1939-49 *S.L.D.* 134. The teacher in that case taught home economics at first one day and later two days each week for the full school year and had done so for eleven consecutive years. In reaching his conclusion that petitioner Fox had acquired protection in a part-time job, the Commissioner pointed out that the provisions of *R.S.* 18:13-16 [now 18A:28-5] *** apply to 'all teachers,' without regard to their employment on either a full-time or part-time basis.***" (at 45)

In *De Simone, supra,* the Commissioner makes the distinction between the regular part-time employees and substitute teachers and others employed occasionally and irregularly part-time wherein he cited *Sherrod v. Lawrenceburg,* 213 *Ind.* 392, 12 *N.E.2d* 944 (*Supreme Court of Indiana* 1938):

"It is contended *** that the appellant is not a tenure teacher and that her employment and her salary are not protected by the Teachers' Tenure Law, for the reason that she was what is termed as 'part-time teacher,' that is, that she did not teach classes every school day, but only twelve days in each month. There can be no merit in this contention. She was not an occasional teacher, who taught intermittently as a substitute or otherwise. She was a regular teacher. The law does not require that teachers shall teach every day, or every hour of every day. Such subjects as art or music may require fewer hours of teaching. This is in the discretion of the school authorities. But appellant was undoubtedly regularly employed, teaching the same subject a given number of days per month, over a period of years, and must be considered a regular teacher." (at 46)

In the context of the Commissioner's determinations, *ante,* and the findings adduced at the hearing, the hearing examiner recommends that the Commissioner determine petitioners herein have acquired a part-time tenure status in the Point Pleasant Beach School District pursuant to *N.J.S.A.* 18A:28-5(c).

The hearing examiner further finds that the Board exercised its discretionary statutory authority to abolish its Title I program (*N.J.S.A.* 18A:11-1, 18A:33-1) and the teaching positions assigned thereto. (*N.J.S.A.* 18A:28-9) The record reveals, however, that the Board took its action subsequent to petitioner's filing of the instant Petition of Appeal before the Commissioner. (Tr. II-18-19)

The hearing examiner, therefore, leaves to the Commissioner to determine the appropriateness of the Board's action to abolish its Title I program.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed and carefully considered the record of the controverted matter including the exhibits in evidence, the testimony adduced at two days of hearing, the report of the hearing examiner and the exceptions thereto filed by counsel for petitioners pursuant to *N.J.A.C.* 6:24-1.17(b).

With regard to the principal issue of tenure accrual, the Commissioner is constrained to observe that petitioners met the precise statutory requirement of *N.J.S.A.* 18A:28-5(a) in that the Board employed petitioners for three academic years with employment beginning on the fourth year, although on a part-time basis rather than full-time. *Zimmerman, supra; Ahrensfield, supra; Nearier, supra; Noorigian, supra*

The Commissioner observes that the working hours for full-time teaching staff members employed by the Board approximated six hours daily. The Commissioner determines, therefore, that Petitioner Watson has accrued tenure status in a one-half time position and Petitioners Hennessy and O'Neil have accrued tenure status in two-thirds time positions, respectively, and are entitled to those prorated salaries and prorated benefits which existed during the years of their employment. In this regard, the Commissioner stated in *Woodbridge Township Federation of Teachers Local No. 822, AFL-CIO and Woodbridge Township School Administrators' Association v. Board of Education of the Township of Woodbridge,* 1974 *S.L.D.* 1201 as follows:

> "***In previous instances, the Commissioner has held that a teaching staff member could acquire a tenure status in a part-time position. See *Josephine DeSimone v. Board of Education of Borough of Fairview, Bergen County,* 1966 *S.L.D.* 43. Tenure in a part-time position does not entitle a teaching staff member to rights to a full-time position; thus a tenure status in a part-time position is sharply differentiated from tenure in a full-time position. Those who do acquire a tenure status in a part-time position are steadily employed. The term steadily employed is construed to mean regular, continuous employment for the entire school year, for less hours daily or for fewer days per week than would be required for full-time employment. For example, a teacher of art in an elementary school might be steadily employed for two days per week for the entire academic year, or a music teacher might be steadily employed on a half-day basis for the entire academic year. Such steady employment is contrasted with employment which is occasional or for a brief duration of days or weeks. Under these circumstances the steadily employed teacher would be entitled to a prorated benefit as a principle of equity. A teaching staff member employed for half days for the entire academic year is entitled to one half the benefit received by those steadily employed on a full-time basis.***" (at 1206-1207)

Thus, petitioners are entitled retroactively to those fractions of the salary scale and benefits which existed during the terms of their employment by the Board. The application of the principles as set forth in *Woodbridge, supra,* is shown by example with regard to Petitioner O'Neil as follows: her employment for two hours per day for the school years 1969-70, 1970-71 and 1971-72 entitled her to one third the annual salary and benefits afforded to full-time teaching staff members for each of those years; in 1972-73 she was employed for three hours or the equivalent of one half the annual salary and benefits; her employment of four hours per day for the school years 1973-74 and 1974-75 equals two thirds time and the concomitant salary and benefits; in the 1975-76

school year petitioner was employed for six hours per day and therefore is entitled to the salary and benefits accorded a full-time teaching staff member for that period of employment. Accordingly, the Commissioner directs the Board to make such restitution to Petitioner O'Neil and similarly apply the principles in *Woodbridge* to Petitioners Hennessy and Watson.

Petitioners aver that the series of events and actions which comprise the record herein stand as convincing evidence that the Board's decision to abolish its ESEA Title I program and to deny them tenure rights was an arbitrary, capricious and unreasonable one contrary to law and administrative procedure.

Petitioners assert that the Board abolished its Title I program subsequent to petitioners' inquiry with regard to a clarification of their respective tenure status and other emoluments afforded teaching staff members in the district but denied petitioners. The elimination of such positions by a local board of education is expressly permitted by *N.J.S.A.* 18A:28-9 which reads as follows:

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

Although petitioners question the propriety of the Board's action, the Commissioner determines that the Board exercised its prerogative and abolished its Title I program pursuant to the statutes.

With regard to the Board's abolishment of its Title I program pursuant to *N.J.S.A.* 18A:28-9, *N.J.S.A.* 18A:28-10 must be considered *in pari materia* as follows:

> "Dismissals resulting from any such reduction shall not be made by reason of residence, age, sex, marriage, race, religion or political affiliation but *shall be made on the basis of seniority* according to standards to be established by the commissioner with the approval of the State Board."
> (*Emphasis supplied.*)

N.J.A.C. 6:3-1.10(h) provides that:

> "Whenever any person's particular employment shall be abolished in a category, he shall be given that employment in the same category to which he is entitled by seniority."

In the instant matter, the Commissioner determines that petitioners are entitled to part-time tenure status and seniority rights as teaching staff members within the scope of their certification. *Michael J. Keane v. Flemington-Raritan Regional Board of Education,* 1970 *S.L.D.* 176; *Mary Ann Popovich v. Board of Education of the Borough of Wharton,* 1975 *S.L.D.* 737

Accordingly, the Commissioner directs that the Board restore petitioners to positions of entitlement, if indeed such positions exist. In the event such positions do not exist, the Board is directed to place petitioners on a preferred seniority eligibility list for a one-half time teaching position for Petitioner Watson and a two-thirds time teaching position each for Petitioners Hennessy and O'Neil. It is further directed that the Board provide petitioners with salary and other emoluments equal to the difference between that which they received and that which they would otherwise have been provided as part-time teaching staff members during the period of employment controverted herein.

COMMISSIONER OF EDUCATION

December 9, 1977
Pending State Board of Education

George Delli Santi,

Petitioner,

v.

Board of Education of the City of Newark, Essex County,

Respondent.

COMMISSIONER OF EDUCATION

ORDER

For the Petitioner, John Cervase, Esq.

For the Respondent, Pickett & Jennings (Robert T. Pickett, Esq., of Counsel)

This matter having been opened before the Commissioner of Education by George Delli Santi, hereinafter "petitioner," by the filing of a Petition of Appeal wherein it is alleged that the Board of Education of the City of Newark, hereinafter "Board," illegally terminated his employment as a teacher in the Newark Public Schools; and

The matter having proceeded through a conference of counsel and three days of plenary hearing which concluded on October 18, 1976; and

The Board having filed at the direction of the hearing examiner, to which no objection was raised by counsel for petitioner at the hearing, an affidavit of the Board's Assistant Executive Superintendent for Education (Deputy), hereinafter "Executive Superintendent," wherein it is affirmed only that the Newark schools were open during four months of 1971 as follows:

September – 14 days
October – 19 days
November – 15 days
December – 16 days

(Transcript of October 18, 1976, at pp. 92-93; Affidavit of Edward I. Pfeffer)

Petitioner having applied to exclude from the record the aforementioned affidavit or, in the alternative, to be allowed to submit an affidavit himself, which affidavit as submitted treats numerous matters other than which days school remained open from September to December in 1971; and

The hearing examiner having by letter dated March 22, 1977, both accepted the affidavit of the Executive Superintendent into evidence and rejected petitioner's affidavit for the reason that it was beyond the scope of the consideration of the number of days on which school was open during September through December, 1971; and

Petitioner having moved on March 31, 1977 for an Order of the Commissioner directing that the hearing be reopened in order that the Executive Superintendent may be cross-examined on the subject matter of his affidavit, which request had been denied earlier by the hearing examiner; and

Petitioner having applied to the Commissioner by letter dated March 24, 1977 seeking the disqualification of the hearing examiner for alleged unfairness, prejudice and favoritism; and

The Commissioner having reviewed both the arguments set forth by petitioner in support of his application and Motion and those arguments set forth by the Board on April 6, 1977 in opposition to petitioner's Motion; and

The Commissioner having weighed these arguments within the factual context reflected in the transcripts of three days of hearing at which petitioner was given ample opportunity to testify under oath on three separate days to that which he seeks to affirm in the affidavit which was rejected by the hearing examiner; and

The Commissioner having concluded that petitioner was offered by the hearing examiner full, fair and free opportunity to examine the school registers of the Board or such other records as may exist relative to the days on which school was kept open during September through December, 1971, of which opportunity it appears petitioner chose not to avail himself; and

The Commissioner having concluded that the hearing examiner's procedural rulings in respect to both the controverted affidavits and the conduct of three days of hearing were reasonable, unbiased and in no way prejudicial to the rights of petitioner to obtain a justiciable determination of the dispute; and

The Commissioner having determined that both the application of

petitioner for the disqualification of the hearing examiner and the Motion to reopen the hearing are without merit; now therefore

IT IS ORDERED that petitioner's Motion and the aforementioned application be and are dismissed; and

IT IS FURTHER ORDERED that the hearing examiner proceed in an expeditious manner to issue his report to which the parties may thereafter state their exceptions, if any, pursuant to *N.J.A.C.* 6:24-1.17(b).

Entered this 18th day of May 1977.

COMMISSIONER OF EDUCATION

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, John Cervase, Esq.

For the Respondent, Pickett & Jennings (Robert T. Pickett, Esq., of Counsel)

Petitioner alleges that as a result of his employment from September 1969 through June 1974 by the Board of Education of the City of Newark, hereinafter "Board," he acquired a tenure status and that the Board's refusal to employ him in September 1974, absent a certification of charges pursuant to *N.J.S.A.* 18A:6-10 *et seq.*, was illegal. The Board, while admitting that petitioner was employed during that period, denies that the employment was continuous or such that petitioner attained a tenure status pursuant to *N.J.S.A.* 18A:28-5.

A hearing was conducted on March 5, June 22 and October 18, 1976 at the office of the Morris County Superintendent of Schools, Morris Plains, by a hearing examiner appointed by the Commissioner of Education. Briefs were filed subsequent to the hearing. The report of the hearing examiner follows, setting forth first the testimony of petitioner concerning his employment by the Board.

Petitioner testified that he taught as a per diem substitute at the rate of $30 per day for thirteen weeks during a teachers' strike and for approximately four additional days during the school year 1969-70. (Tr. I-21, 46) He testified that during 1970-71 he was paid at the per diem substitute rate of $35 per day to serve in a number of the Board's schools where he was assigned for varying lengths of time to classes of absent teachers. He also testified that on occasion during that year he had refused opportunities to substitute because of demands of his part-time employment as a draftsman. (Tr. I-23-26, 72-77, 110)

Petitioner testified that during 1971-72 he was compensated on a per diem basis for teaching in at least six different schools, for more than one teacher, for varying lengths of time and in numerous subject areas during the first semester. Petitioner stated that during the first semester of 1971-72 he was assigned on occasion to positions of teachers who were absent for short term illnesses, that he did not submit grades for pupils and frequently taught in subject areas in which he was not certified from plans prepared by the regular teachers of the classes to which he was assigned. He testified also that he was not paid for days when he himself was ill. (Tr. I-104, 115-119; Tr. II-40) By contrast, he testified that during the second semester of 1971-72 he had prepared daily lesson plans, taught, and assigned pupil grades at the Board's Central High School in a single industrial arts position as replacement for a retired teacher. (Tr. I-27, 70, 81-88, 91-92, 104; Tr. II-29-35, 40; Tr. III-62-64)

Petitioner testified that during the 1972-73 school year he was under contract for the entire year to teach industrial arts at Vailsburg High School, after which he continued under contract teaching drafting at Malcolm X. Shabazz High School for the 1973-74 school year where he was notified by his principal on the last day of school that he would not be reemployed for the ensuing year. (Tr. I-27, 31, 35, 44, 54, 70; R-5)

Petitioner testified that he has been permanently certified in English and social studies since 1969. He was granted emergency certification as a teacher of industrial arts in October 1972 and first became eligible for permanent certification to teach industrial arts in the summer of 1976. (Tr. I-42-44, 72-73, 117; P-3, 5)

The assistant supervisor of the Board's payroll department testified that petitioner received no compensation whatsoever during the third and fourth quarters of 1970 and the third quarter of 1971. (Tr. I-124-132; R-2, 3, 4) He testified further that from October through December 1971 petitioner was paid $1,330. At the applicable $35 per diem rate of compensation, petitioner was paid for 38 days of the total of fifty days during which school was in session for that period. (Tr. III-82-88, 92; R-6) (Affidavit of the Board's Assistant Executive Superintendent appended to the Board's Memorandum of Law as directed by the hearing examiner)

Petitioner's Brief advances the argument that, although petitioner was hired and paid as a substitute from September 1969 through June 1972, this designation was a subterfuge to prevent his attainment of tenure since he allegedly performed all the duties of a regular teacher. It is argued that that time accrues toward tenure, as does the period from September 1972 through 1974 when he in fact served under contract as an industrial arts teacher. *Viemeister v. Board of Education of the Borough of Prospect Park,* 5 *N.J. Super.* 215 (*App. Div.* 1949)

Petitioner argues that the fact that he did not have a certificate in industrial arts during the 1971-72 school year may not bar the accrual of that time toward tenure. In this regard is cited, *inter alia, Mildred Givens v. Board of Education of the City of Newark, Essex County,* 1974 *S.L.D.* 906. Petitioner

contends that he was fully certified in both English and social studies since 1969 and that the delay in procuring his certification in industrial arts was, in any event, attributable to failure of the Board's administrative officers to make timely application on his behalf to the State Board of Examiners. It is further argued that the procurement of his permanent certification, thereafter, establishes the time served as applicable toward the requirement for tenure. (Petitioner's Brief, at pp. 6-7) *Elaine M. Chianese v. Board of Education of the Township of Bordentown, Burlington County,* 1976 *S.L.D.* 805, aff'd State Board of Education February 2, 1977; *Veronica Smith et al. v. Board of Education of the Borough of Sayreville, Middlesex County,* 1974 *S.L.D.* 1095, aff'd State Board of Education 1975 *S.L.D.* 1160, aff'd Docket No. A-2654-74 New Jersey Superior Court, Appellate Division, February 27, 1976 (1976 *S.L.D.* 1170); *Joann K'Burg v. Board of Education of the Township of Lower Alloways Creek, Salem County,* 1973 *S.L.D.* 636

Petitioner argues, additionally, not only that the termination of his employment on the last day of school in June 1974 was arbitrary, capricious and unreasonable, but that the Board failed to give reasons for his non-reemployment pursuant to *Donaldson v. Board of Education of North Wildwood,* 65 *N.J.* 236 (1974). (Petitioner's Brief, at pp. 8-9)

It is argued, conversely, by the Board that petitioner has not served the requisite time under proper certification to acquire a tenure status pursuant to *N.J.S.A.* 18A:28-5. (Board Memorandum, at pp. 7-9) It is further argued that petitioner's service as a per diem substitute does not accrue toward the requisite period for tenure entitlement. (Board Memorandum, at pp. 10-14) *Schulz v. State Board of Education,* 132 *N.J.L.* 345 (*E.&A.* 1945); *Gordon v. State Board of Education,* 132 *N.J.L.* 356 (*E.&A.* 1945); *Biancardi v. Waldwick Board of Education,* 139 *N.J. Super.* 175 (*App. Div.* 1976), aff'd 73 *N.J.* 37 (1977)

Finally, the Board asserts that, absent permanent certification in his industrial arts position in June 1974, and in further consideration of the fact that petitioner had frequently worked from 1969 through 1972 outside the scope of his certification in English and social studies, he has no valid claim to a tenure status. (Board Memorandum, at pp. 15-16)

The hearing examiner, having carefully reviewed and considered the documentary evidence, the pleadings, and the testimony of witnesses, sets forth the following findings of fact and recommendations for the consideration of the Commissioner:

1. Petitioner's service to the Board from 1969 through January 1972 was as a per diem substitute. His assignments were frequently outside the scope of his certification and were for the coverage of classes of absent teachers for varying lengths of time. On occasion petitioner did not choose to answer the call to substitute. During this period petitioner did not have the full responsibilities of a teaching staff member.

Counsel for the Board initially stipulated that petitioner had worked

continuously from September 1971 through June 1974 as a regular teacher. (Tr. I-7) The hearing examiner set this stipulation aside, however, since it was based in part on an erroneous representation (R-1) by petitioner, submitted in compliance with Agreement G of the memorandum of a conference of counsel held on May 22, 1975. This written representation was shown to be in error by petitioner's own testimony at the hearing. (See Tr. I-88, 94; Tr. II-19, 61, 64-66.)

2. Petitioner worked continuously for a period of one-half year from February through June 1972 as a substitute teacher in subjects for which he had not yet obtained certification and for which he was paid the prevailing rate for per diem substitute teachers.

3. Petitioner worked from September 1972 through June 1974, a period of two academic years, under emergency certification in industrial arts for which he was paid a regular teacher's salary.

4. At the time of notification of non-reemployment in June 1974, petitioner had not obtained permanent industrial arts certification, eligibility for which was later established upon the completion of a course in June 1976. (P-3, 5)

The above findings of fact are based upon the testimony of petitioner himself as corroborated by documents and the Board's witnesses.

The hearing examiner, in consideration of the above findings, recommends that the Commissioner determine that petitioner failed to meet the precise requirements for the acquisition of a tenure status or to establish service which could validly count toward fulfillment of tenure requirement in the subjects of English and social studies for which he was certified. It is further recommended that, since petitioner was regularly employed for a total of only two academic years from September 1972 until June 1974 as an industrial arts teacher with only emergency certification, the Commissioner determine that he did not acquire tenure as a teaching staff member pursuant to *N.J.S.A.* 18A:28-5, which states, *inter alia,* that:

> "***[T]eaching staff members *** and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners *** excepting those who are not the holders of proper certificates in full force and effect, shall be under tenure during good behavior and efficiency and they shall not be dismissed***, after employment in such district or by such board for:
>
> (a) three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or
>
> (b) three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or

(c) the equivalent of more than three academic years within a period of any four consecutive academic years***."

Although an emergency certificate is a valid certificate to teach for the term of its issuance, it has been held that its possession may not be construed as meeting the precise conditions required for tenure. It was stated by the Commissioner in *Joann K'Burg, supra,* when ordering a teacher reinstated that:

"***In this instance, these 'precise' conditions are met, because petitioner has clearly served the requisite period of time in the Board's employ and acquired possession of a standard teaching certificate during the course of the academic year *while she was still employed.****" (*Emphasis in text.*) (1973 *S.L.D.* at 640)

The instant matter is clearly distinguishable from *K'Burg* in that petitioner did not secure a standard teaching certificate while he was still employed by the Board.

It is further recommended that the Commissioner determine that, although the Board failed to notify petitioner by April 30, 1974 that he would not be reemployed for the ensuing year, pursuant to *N.J.S.A.* 18A:27-10, petitioner has failed to prove entitlement to such employment since the record is devoid of proof that he notified the Board in writing of acceptance of such employment pursuant to *N.J.S.A.* 18A:27-10, 11.

In conclusion, it is recommended that the Commissioner determine that petitioner has failed to carry the burden of proof that he has either met the precise conditions required for tenure or that he is entitled to the relief which he seeks.

In conclusion it is recommended that the Petition of Appeal be dismissed. *Schulz, supra; Biancardi, supra; Gordon, supra; Smith, supra; Ahrensfield v. State Board of Education,* 126 *N.J.L.* 543 (*E.&A.* 1941)

This concludes the report of the hearing examiner.

* * * *

The Commissioner has examined the entire record of the controverted matter including the exceptions to the hearing examiner report filed by petitioner pursuant to *N.J.A.C.* 6:24-1.17(b). No exceptions were filed by the respondent Board.

An interlocutory Order of the Commissioner was issued May 18, 1977, denying petitioner's application to strike from the record an affidavit setting forth solely the dates school was open from September through December 1971, which affidavit the hearing examiner required of an administrative agent of the Board. (Tr. III-92-93; Affidavit of Edward I. Pfeffer) Similarly denied was petitioner's application after the hearing to enter an affidavit on subject matter other than that in the affidavit required by the hearing examiner. Petitioner's

further application to reopen the hearing for purposes of cross-examining the affiant was denied on the basis that counsel for petitioner chose not to avail himself of opportunity provided by the hearing examiner to examine the Board's attendance registers in order to verify or disprove the accuracy of the truth of the controverted affidavit. Finally, petitioner's application for disqualification of the hearing examiner for alleged prejudice was dismissed as being without merit.

Exception is taken to the hearing examiner's ruling setting aside a stipulation entered into by the parties that petitioner had worked continuously from September 1971 through June 1974 as a regular teacher. That stipulation had been based on petitioner's written representation. (R-1) Petitioner himself disavowed that representation under oath by testifying at the hearing that it was not accurate. (Tr. I-87-88, 94; Tr. II-19, 61, 64-66) The hearing examiner's ruling was consistent with his authority under *N.J.A.C.* 6:24-1.1(a) and *N.J.A.C.* 6:24-1.12. It was also consistent with the spirit of existing law which requires justiciable settlement of disputes arising under educational law in the forum of administrative review. Such decisions would be subverted if they rested on such frail reeds as stipulations inadvertently entered into but proven false during the hearing process. The Commissioner so holds.

Exception is taken to the hearing examiner's finding that petitioner did not avail himself of *N.J.S.A.* 18A:27-11 and 12 which provide:

> "Should any board of education fail to give to any nontenure teaching staff member either an offer of contract for employment for the next succeeding year or a notice that such employment will not be offered, all within the time and in the manner provided by this act, then said board of education shall be deemed to have offered to that teaching staff member continued employment for the next succeeding school year upon the same terms and conditions but with such increases in salary as may be required by law or policies of the board of education."
>
> "If the teaching staff member desires to accept such employment he shall notify the board of education of such acceptance, in writing, on or before June 1, in which event such employment shall continue as provided for herein. In the absence of such notice of acceptance the provisions of this article shall no longer be applicable."

Petitioner's argument that he could not avail himself of this statutory provision because he was not notified of non-reemployment until June 1974 is specious. The statutory provision was available to him in May 1974, absent notification by the Board by April 30 that he would not be reemployed. The record is barren of evidence that he availed himself of his statutory right. Familiar canons of statutory interpretation preclude his exercise of that right beyond the terminal date fixed by legislative fiat. *Lane v. Holderman*, 23 *N.J.* 304 (1957)

Remaining exceptions filed by counsel on petitioner's behalf consist of unsubstantiated allegations that the Board's decision not to reemploy was predicated on racial prejudice and that the Board's records were so unreliable as to be unacceptable as evidence. The Commissioner has thoroughly reviewed the

Petition, Amended Petition and agreements reached at the conference of counsel and fails to perceive therein such issues as counsel for petitioner now seeks in untimely fashion to inject. Nor does the Commissioner perceive prejudice or error in any other aspects of the hearing examiner's procedural rulings and conclusions which the Commissioner henceforth holds as his own.

Petitioner was not tenured nor could he have been tenured with only emergency certification for his teaching position in June 1974. Nor did he avail himself in May 1974 of the provisions of *N.J.S.A.* 18A:27-10 *et seq.* The Board had no obligation to reemploy him but was under obligation to seek out a teacher with other than emergency certification.

The remaining agreed upon issue of whether the Board's practice of employing petitioner as a substitute violated his statutory rights is determined on the basis of the testimony of petitioner alone. He accepted employment, worked and was paid as a substitute serving in numerous schools for various teachers for varying periods of time until December 1971. On occasion he chose not to accept daily assignments. He was, during that period, neither enrolled in the TPAF nor paid for days of absence or illness. Such employment is typical of that of substitutes in this State. Given that factual context, petitioner had not met the precise statutory requisite for accrual of tenure which contemplates either a continuous period of employment in excess of three academic years or the equivalent of a period in excess of three academic years within a four year period. *N.J.S.A.* 18A:28-5

Accordingly, petitioner's claims to tenure and additional benefits are determined to be without merit in the light of the opinion of the Superior Court in *Biancardi, supra,* as affirmed by the New Jersey Supreme Court. *Schulz, supra; Gordon, supra* Accordingly, the Petition of Appeal and the prayers for relief therein are dismissed.

A copy of this opinion shall be forwarded to the Essex County Court, Law Division, in compliance with the directive in Judge Michael J. O'Neil's Order in *George Delli Santi v. Newark Board of Education et al.,* Docket No. A-13249, May 1975.

COMMISSIONER OF EDUCATION

December 12, 1977
Pending State Board of Education

Peter Marshall,

Petitioner,

v.

Board of Education of the Borough of North Arlington, Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

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

For the Respondent, Frank Piscatella, Esq.

Petitioner, a tenured teaching staff member in the employ of the Board of Education of the Borough of North Arlington, hereinafter "Board," alleged in a Petition of Appeal filed with the Commissioner of Education in 1974 that the Board had illegally rescinded an offer of summer employment it had made to him. A hearing followed and on September 4, 1975, the Commissioner issued a decision which held that petitioner had offered no proof that he had accepted the proposed summer employment and that the Board had the statutory authority to rescind its offer. (1975 *S.L.D.* 688) The Commissioner dismissed the Petition and petitioner appealed such dismissal to the State Board of Education. Subsequently the State Board issued a decision on February 4, 1976 which remanded the matter to the Commissioner for clarification of the following two questions:

1. Did Appellant (petitioner) accept the Board's offer of summer employment on or about June 1, 1974; and

2. What were the Board's grounds for its rescinding action of June 24, 1974?

Subsequent to the remand, a hearing was conducted on June 29, 1976 at the office of the Bergen County Superintendent of Schools, Wood-Ridge, before a hearing examiner appointed by the Commissioner. Briefs were filed. The report of the hearing examiner follows:

Petitioner is a tenured teaching staff member in the Board's employ who testified at the hearing that he discussed summer employment as a Cooperative Industrial Education Coordinator (C.I.E.C.) with his supervisor in January 1974. This testimony is corroborated by a memorandum to the Superintendent from the high school principal on January 30, 1974 which reads as follows:

"Recommendation for C.I.E. Coordinator

"I would like to recommend Peter Marshall to the position of C.I.E.

Coordinator. It is understood that he will be employed for one extra month at a salary rate of one-tenth of his annual salary. Mr. Marshall is fully certified for the position and is presently working with Mr. Recchia on the curriculum for presentation to the Board for approval.

"Mr. Marshall has been apprised that the Board would like a written explanation from the C.I.E. teacher of his plans for the extra month, what he proposes to do, and any other pertinent information to his getting ready for September. I will have him work with Mr. Recchia on this matter should the Board approve my recommending him to the position." (P-2)

Thereafter on April 8, 1974 the Board in a regular meeting adopted a payroll resolution which included petitioner's name with a listed salary of $18,744 and on April 10, 1974 the Superintendent advised petitioner by letter his salary for the ensuing year would be $17,040. Petitioner signed a statement affixed to the letter which indicated he planned to return to the district as a teacher. On May 13, 1974 the Board, again in a regular meeting, moved to increase this salary to petitioner by 10 percent as payment for one month of summer work and apprised petitioner of this employment in a letter from the Superintendent dated May 15, 1974. This letter is recited in its entirety as follows:

"At its regular meeting held on May 13, 1974, the North Arlington Board of Education approved your employment for one month during the coming summer in order to make the necessary preparations for the C.I.E. program in the new school year.

"You will receive $1,704.00 (one-tenth of your annual salary for 1974-75) for the month's work. This will be an extra pay for extra services amount and is not added to your basic pay.

"You will be expected to report starting and leaving time to the Principal's Office each day." (Schedule B)

It may be observed here that this letter did not request that petitioner signify a formal acceptance of an offer of summer employment but states that he was "expected" to report to the Principal's office at the stated times. In any event, petitioner did not thereafter formally indicate his acceptance of the offer but avers he relied on its clear expression of intent and that no answer was required.

Subsequently, on June 24, 1974, the Board in a special meeting acted to rescind its action of May 13, 1974 to employ petitioner for the summer work and on June 25, 1974 the Superintendent apprised him by letter of this action. The letter said in pertinent part:

"The North Arlington Board of Education has decided not to employ a C.I.E. Coordinator for one month in the summer. Therefore, the section of the Superintendent's Agenda (bb) of the minutes of the Board meeting of May 13, 1974 concerning your appointment for one month during the

> summer of 1974 at the rate of one-tenth of your annual salary for 1974-75, is hereby rescinded.***" (Exhibit A)

This notification clearly shows the Board's understanding that petitioner had accepted the appointment for summer employment, albeit not formally, since if this were not so an act of rescission would not have been necessary.

Confirmation of this understanding is provided by the Superintendent who testified at the hearing as follows:

> "When he was sent the letter announcing the fact that he was to be employed for the month of July, I assumed that that was going to be it because I knew that he wanted the July work. I didn't need any acceptance or any verification of that. It was a Board action." (Tr. 82)

Accordingly, in response to the first question of the State Board cited, *ante,* the hearing examiner finds that while there was no formal acceptance by petitioner of the Board's offer of summer employment there was an acceptance to be found in the circumstances and in the understanding of the parties.

The Board President testified with respect to the reason for its decision on June 24, 1974 to rescind its offer of summer employment to petitioner. The President testified that he is a CIE Coordinator in another school district and that on the basis of expertise acquired in such position he had determined that petitioner had not properly prepared himself for the 1974-75 school year. He reached that conclusion, he testified, after the Board had asked him to investigate all of the facts. He testified he had learned that petitioner did not have any work stations for pupils approved for the C.I.E. program in June and that therefore, in his opinion, petitioner had failed to perform his job. The Board President testified that it was his recommendation to the Board which led the Board to its controverted action of June 24, 1974. (Tr. 89-90)

On the basis of this testimony the hearing examiner finds, in response to the second question of the state Board, cited *ante,* that the reason for the Board's act of rescission was the determination of the Board President that petitioner had not properly prepared for the summer program.

Subsequent to the hearing on remand petitioner and the Board submitted Briefs.

Petitioner avers that the facts of this case attest to the truth of an assertion that he had entered into a contract in 1974 with the Board for summer employment and that as a result he had a vested right to such employment. He further avers that the Board's resolution of May 13, 1974 to employ petitioner for the summer employment "***was phrased as an acceptance of an offer [from petitioner] which created a mutually binding agreement for petitioner's service at the stated salary.***" (Petitioner's Brief, at p. 4) Petitioner maintains that once such agreement had been reached it could not be rescinded by the Board. He cites, *inter alia, Leonard V. Moore et al. v. Board of Education of Roselle,* 1973 *S.L.D.* 526; *Albert DeRenzo v. Board of Education of the City of*

Passaic, 1973 *S.L.D.* 236; *Robert Anson et al., v. Board of Education of the city of Bridgeton,* 1972 *S.L.D.* 638; *James Docherty v. Board of Education of the Borough of West Paterson,* 1967 *S.L.D.* 297 in support of this view. He contends that "***a binding *contractual* resolution cannot be unilaterally rescinded at the whim of the respondent Board.***" (*Emphasis in text.*) (Petitioner's Brief, at p. 12) Petitioner also contends that there were no valid grounds for the Board's action of rescission since the Board President is not qualified as a supervisor and since those who were, the Principal and Superintendent, did not recommend the Board's action of June 24, 1974.

The Board avers that petitioner never accepted its offer of summer employment and that there were valid grounds for its action to rescind its offer. Further, the Board avers there is no statutory mandate for the operation of a summer school and that if a change of program is necessary a local board "***cannot be bound to spend public monies for services not rendered.***" (Board's Brief, at p. 6) The Board cites *Robert T. Currie v. Board of Education of the School District of Keansburg,* 1966 *S.L.D.* 193 in support of its assertion that a local board may rescind a contract with appropriate notice.

The hearing examiner has examined such arguments in the context of the facts of this case and determines that the vested right concept espoused by petitioner in this matter has no applicability to employment for the performance of duties in summer school, or for after school, weekend or evening or other special assignment. Such employment has traditionally resulted, as herein, from an agreement between a local board of education and teaching staff members and has been subject to termination for cause. *Lillian M. Reed and E. May Hills v. Board of Education of the City of Trenton,* 1938 *S.L.D.* 437 (1917), rev'd State Board of Education 439. In *Reed* as herein there was also a dispute over payment for an agreed upon extra classroom service and the Commissioner and the State Board were required to adjudicate it. The State Board in its decision drew a sharp distinction between a permanent scheduled salary for a tenured teacher and temporary payments for temporary work. In effect the holding was that temporary payments could be withdrawn at will. The State Board said:

> "***The prohibition against reduction of salary applies to a permanent scheduled salary and not to a temporary increase given for extra work done. The prohibition of the statute was meant to prevent school boards from reducing a teacher's salary to a nominal sum and thus forcing a resignation that could not be gotten otherwise. There is no attempt in this case to force a resignation nor is there any reduction in the regular scheduled salary. The extra work given the teachers was withdrawn and the Trenton Board of Education thought the extra salary should be withdrawn also.***" (at 441)

(See also *Howard E. Deily v. Board of Education of the City of Jersey City,* 1950-51 *S.L.D.* 44, aff'd State Board of Education 47 and *Mildred W. Potter v. Board of Education of the Township of Berkeley,* 1960-61 *S.L.D.* 167.) The distinctions drawn by the State Board in *Reed,* while not strictly applicable to the factual situation in the instant matter are applicable in part. Summer school employment has been and must remain tentative if the interests of the citizens,

as well as teachers, are to be protected. Enrollments in summer school cannot be determined in advance with certainty. Course offerings entailing great expense must with propriety often be abandoned if costs per pupil render such offerings unwarranted. The vested interest argument must fail in the context of such circumstance.

In this instance petitioner was criticized for failing to properly prepare for the summer program. This criticism did not emanate from school administrators who knew petitioner best but from a school board member whose investigation of the facts appears to the hearing examiner to be incomplete. There is no evidence that he ever consulted with school administrators about his determination. The evidence is instead that the determination was his alone and that the Board adopted this determination as its own without further investigation. Such an action appears to the hearing examiner to be an abdication of responsibility by the Board and in contravention of petitioner's rights. It would be frivolous to determine in April that the employment of a teaching staff member was required for July and then determine in June, without the participation of school administrators, that the employment was not required.

Accordingly, the hearing examiner recommends that the Commissioner determine that the Board's action herein was improperly based and that petitioner's temporary summer assignment was terminated improperly without just cause. The hearing examiner accordingly recommends that petitioner be awarded the sum he would have earned by participation in the summer C.I.E. program, less mitigation, on the grounds of equitable principles.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and the exceptions, objections and replies pertinent thereto filed by the Board. Such exceptions dispute the finding that the investigations of the Board President appeared to be incomplete and aver that his testimony should be afforded "great credence" because of his employment in another district in a position similar to that of petitioner's in North Arlington. The Board does not deny that school administrators were not asked for an opinion or recommendations prior to the June 24, 1974 act of rescission but avers that the Superintendent was present at the meeting of that date and offered no comment. The Board avers that such fact is a "clear indication" that the Superintendent concurred with the Board President's recommendation and that the subsequent action by the Board was one taken within the parameters of its legal authority.

The Commissioner has reviewed all such arguments in the context of the total record of this matter and determines that the primary facts upon which the "reconsideration" of this Petition, as directed by the State Board, must be based are that:

1. there was an offer of summer employment to petitioner and an

acceptance of such offer by petitioner under the circumstances described and in the understanding of the parties, and

2. the reason for the Board's rescission was a determination by the Board President that petitioner had not properly prepared for the summer program he had been employed to conduct.

Such facts are not disputed in the Board's exceptions which are, in effect, a defense of the procedure followed herein and of the merits of the Board President's determination. It remains a fact, however, that there was a firm understanding between the parties with respect to petitioner's summer employment and that this understanding, which the Commissioner holds was a firm contractual commitment, was breached by an action of the whole Board without prior notice to petitioner. The basis for the action was a report of one Board member which was critical of petitioner's preparation for his assignment. Petitioner was never afforded an opportunity to rebut such criticism prior to the time of the action. The Commissioner holds such opportunity was required to be afforded and that in its absence the Board's action must be rendered a nullity.

Such holding is consistent with many prior decisions of the Commissioner and the courts wherein, prior to the time of a contract rescission for cause, procedural due process was required to be afforded. *Frances Finkle v. Board of Education of the City of Paterson, Passaic County,* 1976 *S.L.D.* 727; *Murphy v. Freeholders of Hudson County,* 92 *N.J.L.* 244 (*E.&A.* 1918); *J.A. Weekley v. Board of Education of the Township of Teaneck,* 1938 *S.L.D.* 390 (1929), aff'd State Board of Education 396 The instant matter is not one in which the Board was required to effect a change of program because of inadequate enrollment. Nor were there financial stringencies which dictated the necessity for the action. Such reasons are valid ones which may well require a unilateral action by a local board to terminate an obligation otherwise firmly made with respect to summer employment. *Frank S. Taylor et al. v. Paterson State College et al.,* 1966 *S.L.D.* 33

The reason for the Board's action was clearly petitioner's alleged lack of preparation. The holding herein is that an action grounded in such a reason might well be advisable, but not unilaterally and not without prior notice and an opportunity for petitioner to reply.

Accordingly, the Commissioner directs the Board to compensate petitioner for the amount of salary which it was jointly agreed was payable to him for employment in the Board's summer school program in 1974.

COMMISSIONER OF EDUCATION

December 13, 1977
Pending State Board of Education

Nancy Sherwood,

Petitioner,

v.

Board of Education of the Township of Piscataway, Middlesex County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Mandel, Wysoker, Sherman, Glassner, Weingartner & Feingold (Richard H. Greenstein, Esq., of Counsel)

For the Respondent, Rubin & Lerner (Frank J. Rubin, Esq., of Counsel)

Petitioner, a nontenured teacher of music employed by the Board of Education of Piscataway, hereinafter "Board," alleges that the Board's determination not to reemploy her for the 1975-76 school year was arbitrary, capricious, unreasonable, and without legal basis. The Board, conversely, asserts that its determination was a sound exercise of its discretionary authority.

A hearing was conducted before a hearing examiner appointed by the Commissioner of Education on December 3 and 6, 1976 at the office of the Middlesex County Superintendent of Schools, New Brunswick. The report of the hearing examiner follows:

Petitioner, who had been employed previously, as a teacher of instrumental music by the Board in its elementary program from September 1969 through June 1971, was reemployed as an elementary school vocal music teacher from April 7 through June 30, 1975. She testified that she was told orally on May 19 by her vice-principal, after she had been observed informally by the district music coordinator and formally by the principal and the vice-principal, that she would be reemployed for the 1975-76 academic year. (Tr. I-33) Petitioner stated that she was encouraged by reassurances of the vice-principal and others at the time of her hiring and thereafter to anticipate reemployment for the ensuing school year. (Tr. I-28, 63, 69; Tr. II-14-18) In this regard she testified that she was told she should not worry, that a contract would be forthcoming, and that she was introduced by the vice-principal to parents of incoming kindergarten pupils as follows:

> "***'Mrs. Sherwood [will] speak***about her music program for the following year.'***" (Tr. II-4)

Petitioner testified that as a result of such encouragements and promises she had forsaken pursuit of a possible alternate teaching position in a nearby school district. (Tr. II-10) She related further that when she was called by the vice-principal into his office on May 20, 1975 and given a formal written evaluation of her teaching performance:

> "***I was absolutely shocked, that it was untrue, it was unfair that I didn't understand why he had promised me on several occasions prior to this that I was going to get my contract and his response to that was don't put words in my mouth.***" (Tr. I-36)

That evaluation states, *inter alia*:

> "1. I felt that a more positive means of motivation should have been employed ***. There was no 'lead-in' other than today we are going to learn a new song.***
>
> "2. There were several students who took no part in singing and no attempt on your part to encourage them was offered.***
>
> "3. Although you had prepared to show a film strip, which the children had already seen, you proceeded with the rest of your lesson without a hitch.
>
> "4. I did not see any emphasis during this lesson using the Kodaly method of instruction *** [which] has been used with classes during the school year.
>
> "5. I liked the ***games you used at the end of the lesson.***
>
> "6. I feel that the type of rapport you have with the children must be strengthened.***" (P-2)

To this generally critical appraisal, petitioner responded with a written rebuttal wherein she stated that motivation for the song was to have come from the filmstrip which, inadvertently, she had not known the pupils had already seen. Petitioner wrote that from her place at the piano she had not noted any non-participants and that she had utilized the Kodaly method throughout the entire lesson. She further protested what she perceived to be unfair and unclear criticism of her teaching performance. (P-4)

Petitioner testified that on May 27 she received a written evaluation signed by the principal which stated the following:

> "Mrs. Sherwood has failed to demonstrate to my satisfaction that she has achieved the type of teacher-learning atmosphere that is conducive to maintaining the proper level of classroom control with the children.
>
> ***
>
> "In view of this particular deficiency, I find it necessary not to offer Mrs. Sherwood employment for the 1975-76 school year." (P-6)

Petitioner stated that she also rebutted this evaluation in writing wherein she protested that:

"***The report***was negative and diametrically opposed to the favorable tenor of the first report, it contained conclusions and not facts***. In the first report you wrote:

" 'Strengths

" 'Your lesson preparation and organization was excellent. You have an outstanding musical background and know your subject thoroughly. "'[Y]ou took over the music program very competently.***I felt there should be better rapport between you and your students. A little more discipline and order should be required. Otherwise the lesson was very good.' [See P-1.]

"Today***in your office***[y]ou climaxed the meeting by stating that if it were up to you I would be re-hired next year.***" (P-3)

The music coordinator, called by petitioner, testified that when a vacancy opened as the result of a resignation it was he who had advised petitioner of that vacancy. He testified that, although he had observed petitioner, it was not his duty to write formal evaluations and that when, in an effort to help her, he sought to enter a strong recommendation for petitioner into her personnel file, it was rejected by his superiors. (Tr. I-81-90; P-12)

Two teacher association representatives testified that they had been present when the principal had stated that, if he had not been retiring, "***he would hire [petitioner]*** and see how things went from there, he would take the chance on her***." (Tr. I-99, 107, 119) Yet another education association member corroborated that testimony and stated that he was unsuccessful in getting the principal to fulfill a promise to reobserve and reevaluate petitioner. (Tr. II-119-123)

A member of the Board, called by petitioner as a rebuttal witness, testified that, after petitioner's informal appearance and a heated discussion by the Board, a vote of 4-4 was taken regarding her possible reappointment. (Tr. II-128-136) He testified further that he sought to persuade the Board to reemploy petitioner but that after review of the matter one Board member who had previously voted to reemploy petitioner cast a negative vote, thus establishing a majority of the full Board opposed to her reemployment. (Tr. II-138-146)

It is argued in petitioner's Brief that she was arbitrarily, capriciously and unreasonably denied a second observation and evaluation by the principal and the vice-principal despite glaring inconsistencies between their evaluations of May 19 and May 20, 1975. (P-1, 2) Petitioner avers that such reevaluation should have been provided in keeping with the compelling rationale of legislation and rules which have since been enacted as follows:

"Every board of education***shall cause each nontenure teaching staff member*** to be observed and evaluated in the performance of his duties at least three times during each school year but not less than once during

> each semester***. The purpose of this procedure is to recommend as to reemployment, identify any deficiencies, extend assistance for their correction and improve professional competence." (*N.J.S.A.* 18A:27-3.1)

And,

> "The purposes of this procedure for the observation and evaluation of nontenured teaching staff members shall be to identify deficiencies, extend assistance for the correction of such deficiencies, improve professional competence, provide a basis for recommendations regarding reemployment, and improve the quality of instruction received by the pupils served by the public schools." (*N.J.A.C.* 6:3-1.19(f))

Petitioner maintains that arbitrariness of the Board and its agents coupled with denial of her right to see the vice-principal's evaluation prior to discussing it with him argue eloquently that her non-reemployment should be set aside and that she should be given opportunity to demonstrate her professional competency upon reinstatement. (Petitioner's Brief, at pp. 4-11) In support of this contention are cited, *inter alia, Cullum v. Board of Education of North Bergen,* 15 *N.J.* 285 (1954); *David Payne v. Board of Education of the Borough of Verona, Essex County,* 1976 *S.L.D.* 543, aff'd State Board of Education 554; *Elizabeth Rockenstein v. Board of Education of the Borough of Jamesburg, Middlesex County,* 1974 *S.L.D.* 260, 1975 *S.L.D.* 191, aff'd State Board of Education, 199, aff'd Docket Nos. A-3916-74, A-4011-74, New Jersey Superior Court, Appellate Division, July 1, 1976 (1976 *S.L.D.* 1167).

Petitioner, further grounding her claim of entitlement to reinstatement upon the doctrine of promissory estoppel, argues that she was assured on a number of occasions by her superiors that she would be reemployed. She avers that her superiors' assurance, reliance on which caused her to forsake an offer of employment elsewhere, created a legal and moral obligation that the Board offer her a contract for 1975-76. (Petitioner's Brief, at pp. 12-19) (See also Petitioner's Reply Letter in Lieu of Formal Brief.)

For the aforestated reasons petitioner submits that she is entitled to reinstatement to an appropriate teaching position with full recompense of lost salary and attendant emoluments.

The relevant testimony of witnesses called by the Board is succinctly set forth as follows:

The Assistant Superintendent testified that when he interviewed petitioner he "***made certain she understood that this was for the remainder of the school year and that it would terminate as of June 30th.***" (Tr. II-29)

The Board President affirmed that petitioner was given a statement of the reasons for her non-reemployment which was based on her evaluations, and that she was afforded an informal appearance wherein she was allowed "***opportunity to say that which she felt she wanted to say***." (Tr. II-60) He stated that the Board then discussed this matter after which the

aforementioned 4-4 vote was taken and that subsequent discussions resulted in a consensus that petitioner not be reemployed. (Tr. II-59-62)

The then vice-principal testified that when he interviewed petitioner he had advised her that she would be hired for the remainder of the school year and that subsequent reemployment would depend on her evaluation. He stated that when she queried him on two occasions in April concerning reemployment he advised her "***that her contract would not be forthcoming until the administration had an opportunity to observe her.***" (Tr. II-81) He denied that at any time he had either assured petitioner that she would be reemployed or that he had introduced her to parents to describe her music program. (Tr. II-82, 97-98)

The then principal, who has since retired and has been succeeded by the then vice-principal, testified that in spite of his concern over the discipline he observed of young pupils in petitioner's classroom, he had sought to be supportive and positive when he evaluated her teaching performance of May 19. (P-1; Tr. II-104-106, 115, 121) He stated, however, that in view of his imminent retirement and contrary to his personal willingness to give petitioner a chance to prove herself, he deferred to the opinion of his vice-principal when he wrote a recommendation that petitioner not be reemployed. (Tr. I-110; P-6)

The argument is advanced in the Board's Brief that petitioner, as a nontenured employee, has no right to continued employment and has failed to meet her burden of proof that the Board acted unreasonably, arbitrarily or capriciously. Cited, *inter alia,* are *Sallie Gorny v. Board of Education of the City of Northfield et al., Atlantic County,* 1975 *S.L.D.* 669; *Pickering v. Board of Education,* 391 *U.S.* 563 (1968); *Perry v. Sindermann,* 408 *U.S.* 593 (1972); *Donaldson v. Board of Education of North Wildwood,* 65 *N.J.* 236 (1974); *Jo-Ann Krill et al. v. Board of Education of the Borough of Red Bank, Monmouth County,* 1976 *S.L.D.* 245; *Moses Cobb v. Board of Education of the City of East Orange, Essex County,* 1975 *S.L.D.* 1047, aff'd State Board of Education 1976 *S.L.D.* 1135.

The Board argues that it is not required to justify the highly subjective evaluations of its administrators. *Cobb, supra; Gorny, supra* The Board asserts also that its administrators were under no obligation to reevaluate petitioner. In regard to petitioner's charge that she was not given opportunity to review her evaluation by the vice-principal prior to conferring with him, the Board avers that she could have done so had she so chosen. It is argued that, even if there were violation of that provision of the agreement which provides for advance review of an evaluation, such would not void the Board's statutory right to determine whom to reemploy. *Gorny, supra; Cobb, supra* (Board's Brief, at pp. 1-7)

The Board argues that, even if there were a finding that its administrators promised to reemploy her, they were without authority to bind the Board by such promises since *N.J.S.A.* 18A:27-1 clearly requires that:

"No teaching staff member shall be appointed, except by a recorded roll

call majority vote of the full membership of the board of education appointing him."

It is argued that the Board at no time delegated or voted to delegate such authority to its administrators or had power to do so contrary to statutory mandate. The Board asserts that:

> "***[I]t cannot be argued that the Board placed [the vice-principal] in a position where third parties would reasonably expect his statements to implicate the Board, since hiring teaching staff is not within the domain of the Vice-Principal.*** *Law v. Stokes,* 32 *N.J.L.* 249 (Sup. Ct. 1867) All credibility issues resolved in favor of petitioner, the undisputed fact remains that no manifestations or acquiescence flowed from the Board. Thus, under settled principles of agency law there can be no finding of apparent authority.***" (Board's Brief, at p. 11)

Finally, the Board argues that, even had the vice-principal made such promises of employment as petitioner alleges, the Board was under no obligation to accept its subordinate's recommendation. The Board cites in this regard *Mary Ann McCormack et al. v. Board of Education of the Northern Highlands Regional High School District et al., Bergen County,* 1976 *S.L.D.* 754, aff'd State Board of Education January 5, 1977, wherein the Commissioner upheld the right of the Northern Highlands Regional Board to deny reemployment to a teacher whose evaluations were favorable. (Board's Brief, at pp. 8-13)

For these reasons the Board submits that the Petition of Appeal should be dismissed.

The hearing examiner has carefully reviewed the pleadings, the testimony of witnesses, the documents in evidence and the cited cases at law and makes the following findings of fact:

1. Petitioner was given encouragement to expect that she would be reemployed for 1975-76 but at no time was she categorically promised by the Board or its administrators that she would in fact be reemployed. This finding is grounded on the testimony of the Board's administrators who testified that her employment would terminate on June 30, 1975 and that subsequent employment would be contingent upon her evaluations. (Tr. II-29, 75-76, 79, 81-82, 90) This finding is further grounded upon petitioner's own testimony as follows:

> Q. "***[I]s it not a fact that [the vice-principal] never said to you that you will be rehired?
>
> A. "He did not say 'you will be rehired' in those words. He said it in other words." (Tr. I-63)

2. Neither the vice-principal nor any other administrator was delegated the Board's responsibility to employ or not to employ petitioner. They did,

however, advise the Board of their respective recommendations not to reemploy her.

3. The principal, although willing to "take a chance" on reemploying petitioner, acceded to the vice-principal's judgment not to recommend her in consideration of his retirement and the vice-principal's impending advancement to the principalship.

4. The Board received from its administrators a recommendation not to reemploy petitioner and notified her on June 16 that her services would terminate June 30. (P-8)

5. Petitioner was afforded the due process to which she was entitled in the form of a statement of reasons and an informal appearance before the Board at which she was given opportunity to attempt to persuade the Board to reemploy her. Thereafter, the Board gave serious consideration to her statements as evidenced by a tie vote, heated discussion, and the subsequent negative vote of a majority of the full Board.

6. Petitioner, having previously been employed by the Board, did not appear to the hearing examiner to be so uninformed as to assume that the Board would or could delegate its authority to its vice-principal to offer or decline reemployment.

7. Petitioner's evaluation by her principal on May 19, while generally favorable and encouraging, was constructively critical of her communication and rapport with pupils and classroom discipline. (P-1) The report of the vice-principal based on a different class period evaluation was distinctly critical. (P-2) The third evaluation report, the result of collaboration by the principal and vice-principal and signed by the principal, was complimentary of her effort but critical of demonstrated performance. As such it was not inconsistent with elements of the two prior evaluations. (P-6)

8. Petitioner was given inadequate opportunity to review the vice-principal's evaluation prior to the conference at which that evaluation was discussed. This finding is grounded on petitioner's convincing testimony that the conference was held immediately upon her receipt of the written evaluation. (Tr. I-34-36) This procedure is contrary to the apparent intent of Article XIV(A)(3) of the negotiated agreement which states:

> "A teacher shall be given a copy of any class visit or evaluation report prepared by his evaluators prior to any conference to discuss it. If the evaluation is unfavorable to the teacher, a request for a 24-hour delay shall be granted." (at pp. 22-23)

Such violation is, in the opinion of the hearing examiner, not fatal to the Board's case and has its appropriate remedy in the grievance procedure provided by the agreement, an avenue which petitioner chose not to follow to its conclusion. In any event, similar lack of adherence by boards to the supervisory

procedures set forth in their negotiated agreements were considered by the Commissioner in *Cobb, supra,* and *Gorny, supra,* and found insufficient to result "***in an unfair or unreasonable final determination by the Board, not to reemploy***." (*Gorny,* 1975 *S.L.D.* at 681)

In consideration of the above findings of fact and the relevant case law in *Donaldson, supra; Banchik, supra; Gorny supra; McCormack, supra; Krill, supra;* and *Cobb, supra,* the hearing examiner recommends that the Commissioner determine that the Board was not bound either by any categorical promise of any of its administrators for the reason that no such promise was given. It is also recommended that, if indeed it should be found by the Commissioner that the record supports a conclusion that promise of employment was given to petitioner by an administrator, the Board was not bound by such a promise. It is further recommended that the fact that petitioner was not given opportunity to review the vice-principal's evaluation, prior to the conference when it was discussed, be determined insufficient to void the Board's statutory obligation to decide whether to reemploy a nontenured teacher. *Cobb, supra; Gorny, supra*

Finally, it is recommended that the Commissioner determine that the Petition of Appeal should be dismissed for failure of petitioner to meet the burden of proof of showing that the Board's action was arbitrary, capricious, unreasonable, or an illegal exercise of its discretionary authority.

This concludes the report of the hearing examiner.

* * * *

The Commissioner, having reviewed the record of the controverted matter, observes that no exceptions to the hearing examiner's findings of fact were filed pursuant to *N.J.A.C.* 6:24-1.17(b). Those findings are consistent with the evidence within the record and are accordingly adopted by the Commissioner as his own.

The Legislature of this State has vested authority for the staffing of the public schools in local boards of education. As was stated in *Porcelli et al. v. Titus et al.,* 108 *N.J. Super.* 301 (*App. Div.* 1969), *cert.* den. 55 *N.J.* 310 (1970):

> "***We endorse the principle, as did the court in *Kemp v. Beasley,* 389 *F.*2d, 178, 189 (8 Cir. 1968), that 'faculty selection must remain for the broad and sensitive expertise of the School Board and its officials'***."
> (108 *N.J. Super.* at 312)

At no time has the Legislature seen fit to authorize administrative officers of local boards of education to consummate contractual relations between local boards and their teacher employees. *N.J.S.A.* 18A:27-1, *ante* Absent such authorization, it may neither be delegated by boards nor usurped by their administrative officers. The Commissioner so holds. Teacher applicants who rely upon administrators' promises of employment or reemployment do so at their own peril. Similarly, administrative officers of boards who unwisely exceed their

authority by promising employment which may only be authorized by local boards of education may find themselves culpable on charges of misrepresentation.

In the instant matter the Board made no promise to reemploy petitioner. Nor was it under obligation to do so. There is ample evidence that, after it seriously considered the matter, the Board, upon affording petitioner an informal apearance and reviewing her evaluations, was unable to produce a majority vote in favor of her reemployment. (Tr. II-59-62)

Absent a showing that the Board acted illegally, denied petitioner due process or abused its discretionary authority, its determination not to reemploy her must be accorded a presumption of correctness. *Boult and Harris v. Board of Education of Passaic,* 135 *N.J.L.* 329 (*Sup. Ct.* 1947), aff'd 136 *N.J.L.* 521 (E.&*A.* 1948); *Quinlan v. Board of Education of North Bergen Township,* 73 *N.J. Super.* 40 (*App. Div.* 1962)

The failure of the vice-principal to provide petitioner with opportunity to review his written evaluation report prior to the conference with her to discuss that evaluation, although violative of Article XIV(A)(3) of the negotiated policy, is not of such moment as to negate the Board's statutory right not to reemploy her. Such matters are, in any event, more appropriately remedied under local grievance procedures. In the instant matter, this flaw is insufficient to require petitioner's reinstatement or entitle her to any other relief. The broad authority of the Board to determine who shall teach in its schools, as iterated in *Porcelli, supra,* is not rendered ineffectual by such minor violation. The Commissioner so holds. *Gorny, supra* As was stated in *Cobb, supra*:

> "***[T]he Commissioner holds that the validity of the Board's actions with respect to petitioner may not be impinged because certain supervisory evaluations concerned with petitioner's work were not made in accordance with a contractual agreement***. The judgment of local boards of education, with respect to the employment or non-reemployment of nontenured teaching staff members, does not depend alone on such evaluations although they may constitute a part, even the principal part, of a total consideration.***" (at 1055)

Absent verification that the Board's action was arbitrary, capricious, unreasonable or violative of petitioner's statutory or constitutional rights, petitioner has failed in her burden of proving that she has entitlement to the relief she seeks. Accordingly, the Commissioner determines that the complaint is without merit. The Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

December 13, 1977

In the Matter of the Suspension of the Teacher's Certificate of Gordon Verge, School District of Salem County Vocational-Technical School, Salem County.

COMMISSIONER OF EDUCATION

DECISION

Upon notification by the Superintendent of Schools of the Salem County Vocational-Technical Schools that Gordon Verge, hereinafter "teacher," had failed to fulfill the terms of his contract of employment, a committee of the State Board of Examiners consisting of the Commissioner of Education and the Director of the Bureau of Teacher Certification and Academic Credentials heard the teacher's explanation of his actions at the office of the Commissioner in Trenton, on April 18, 1977.

The Superintendent's letter notification states that the teacher failed to report to work on Monday, September 13, 1976 at which time his letter of resignation was submitted to take effect immediately. The letter stated further that the teacher previously agreed to report to work on September 14 so that pupil instruction might continue and a reasonable time period could be mutually worked out until his resignation became effective. He did not return to work. (C-1)

The teacher testified that he resigned after performing his teaching duties for three days beginning Wednesday, September 8, 1976. (Tr. 4-8; C-1) He gave as his reason the lack of materials and equipment that he had been promised by the Board's administrators. (Tr. 3-4, 15)

There is no question of the fact that the teacher resigned on September 13, effective immediately, after three days of duty and that he gave the Board no notice so that a replacement could be found.

No copy of any contract was offered in evidence although the teacher testified that he signed a contract on his third day of employment, but to his knowledge it was not approved by the Board. He testified, further, that he received a Board approved copy of the contract he signed, three days after he resigned, and it was backdated to August.

The Commissioner determines that a contract was let and it may or may not have had a termination clause. In either case the teacher unlawfully violated his contract. In that regard *N.J.S.A.* 18A:26-10 reads as follows:

> "Any teaching staff member employed by a board of education, who shall, without the consent of the board, cease to perform his duties before the expiration of the term of his employment, shall be deemed guilty of unprofessional conduct, and the commissioner may, upon receiving notice thereof, suspend his certificate for a period not exceeding one year."

If the contract contained a termination clause the teacher failed to give the Board notice and, if it did not, the teacher was in violation of the law.

This matter is further complicated by the teacher's testimony in which he stated he has never been awarded a teaching certificate although he was told that the Superintendent would apply for an emergency certificate to the County Superintendent's office. (Tr. 11) The Commissioner's records confirm that the teacher has never been awarded any certificate to teach and that no application for an emergency certificate has ever been received in the office of the Salem County Superintendent of Schools. The lack of such application was undoubtedly caused by the teacher's abrupt resignation. The record shows that the teacher did not perform the required student teaching for a regular teacher's certificate; therefore, he was eligible only for an emergency certificate upon application to the State Board of Examiners by the Board.

Because the teacher has no certificate there is no penalty the Commissioner can exact commensurate with the teacher's unprofessional conduct. The teacher is forewarned, however, that he will forfeit his teaching certificate pursuant to *N.J.S.A.* 18A:26-10 if there is a subsequent similar violation. It must be understood that a proper notice of termination of an employment contract is not only important to the contracting parties, but even more important in ensuring the continuity of instruction of pupils.

If the teacher possessed any certificate it would have been suspended for a year; however, he did not and the Commissioner will not take any action because of the peculiar nature of the instant matter.

For these reasons the application for suspension of the teacher's certificate is dismissed.

COMMISSIONER OF EDUCATION

December 14, 1977

Robert Tirri and Patrick F. Montrose,

Petitioners,

v.

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

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Saul R. Alexander, Esq.

For the Respondent, Robert P. Swartz, Esq.

Petitioners, teaching staff members in the employ of the Board of Education of the City of Paterson, hereinafter "Board," allege that the Board has, contrary to law (*N.J.S.A.* 38:23-1), withheld their salary for periods of service in the armed forces. They demand judgment to this effect and a restoration of such salary. The Board denies that petitioners' military service entitled them to the benefits set forth in law for service with a military unit and requests dismissal of the Petitions of Appeal which are here combined.

The Petitions are submitted for Summary Judgment by the Commissioner of Education. The Board has filed a Brief.

Certain facts in this matter are not in dispute and may be recited succinctly for consideration in the context of the statute *N.J.S.A.* 38:23-1 and the decision of the Commissioner in *Walter E. Reutter v. Board of Education of the Borough of Roselle, Union County*, 1975 *S.L.D.* 532 and of the Supreme Court of New Jersey in *Lynch v. Borough of Edgewater*, 8 *N.J.* 279 (1951).

Petitioners have requested and been granted leaves of absence by the Board in the period 1969-74 as follows:

Petitioner Montrose:

From March 16, 1970 to June 30, 1970
For summer camp in 1974 (dates unspecified)

Petitioner Tirri:

From May 23, 1969 to September 30, 1969
From June 15, 1970 to June 25, 1970
From June 12, 1971 to June 25, 1971
From June 12, 1972 to June 23, 1972
From April 30, 1973 to May 11, 1973
From April 22, 1974 to May 3, 1974

All leaves were without the payment of salary by the Board. The only official government document submitted with respect to the leaves of absence is one wherein Petitioner Montrose was ordered by the United States Army to "***ACTIVE DUTY FOR TRAINING *** with his consent***" in the 1970 period. (R-1) There is also submitted a series of letters concerned with that specific period of active duty which are summarized as follows:

(a) a letter of December 18, 1969 from Petitioner Montrose's principal to a Captain P. Rhodes, detachment commander of the military unit to which Petitioner Montrose was attached which requests, *inter alia,* that there be a "delay" in the issuance of active duty orders to Petitioner Montrose "***until the end of the academic school year, June 30, 1970.***" (PR-1)

(b) letters to and from Congressman Robert A. Roe which indicate that Petitioner Montrose had contacted him and requested a delay in the enforcement of the requirement of active duty (PR-2-4)

(c) letters wherein Petitioner Montrose requested military leave for the period March 13 to June 30, 1970 and wherein the Board granted such request. (PR-5-7)

There has also been a joint submission of a document which contains the name Robert C. Tirri. This document is in the form of a check-list reply to an inquiry by the General Services Administration, and it contains only one penciled check in a box before the sentence, "The document or information requested is not in file." The document is dated April 1, 1976. (PR-8) No other documentary evidence or other proof with respect to the listed periods of military service has been submitted or advanced by petitioners. Petitioners do claim that in each instance there was a requirement for the service that they rendered in an active duty status and that this fact entitles them to compensation for the periods of leave but that the Board has refused payment. Petitioners cite the statute *N.J.S.A.* 38:23-1 in support of their claim and additionally recite a contract provision of a negotiated agreement between the Board and the Paterson Education Association. The Board maintains that the military service of petitioners was not "field training" as defined in *Lynch, supra,* and that the salary deductions it made for the periods of leave were appropriate.

The statute of reference herein is recited in its entirety as follows:

N.J.S.A. 38:23-1

> "An officer or employee of the State or a county, school district or municipality, who is a member of the organized reserve of the Army of the United States, United States Naval Reserve, United States Air Force Reserve or United States Marine Corps Reserve, or other organization affiliated therewith, shall be entitled to leave of absence from his respective duty without loss of pay or time on all days on which he shall be engaged in *field training.* Such leave of absence shall be in addition to the regular vacation allowed such employee." (*Emphasis supplied.*)

The decision of the Supreme Court in *Lynch, supra,* interpreted military service in "field training" to mean "***training for battle as a unit***" (at 290) and, in effect, exempted other types of military duty service or instruction from the benefits the statute sets forth. In its interpretation the Court said:

> "***[W]e hold that *R.S.* 38:23-1 *** must be construed to intend by 'field training' only that training which consists of participation in *unit training* in field operations.***" (*Emphasis supplied.*) (at 285)

And,

> "***[R]eferences to state and federal legislation are not exhaustive. They serve, however, to illustrate the clear distinction, made in both realms of legislative effort between 'field' training or instruction and other types of military or naval duty, service or instruction. There is no doubt that the Legislature of this State had this distinction in mind when *L.* 1931, *c.* 347, *secs.* 1, 2, now *R.S.* 38:23-1, was enacted and while we may not be certain as to the motivation of the Legislature in applying that distinction, it is probable that at least one consideration was that the organized units of the National Guard and other reserve forces are those primarily to be considered as necessary to the defense of the State, ready to fight on very short notice and *required* [*emphasis in text*] by law to undergo field training, *i.e., training for battle as a unit,* without the consent of the individual serviceman to support or prepare for that defensive effort.***" (*Emphasis supplied.*) (at 290)

Thus, as the Commissioner said in *Reutter, supra,* "***in the Court's judgment the statute [*N.J.S.A.*] 38:23-1 applies only when employees enter periods of service 'as a unit' for field training without their consent.***" (at 533)

An application of this criterion to the few recited facts herein leads to a conclusion by the Commissioner that the submission by petitioners is incomplete and insufficient. There is no proof in the joint submission of documents that at least initially, in 1969, Petitioner Montrose had not consented to military service for the period March-June 1970, albeit on second thought, he may have attempted to abort the assignment. His orders to serve on that occasion state specifically that the service was "with his consent." Neither is there proof herein that petitioners served in organized units in "***training for battle as a unit***." (*Lynch, supra,* at 290) Such proofs are required to be offered before a claim to the statutory benefits or benefits of the contract, which is also predicated on service with a specific "unit," may be found to be one with merit.

Accordingly, for the reasons stated, the Petition is dismissed.

COMMISSIONER OF EDUCATION

December 16, 1977
Pending State Board of Education

"D.W.", an infant by his guardian *ad litem* Bernard Wecht; Bernard Wecht, individually; and Leona Wecht,

Petitioners,

v.

Board of Education of Pompton Lakes, Donald Allison, Robert Magee, Sylvia L. Margolis, Marianne Nicholson, William Foy, Lewis E. Taylor, R. David Waibel, Stanley Lehrer, Walter Oberti, individually; Joel McKenzie, Principal of Pompton Lakes High School; Enrico J. Cipolaro, Superintendent of Schools; Bernice Forrest, Faculty Advisor for the National Honor Society, Passaic County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Grabow and Verp (Robert A. Milanese, Esq., of Counsel)

For the Respondents, Slingland, Bernstein & vanHartogh (George W. Slingland, Esq., of Counsel)

Petitioners are the parents of a son, hereinafter "D.W.," who is enrolled as a pupil in the eleventh grade of the Pompton Lakes High School which is operated by the Board of Education of Pompton Lakes, hereinafter "Board." Petitioners allege that the local faculty committee of the National Honor Society, hereinafter "Society," and the Board denied D.W. admission into the local chapter based on improper reasons. Petitioners request that the Commissioner of Education direct the Board to enroll D.W. into the Society forthwith and that such enrollment be made retroactive to October 27, 1976. Petitioners seek, in the alternative, that the local chapter of the Society be disbanded. The Board denies the allegations and asserts that the action of its faculty committee, as well as its own action in the matter, is proper in every respect.

The matter is referred directly to the Commissioner on Cross-Motions for Summary Judgment on the record which includes the pleadings, stipulation of fact, exhibits and Briefs of the parties in support of their respective positions.

The Society was formed and organized in 1921 by the National Association of Secondary School Principals. Its avowed purpose is to promote and encourage the fundamental virtues of character, leadership, scholarship and service. Any secondary school which desires to establish a local chapter must file an application, a proposed local constitution and a registration fee to the Society. Once the Society recognizes the local chapter, that chapter is granted all privileges of membership including the right to elect members. Pupils being considered for membership must meet local eligibility criteria in character, leadership, scholarship and service.

In the instant matter, each pupil being considered for membership is rated by the Society's local faculty committee in each of the four areas on a scale of zero to four, zero being the lowest rating and four the highest. A successful candidate must achieve a minimum rating of three in each of the four categories. D.W.'s ratings in each of the areas were as follows: scholarship, 3.965; leadership, 3.0; character, 3.67; and service, 2.7. Petitioners complain that the below minimum rating received by D.W. in the area of service was due to the faculty committee considering only his participation in soccer for three years. It is noticed that the area of service is rated on the pupil's participation in extracurricular activities in the school and in the community.

Petitioners complain that D.W. has participated in many extracurricular activities, both in the school and the community, which the faculty committee failed to consider. Petitioners argue that had D.W.'s total activities been considered, his rating would have been higher than the minimum three and he would then have been eligible for membership.

The Commissioner observes that the issue of D.W.'s involvement in school and community extracurricular activities arose in the following manner. Prior to the posting of the names of those pupils selected for membership in the Society on October 15, 1976, a form was passed out to each pupil with the following instructions:

> "Please list the activities in which you have participated for each year you have attended in any high school. Name the office you have held in any organizations. List activities and honors received outside of school as well as those inside the school." (C-1)

Petitioners assert that because D.W. thought the solicited information was to be used for the high school yearbook and, accordingly, was not really important, he simply reported that he played soccer in grades nine, ten and eleven. The Commissioner observes that notwithstanding the perceived beliefs of D.W., the requested information was relied upon by the faculty committee of the Society in their ratings of pupil candidates.

Petitioners met with the Board on October 26, 1976 and the complaint with respect to D.W.'s actual extracurricular activities was set forth. Petitioners requested the Board to reconsider the nomination of D.W. to the Society. The minutes of that meeting establish that the Board considered petitioners' request and determined that "***even if [D.W.] had added several or more extracurricular activities to his service record, there would be no guarantee that he would have been selected. The conclusion of the Board was that it did not appear that under the [selection] system a deliberate injustice had been done.***" (C-4)

Petitioners met again with the Board on November 9, 1976, represented by legal counsel, and once again requested it to reconsider D.W.'s nomination to the Society. The minutes of that meeting establish that the Board, while it questioned the subjectivity used by the faculty committee in its ratings,

determined to affirm the faculty committee's decision not to offer D.W. membership. (C-3)

The Commissioner observes that D.W., at a time after the successful candidates for membership to the Society were known, and after he learned the reasons for his 2.7 service rating, did set forth an extensive list of extracurricular activities in which he had been involved. (C-2)

The Commissioner opines that it is possible D.W. would have received a higher rating in the service area had he completed the information on the form (C-1) as he had been directed. Petitioners' complaint that D.W. should have been informed of the purpose of the requested information is without merit. It was not D.W.'s prerogative to select and choose the importance of information requested of him. In this matter, D.W. by his own inaction did not provide the information necessary for successful application into the Society. It would be patently unfair to now conclude that either the Board or the faculty committee acted improperly in regard to D.W.'s failure to secure a minimum of three in the area of service in view of his failure to supply the requested data.

The Commissioner has reviewed the remaining allegations presented by petitioners with respect to the whole of the selection process of the Society. The Commissioner finds no merit therein.

Having found no reason to intervene, the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

December 20, 1977

Ingrid Boonstra Sarrat and the Board of Education of the Borough of Audubon, Camden County,

Petitioners,

v.

New Jersey State Board of Examiners,

Respondent.

COMMISSIONER OF EDUCATION

ORDER

For the Petitioners, J. Robert McGroarty, Esq., of Counsel

For the Respondent, William F. Hyland, Attorney General of New Jersey (Mark Schorr, Esq., of Counsel)

This matter having been opened before the Commissioner of Education by petitioners' filing of a Petition of Appeal alleging, *inter alia,* that respondent wrongfully denied Petitioner Sarrat certification as a principal; and

A timely Answer having been filed by respondent; and

A hearing in the matter having been conducted by a representative of the Commissioner at the State Department of Education, Trenton, on July 12, 1977; and

The litigants having, during the course of that hearing, arrived at an amicable settlement of the dispute; and

There having been spread upon the record the details of that settlement, the terms of which specify that Petitioner Sarrat will be assigned for one year to teaching duties within the scope of her certification upon the completion of which she will be issued a principal's certificate by respondent; and

Documents having been submitted as required by the hearing examiner, including the Audubon Board of Education's resolution of July 20, 1977 to employ Petitioner Sarrat as a teacher for the 1977-78 school year, the teaching certificate of Petitioner Sarrat, and a resolution of respondent dated October 21, 1977 which sets forth both a job description and the terms of the aforementioned amicable settlement; and

The Commissioner having reviewed, in the light of applicable education statutes and rules of the State Board of Education, the aforementioned documentary submissions, the expressed terms of the amicable settlement, and the Consent Order entered into by the parties; and

The Commissioner having determined that the amicable settlement agreed upon by the litigants both comports with applicable law and is in the best interests of the litigants and the school system of the Borough of Audubon; now therefore

IT IS ORDERED that the Petition of Appeal be and is dismissed with prejudice.

Entered this 20th day of December 1977.

COMMISSIONER OF EDUCATION

Charles Martin,

Petitioner,

v.

Board of Education of the Borough of Keyport, Monmouth County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Chamlin, Schottland, Rosen & Cavanagh (Thomas W. Cavanagh, Jr., Esq., of Counsel)

For the Respondent, Norton & Kalac (Peter P. Kalac, Esq., of Counsel)

Petitioner, a tenured mathematics teacher at Keyport High School, alleges that the Keyport Board of Education, hereinafter "Board," on the recommendation of its Superintendent of Schools improperly and without justification withheld his salary and adjustment increments for the 1976-77 academic year. Petitioner alleges that such action by the Board was arbitrary, capricious, unreasonable and inconsistent with the terms of the negotiated agreement between the local teachers' association and the Board.

Petitioner appeals to the Commissioner of Education pursuant to the provisions of *N.J.S.A.* 18A:29-14 and prays that the Commissioner will set aside the Board's action and grant him immediate payment of the increments in question. The Board avers that its actions were proper and legally correct and moves to dismiss these proceedings before the Commissioner. The Board's Motion to Dismiss is grounded on an affidavit of the Superintendent, supported by observation reports and pertinent correspondence with petitioner, attached thereto. Petitioner opposes the Board's Motion by way of affidavit and supporting documentation. Oral argument with respect to the Board's Motion was entertained on April 10, 1976 at the State Department of Education by a hearing examiner appointed by the Commissioner.

The Commissioner observes from the transcript of the oral argument that petitioner does not dispute the procedural steps taken by the Board in arriving at its determination but, rather, that it is the circumstances giving rise to petitioner's unsatisfactory recommendations to the Board by the Superintendent which are controverted herein.

The facts of the matter which do not appear to be in dispute are as follows:

During the months of February and March 1976 the Superintendent personally conducted a total of four observations of petitioner's classroom teaching performance. These observations were followed by four written reports prepared by the Superintendent (Superintendent's Affidavit, Exhibits A, B, D,

E) copies of which were issued to petitioner and signed by the parties. The observations of petitioner's teaching performance conducted by the Superintendent were apparently triggered by the results of a Grade Analysis Report of petitioner's pupils during the second marking period of the 1975-76 academic year.

According to the Superintendent's affidavit, approximately sixty percent of the pupils who attended petitioner's classes in algebra or general mathematics received grades of 0 or 1 during this marking period. These grades were based on a numerical grading system which designated 0 as the lowest grade and 4 as the highest grade of pupil achievement. The aforementioned observation reports reflect that petitioner's classroom teaching performance was observed by the Superintendent on February 4, 17 and 24, 1976, and again on March 12, 1976. (Superintendent's Affidavit, Exhibits A, B, D, E) The ability levels of the classes observed by the Superintendent are indicated on these reports. The observation conducted February 4, 1976 reveals that petitioner was teaching a class of pupils in Algebra II with an ability level designated as "I" (Superintendent's Affidavit, Exhibit A), whereas the classes observed on February 17, 24 and March 12, 1976 were in general mathematics and the ability levels of the pupils in these classes are designated as "III." (Superintendent's Affidavit, Exhibits B, D, E) These observation reports reflect that petitioner's teaching performance on each of these occasions was evaluated in three areas: condition of the classroom (satisfactory, unsatisfactory); personality (attitude, appearance, voice, enthusiasm, eye contact); and lesson (preparation, presentation, pupil reaction).

Each observation report contained the signature of petitioner and the Superintendent attesting to the fact that petitioner received a copy of the observation and that he had an opportunity to discuss the comments with the Superintendent. All of the observation reports were signed by the parties and dated on the days the observations were conducted except for the report of February 4, 1976. This report bears the signatures of the parties and is dated on the day following the observation.

On February 18, 1976, the Superintendent directed the following correspondence to petitioner regarding the classroom observations conducted on February 4, and 17, 1976. The letter reads as follows:

> "It is the intent of this letter to formally advise you of my dissatisfaction with your job performance. As indicated in the observation reports of your classes dated February 4, 1976 and February 17, 1976 you are going to have to show a marked improvement in:
>
> - outside preparation for classes
> - pedagogical technique, particularly as related to increasing student involvement/participation in learning activities.
> - utilizing class time to better advantage.
>
> "Be assured that I am willing to work with/assist you to help you to achieve the improvement so obviously needed. It is my intent to monitor your progress by means of continued classroom observations.

"Please accept this letter in the spirit in which it is intended—to help you to turn around an unacceptable classroom situation."

(Superintendent's Affidavit, Exhibit C)

Petitioner was again observed by the Superintendent on February 24 and March 12, 1976, and on each occasion he received and signed a copy of the written observation report from the Superintendent evaluating his teaching performance as unsatisfactory.

On March 26, 1976, the Superintendent directed the following letter to petitioner:

"Based on the attached observations, which have been reviewed with you, and the fact that there has not been noticeable improvement it is being recommended that your increment be withheld.

"The Board of Education will meet with you next Monday evening, if you wish, you may have the opportunity to express your views concerning this matter at this meeting. Should you desire to meet with the Board please contact Mr. Donald Hill, Board Secretary, who will make the necessary arrangements.***

"Encl. Observation Report dated 2/4/76
Observation Report dated 2/17/76
Observation Report dated 2/24/76
Observation Report dated 3/12/76"

(Superintendent's Affidavit, Exhibit F)

Thereafter, petitioner was granted an appearance before the Board for the purpose of expressing his views why the Board should not accept the Superintendent's recommendation and withhold his salary and adjustment increments for the 1976-77 academic year. Petitioner was permitted to be represented by the president of the local teachers' association and a field representative of the New Jersey Education Association at that time.

On April 8, 1976, petitioner received the following communication from the Board Secretary.

"At the regular meeting of the Keyport Board of Education held at the Central School at 8:00 p.m. on Wednesday, April 7, 1976, a Resolution was passed by a recorded roll call vote of the full membership of the Board of Education providing for the withholding of your employment and adjustment increments for the 1976-77 school year in accordance with N.J.S. 18A:29-14.

"This action was taken for the following reasons. During the 1975-76 school year you have:

1. failed to maintain the order of your pupils in the classroom;

2. failed to prepare proper lesson plans;

3. failed to maximize instructional time;

4. failed to create the necessary rapport with your class and this prevented you from establishing sound educational environment;

5. failed to adapt your teaching to the needs of all your pupils which resulted in poor achievement results as reflected in the pupil grades.

"The effect of this action of the Board of Education will be to maintain your salary for the 1976-77 school year at $16,750.00."

(Superintendent's Affidavit, Exhibit G)

Petitioner has filed an affidavit and supporting documentation opposing the Board's Motion to Dismiss.

In this regard, petitioner relies on two favorable observation reports pertaining to his teaching performance during the 1972-73 academic year. (Petitioner's Affidavit, Exhibits A, B) Petitioner asserts that these observation reports represent the last time his teaching performance was evaluated by the Board prior to the observations conducted by the Superintendent during the 1975-76 academic year. Petitioner questions why there was a lapse of three years between these evaluations and why the last four evaluations were conducted by the Superintendent within a period of approximately one month.

Petitioner in his affidavit takes issue with the comments contained in the Superintendent's affidavit as well as those comments contained on the four observation reports in question pertaining to his unsatisfactory teaching performance during the 1975-76 academic year.

Petitioner, in the first instance, considers the Superintendent's comments on the observation reports of February 4, 17 and 24, 1976 (Superintendent's Affidavit, Exhibits A, B. D) which link his unsatisfactory performance with the poor achievement of a majority of his pupils during the second marking period as being unjustified and prejudicial against him.It is evident that the Board had this information at its disposal when it determined to withhold his salary and adjustment increments for the 1976-77 academic year.

Petitioner explains that the low level of pupil achievement during the second marking period of the 1975-76 academic year is attributable to the fact that the new subject matter is initially introduced to the pupils during this marking period. It is petitioner's contention that these grades improved over the succeeding marking periods and, further, that the performance of his pupils in other subject areas during the same period of time was similar.

Petitioner also asserts that the potential of many of his pupils was inconsistent with and lower than the designated ability levels of the courses to

which they were assigned. Large class size is also cited by petitioner as being a factor which mitigated against his efforts to provide his pupils with more instructional assistance and which was reflected in lower pupil grades.

Petitioner maintains that the time allotted by the Superintendent to discuss and review his observation reports was insufficient and that the follow-up he requested from the Superintendent for further assistance with his lesson plans was not provided. Furthermore, petitioner argues that he signed his observation reports upon the advice of the Superintendent since he was told that the report was to be signed even if he didn't agree with it.

Finally, petitioner asserts that the Superintendent's attempt to attribute the lack of pupil achievement for a specific marking period to his performance as a teacher is spurious and warrants a determination by the Commissioner reversing the Board's action or, in the alternative, that he be granted a plenary hearing in this matter.

Both parties rely on the statute *N.J.S.A.* 18A:29-14 in support of their respective positions. It reads in its entirety as follows:

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

The Commissioner finds no merit in petitioner's allegations with respect to the Board's failure to comply with the negotiated agreement regarding the withholding of increments. In this regard, the Commissioner is constrained to rely on the language of the Court's construction of *N.J.S.A.* 18A:29-14 in *Westwood Education Association v. Board of Education of the Westwood Regional School District,* Docket No. A-261-73 New Jersey Superior Court, Appellate Division, June 21, 1974 (1974 *S.L.D.* 1436) and *Clifton Teachers v. Clifton Board of Education,* 136 *N.J. Super.* 336 (*App. Div.* 1975). In *Westwood,* the Court held that:

> "***[A] local board of education, pursuant to *N.J.S.A.* 18A:29-14, has sole discretion to withhold a member's salary increment for inefficiency or other good cause and that this right is not negotiable under the provisions of *N.J.S.A.* 34:13A-5.3. See *Assoc. of N.J. State Col. Fac. v. Dungan,* 64 *N.J.* 338 (1974).

> "Appellant, relying upon previous decisions of the Commissioner of Education, contends that *N.J.S.A.* 18A:29-14 has no application to salary schedules in excess of statutory minima, unless the local board first adopts a salary policy pertaining to such increments. We find no basis, statutory or otherwise, for the Commissioner's limiting construction and hold this contention to be without merit. *cf. Kopera v. Board of Education of West Orange,* 60 *N.J.* 288 (*App. Div.* 1960).***" (1974 *S.L.D.* at 1436)

In *Clifton, supra,* the Court expanded upon the construction of the aforementioned statute in ruling that:

> "***This statute authorizes the board to withhold an increment for good cause and establishes a statutory policy which cannot be frustrated by the mere promulgation of a salary guide as part of the contract between the board and the association. The guide, as such, does not inhibit the board from exercising its power under this statute to deny an increment to a particular teacher because of 'inefficiency or other good cause.' The guide merely means that if good cause does not exist for denial of the increment, the quantum thereof will be paid in accordance with the figures of the guide.
>
> "It is not legally necessary for the *** agreement to contain an express reservation of the right to withhold an increment for good cause, since that is a right granted by statute and one which must be accepted as underlying every negotiated contract.
>
> "To accept plaintiff's contention would destroy the inherent right of the board to exercise its preeminent function to pass upon the quality of teacher performance–a function which is manifestly a management prerogative beyond the reach of negotiation. See *Ass'n of N.J. State Col. Fac. v. Dungan,* 64 *N.J.* 338, 353-355 (1974); *Kopera v. West Orange Bd. of Ed.,* 60 *N.J. Super.* 288, 298 (*App. Div.* 1960.)***" (at 339-340)

The record indicates that petitioner was granted an opportunity to appear before the Board with a representative of the teachers' association for the purpose of being heard with respect to the action to be taken by the Board to withhold his salary and adjustment increment for the 1976-77 school year.

The Commissioner has reviewed *N.J.S.A.* 18A:29-14 as well as *Westwood, supra,* and *Clifton, supra,* and finds that there is no authority or mandate expressly provided therein for the Board to grant petitioner or his representative an opportunity to appear and be heard in such proceedings.

In the instant matter, the Commissioner finds that the Superintendent correctly exercised his authority and discretion as chief administrator of the school district in conducting observations of petitioner's classroom teaching performance in light of the information he had at his disposal pertaining to the low grades issued by petitioner to a large number of pupils at the conclusion of the second marking period.

In the Commissioner's judgment the observation reports prepared by the Superintendent and shared with petitioner set forth in sufficient detail the types of corrective action required of petitioner to improve his teaching performance in order to provide a more adequate learning environment for his pupils. It is evident to the Commissioner, based on these observation reports, that petitioner did not respond positively to the Superintendent's suggestions indicating the need for improved lesson planning, more efficient utilization of instructional time and more effective teaching methods in order to provide for more pupil participation in classroom learning activities.

The Commissioner finds and determines that the reasons advanced by petitioner in support of his contentions are without merit. The Commissioner finds and determines that the Board had sufficient cause to accept the Superintendent's recommendation to withhold petitioner's salary and adjustment increments for the 1976-77 academic year. Having found no other basis in law which would support petitioner's prayer for relief, the Commissioner hereby grants the Board's Motion by dismissing the instant Petition of Appeal.

COMMISSIONER OF EDUCATION

December 30, 1977
Pending State Board of Education

SUBJECT INDEX TO COMMISSIONER'S DECISIONS – 1977

Marilyn Arzberger,

Petitioner-Appellant,

v.

Board of Education of the Township of Neptune, Monmouth County,

Respondent-Appellee.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, September 24, 1976

For the Petitioner-Appellant, Chamlin, Schottland & Rosen (Michael D. Schottland, Esq., of Counsel)

For the Respondent-Appellee, Laird & Wilson (Andrew J. Wilson, Esq., of Counsel)

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

January 5, 1977

Marilyn Arzberger,

Petitioner-Appellant,

v.

Board of Education of the Township of Neptune,

Respondent.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Argued: September 27, 1977 – Decided: October 13, 1977

Before Judges Halpern, Larner and King.

On appeal from New Jersey State Board of Education.

Mr. Michael D. Schottland argued the cause for appellant (Messrs. Chamlin, Schottland, Rosen & Cavanagh, attorneys; Mr. William L. O'Reilly, on the brief).

Mr. Andrew J. Wilson argued the cause for respondent (Messrs. Laird, Wilson & MacDonald, attorneys).

Mr. William F. Hyland, Attorney General, filed a statement in lieu of brief on behalf of respondent State Board of Education (Ms. Susan P. Gifis, Deputy Attorney General, of counsel and on the statement).

PER CURIAM:

In February 1972 the Board of Education of the Township of Neptune hired appellant (Arzberger) as a bookkeeping clerk on a probationary basis. A month later her status was changed and she was given an employment contract for three months. Subsequently, the parties executed three consecutive yearly contracts with the final one covering a period from July 1, 1974 to June 30, 1975.

All of the contracts contained a provision giving either party the right to terminate on 30 days' notice.

On July 1, 1974 Arzberger sustained a work-connected injury to her knee which resulted in her absence from work until August 28, 1974. There were also other subsequent periods of absence. She filed a workers' compensation petition, and now alleges that her supervisors voiced displeasure regarding the filing of the workers' compensation claim and the repeated absences caused by her knee injury. It also appears that on December 2, 1974, surgery was performed on the knee, necessitating further absence from work.

While she was recuperating from her surgery she received a 30-day notice of termination of employment pursuant to a resolution adopted by the Board on December 18, 1974. This notice set forth the following reasons for termination: "(1) negative attitude, (2) poor work performance, (3) lack of initiative, (4) failure to work cooperatively with your Supervisor and your fellow workers, (5) excessive absence."

On February 13, 1975, appellant's counsel wrote to the Board suggesting a conference for the purpose of "working out this matter without further litigation." Counsel for the Board responded by pointing out that the Board would not consider Mrs. Arzberger for further employment in the system since she was dismissed for cause. Neither Arzberger nor her attorney ever requested a hearing of the Neptune Board with regard to the factual basis for the causes of termination.

Arzberger filed a petition with the Commissioner of Education, and after a conference outlining the issues, both parties moved for summary judgment. The Commissioner of Education denied petitioner's motion and granted summary judgment in favor of the Board dismissing the petition. Appeal to the State Board of Education resulted in an affirmance of the decision of the Commissioner for the reasons expressed in the latter's opinion.

The Commissioner held that Arzberger had not acquired tenure under the

provisions of *N.J.S.A.* 18A:17-2 and that the local board, although not required to do so, nevertheless complied with the statement of reasons requirement directed in *Donaldson v. Bd. of Ed. of No. Wildwood,* 65 *N.J.* 236 (1974).

Appellant asserted before the Commissioner and on appeal herein that, although not entitled to tenure status, she had a sufficient property right so that her employment could not be terminated without an adversary hearing, citing *Board of Regents v. Roth,* 408 *U.S.* 564, 92 *S.Ct.* 2701, 33 *L.Ed.*2d 548 (1972); *Perry v. Sindermann,* 408 *U.S.* 593, 92 *S.Ct.* 2694, 33 *L.Ed.*2d 570 (1972). Alternatively, she argues that she was deprived of a substantial liberty interest which in turn also demanded a pretermination hearing. See *Board of Regents v. Roth, supra,* 408 *U.S.* at 573-574, 92 *S.Ct.* at , 33 *L.Ed.*2d at 559; *Williams v. Civil Service Commission,* 66 *N.J.* 152 (1974). Finally, she argues that a summary judgment was unwarranted in view of the unresolved factual issue pertaining to her allegation that she was terminated because of her prosecution of the workers' compensation claim.

There is no doubt, as appellant concedes, that she did not enjoy a tenured status since she had not been employed for the period of time required by *N.J.S.A.* 18A:17-2. Furthermore, she did not have a property interest in continued employment in light of the contractual right of the employer to terminate on 30 days' notice. Such a consensual reservation removes this case from those wherein the employee's right is protected as a property interest within the ambit of the opinions of the United States Supreme Court. See *Board of Regents v. Roth, supra,* 408 *U.S.* at 577-578, 92 *S.Ct.* at , 33 *L.Ed.*2d at 561; *Bishop v. Wood,* 426 *U.S.* 341, 96 *S.Ct.* 2074, 48 *L.Ed.*2d 684 (1976). See also *English v. College of Medicine and Dentistry of N.J.,* 73 *N.J.* 20, 22-23 (1977). In the absence of a constitutionally protected interest, such as freedom of speech, or other discriminatory practice, the Board was free to exercise the right to terminate even without cause. *Ibid.*

We next turn to appellant's contention founded upon the denial of due process because of deprivation of a "liberty" interest. Preliminarily it appears that a rule of the Civil Service Commission might result in rejection of appellant for other public employment in the future (*N.J.A.C.* 4:1-8.14). The reasons assigned for termination may create a potential disability affecting her liberty to seek future employment in an area governed by Civil Service regulations. See *Williams v. Civil Service Commission, supra.*

Although appellant did not request a hearing before the local board of education on the factual basis of the reasons for termination, in effect such a hearing demand was implicit in the petition addressed to the Commissioner of Education. The hearing we refer to is a post-termination hearing solely for the purpose of eliminating any stigma on appellant's ability, qualifications or reputation. See *Arnett v. Kennedy,* 416 *U.S.* 134, 163, 94 *S.Ct.* 1633, , 40 *L.Ed.*2d 15, 38-39 (1974); *Endress v. Brookdale Community College,* 144 *N.J. Super.* 109, 140 (App. Div. 1976). Such hearing cannot lead to an order for reinstatement or back pay, since, as already noted, appellant is not entitled to such relief in the absence of a protected property interest. Nevertheless, if she desires such a hearing in an effort to clear her name, she is entitled to it under

the circumstances herein, where the Board terminated for specific causes rather than under its contractual right of termination.

We next turn to the allegation that appellant's initiation of a workers' compensation proceeding led to her termination in violation of the policy enunciated in *N.J.S.A.* 34:15-39.1 This statute in pertinent part provides:

> It shall be unlawful for any employer or his duly authorized agent to discharge or in any other manner discriminate against an employee as to his employment because such employee has claimed or attempted to claim workmen's compensation benefits from such employer, . . . Any employee so discriminated against shall be restored to his employment and shall be compensated by his employer for any loss of wages arising out of such discrimination.

At this point we are not faced with the necessity to evaluate the merits of appellant's accusation since a factual exploration was foreclosed by the Commissioner's order granting summary judgment without a plenary hearing. The allegation was disposed of summarily by the following reference in the Commissioner's decision:

> Petitioner's argument that she was terminated because of a workmen's compensation claim she had filed is without merit. Petitioner has failed to provide any credible evidence in support of this allegation.

Such a summary disposition of this issue was clearly erroneous. Just as petitioner was not entitled to a summary judgment in her favor on the sparse allegation in her affidavit, so was it improper without a plenary hearing to grant judgment for the Board on this factual issue. See *Judson v. Peoples Bank & Trust Co. of Westfield,* 17 *N.J.* 67, 73-77 (1954); *Friedman v. Friendly Ice Cream Co.,* 133 *N.J. Super.* 333, 337 (App. Div. 1975).

The Commissioner and the State Board of Education are equally controlled by the same "settled procedural philosophies in the treatment of motions for dismissal and summary judgment" as those applicable to trial courts. See *Winston v. Bd. of Ed. of So. Plainfield,* 64 *N.J.* 582, 586 (1974), affirming the Appellate Division, 125 *N.J. Super.* 131, 145 (App.Div. 1975). It is manifest that on the record herein Arzberger was entitled to a full evidentiary hearing before the Commissioner on the issue relating to the alleged violation of *N.J.S.A.* 34:15-39.1.

At this juncture we do not deem it appropriate to make a determination whether the statute is intended to apply to the public sector and public employers, whether relief by way of reinstatement is enforceable against the Board in view of the reserved termination right, and, if enforceable, what the extent of such relief should be. These questions plus others which may come into play are more properly reserved for resolution if and when the administrative agency finds a factual basis for appellant's allegation.

In view of the foregoing, the denial of appellant's motion for summary

judgment is affirmed and the summary judgment in favor of the Board is reserved. We remand to the Commissioner of Education to conduct an evidentiary hearing on the issue of alleged violation of *N.J.S.A.* 34:15-39.1 to determine whether the school board did violate that statute and, if so, what relief, if any, should be afforded to the appellant. In addition, if Mrs. Arzberger requests it in writing, such hearing shall encompass the factual foundation of the causes set forth in the Board's termination notice.

We do not retain jurisdiction.

In the Matter of the Application of the Board of Education of the Borough of Avon-by-the-Sea for the Termination of the Sending-Receiving Relationship with the School District of Asbury Park, Monmouth County,

– – – – – – – – – – –

Avon Board of Education,

Petitioner-Appellant,

and

Asbury Park Board of Education,

Respondent-Appellee.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Decided by the Commissioner of Education, April 29, 1976

Decided by the State Board of Education, September 8, 1976

Submitted May 24, 1977 – Decided June 3, 1977

Before Judges Matthews, Seidman and Horn.

On appeal from State Board of Education.

Mr. Thomas F. Shebell, attorney for appellant (Mr. Peter Shebell, Jr., on the brief).

Messrs. McOmber & McOmber, attorneys for respondent (Mr. Richard D. McOmber and Mr. John W. Wopat, III, on the brief).

Mr. William F. Hyland, Attorney General of New Jersey, filed a Statement in Lieu of Brief on behalf of New Jersey State Board of Education (Ms. Mary Ann Burgess, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

The Board of Education of the Borough of Avon-by-the-Sea petitioned the Commissioner of Education for permission to send its high school students to Neptune High School commencing with the 1975-1976 school year, thereby terminating its sending-receiving relationship with Asbury Park High School; or, in the alternative, for reimbursement by the State for the additional costs of sending high school students to Asbury Park High School. The petition was opposed by Asbury Park High School.

A hearing was held before a hearing officer of the Division of Controversies and Disputes, New Jersey Department of Education. The hearing officer submitted a written report in which he found no basis for granting the application and recommended its rejection. The Commissioner of Education reviewed the report and concurred with it for the reasons expressed therein. He dismissed the petition. His decision was thereafter affirmed by the State Board of Education. This appeal followed.

The contentions on appeal are that (1) the Commissioner of Education has the authority to order the termination of a sending-receiving relationship pursuant to *N.J.S.A.* 18A:38-13; (2) the "factual backdrop of the case sub judice constitutes 'good and sufficient reasons'" for termination of the relationship, and (3) racial balance is a State policy and no one school district should be burdened financially to enforce said policy without State aid. We find no merit in any of these contentions and affirm the dismissal of the petition essentially for the reasons set forth in the report of the hearing officer, as adopted by the Commissioner and affirmed by the State Board of Education.

Affirmed.

In the Matter of the Tenure Hearing of Carolyn D. Baley, School District of the Township of Mansfield, Warren County.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, October 1, 1976

For the Complainant Board of Education, Wayne Dumont, Jr., Esq.

For the Respondent, Ruhlman and Butrym (Paul T. Koenig, Esq., of Counsel)

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

January 5, 1977

Nicoletta Biancardi,

Petitioner-Appellant,

v.

Waldwick Board of Education,

Respondent-Respondent.

SUPREME COURT OF NEW JERSEY

Decided by the Commissioner of Education, April 9, 1974

Decided by the State Board of Education, November 6, 1974

Argued March 7, 1977 – Decided April 6, 1977

On appeal from the Superior Court, Appellate Division, whose opinion is reported at 139 *N.J. Super.* 175 (1976). [1976 *S.L.D.* 1106]

Mr. Theodore M. Simon argued the cause for appellant (*Messrs. Goldberg, Simon & Selikoff,* attorneys).

Mr. Steven M. Honig argued the cause for respondent (*Messrs. Honig & Honig*, attorneys).

PER CURIAM

The judgment is affirmed substantially for the reasons expressed in the opinion of the Appellate Division.

(73 *N.J.* 31)

Board of Education of the Township of Brick,

Petitioner-Appellee,

v.

Ronald Heinzman; John Hickman; Brick Township Education Association; the American Arbitration Association; and Julius Malkin, Arbitrator, Ocean County,

Respondents-Appellants.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, November 15, 1976

For the Respondents-Appellants, Joseph N. Dempsey, Esq.

For the Petitioner-Appellee, Anton & Ward (Donald H. Ward, Esq., of Counsel)

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

March 2, 1977

Elaine M. Chianese,

Petitioner-Appellant,

v.

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

Respondent-Appellee.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, September 13, 1976

For the Petitioner-Appellant, Goldberg, Simon & Selikoff (Joel S. Selikoff, Esq., of Counsel)

For the Respondent-Appellee, Kessler, Tutek & Gottlieb (Myron H. Gottlieb, Esq., of Counsel)

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

February 2, 1977

Louis Ciccone,

Petitioner-Appellant,

v.

Board of Education of the Township of Weehawken, Hudson County,

Respondent-Appellee.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, December 22, 1976

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

For the Respondent-Appellee, LeRoy D. Safro, Esq.

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

April 6, 1977

Ciro D'Ambrosio,

Petitioner-Appellant,

v.

Board of Education of the Borough of Palisades Park and George Iannacone, Superintendent, Bergen County,

Respondents-Appellees.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, July 27, 1976

For the Petitioner-Appellant, Ruhlman and Butrym (Paul T. Koenig, Jr., Esq., of Counsel)

For the Respondents-Appellees, Patrick J. Tansey, Esq.

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

March 2, 1977
Pending before Superior Court of New Jersey

Kenneth W. Diffenderfer,

Appellant,

v.

Board of Education of the Borough of Washington, Warren County, New Jersey,

Respondent.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Decided by the Commissioner of Education, May 9, 1975

Decided by the State Board of Education, June 7, 1976

Submitted June 7, 1977 – Decided June 21, 1977

Before Judges Halpern, Allcorn and Botter.

On appeal from the State Board of Education.

Lawrence F. Costill, Jr., attorney for appellant.

Schumann & Seybolt, attorneys for respondent (Robert L. Schumann, on the brief).

William F. Hyland, Attorney General of New Jersey, attorney for State Board of Education (Stephen Skillman, Assistant Attorney General, of counsel; Mary Ann Burgess, Deputy Attorney General, on the brief).

PER CURIAM

The case was submitted to the agencies below on a stipulation of facts. We concur in the conclusion that appellant abandoned his employment as a school principal by volunteering for a four-year period of active military service apart from regular periods of reserve duty. Therefore he is not entitled to reinstatement to his public employment under *N.J.S.A.* 38:23-4. See *State Highway Dept. v. Civil Service Commission,* 35 *N.J.* 320, 326-327 (1961). We find no merit to appellant's contentions. *R.* 2:11-3(e) (D) and (E).

Affirmed.

Joan Driscoll,

Petitioner-Respondent,

v.

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

Respondent-Appellant.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Decided by the Commissioner of Education, January 8, 1976

Decided by the State Board of Education, May 5, 1976

Submitted: September 26, 1977 – Decided: October 18, 1977

Before Judges Allcorn, Morgan and Horn.

On appeal from State Board of Education.

Mr. Sam Monchak, attorney for appellant.

Messrs. Goldberg & Simon, attorneys for respondent (Mr. Theodore M. Simon, on the brief).

Mr. William F. Hyland, Attorney General, Attorney for State Board of Education (Ms. Susan P. Gifis, Deputy Attorney General, of counsel; Mr. Mark Schorr, Deputy Attorney General, submitted a statement in lieu of brief).

PER CURIAM:

The question presented in this appeal by appellant Board of Education of the City of Clifton, Passaic County (local board), is whether petitioner Joan Driscoll, who was appointed as a substitute teacher in the City of Clifton school system, was entitled to be considered as a teaching staff member (*N.J.S.A.* 18A:1-1) with all the emoluments, rights and privileges which follow such position under the circumstances of this case.

The Commissioner of Education (Commissioner) following a contested administrative hearing substantially adopted the hearing examiner's recommendation and held that petitioner was entitled to the emoluments, rights and privileges of a teaching staff member as of October 15, 1973. The State Board of Education (State Board) affirmed. The local board then instituted this appeal pursuant to *R.* 2:2-3(a)(2).

The operative facts are not controverted. Plaintiff, holder of a standard teaching certificate in New Jersey, applied in January or February 1973 to the local board for a teaching position in the Clifton school system. In August she was offered and agreed to accept employment as a substitute teacher, when called upon to perform such duties. At no time was she offered a position as a regular teacher.

Meanwhile a tenured teacher, Elena Voss, had received maternity leave from the local board, to be effective through August 1974. Later Voss thought she could get a teaching position in a school she desired, so she sought to shorten the period of her maternity leave and made a request to teach at that school commencing September 1973. Instead the local board notified her that she was to teach at School No. 15, because there were no openings at the school she preferred. Then she requested that her maternity leave be once again extended through August 1974. This was denied and she was notified to report to teach commencing on September 5, 1973, the day before school began. When she did not report petitioner was called and agreed to teach as a substitute starting the following day, September 6. On and from that day she worked continuously during the ensuing school year ending June 11, 1974, except for one and one-half days when she was ill. She was paid the usual rate for substitute teachers of $23 a day. During the course of the year she was not paid for holidays or for the one and one-half days that she was absent on account of illness. Petitioner, however, performed all the activities of a regular teacher.

On September 13, 1973 the school board wrote Voss a letter, which in part stated:

> *** However, your failure to report to your assignment as directed is deemed as absent without leave and can be legally declared as abandonment of position. In view of your past services, this is a position the Board would be loathe to take.
>
> Therefore, please notify this office immediately following receipt of this communication that you will report within two working days to your 1973-74 assignment to avoid the necessity of taking the legal steps outlined. However, due to your past service, should you desire to resign, a letter to that effect received within the time period outlined will be accepted without prejudice and your personnel record noted that the matter of resignation was voluntary on your part.

Voss did not respond. The Board took no action as to Voss, as it indicated in the letter that it might do. Finally, in August 1974 Voss resigned by letter, giving as a reason that she was moving to New York with her husband.

Petitioner learned when she commenced to work only that she was substituting for Voss. She was not told of the above letter or that Voss had not responded to it. In August 1974, under the authority of *N.J.S.A.* 18A:6-9, plaintiff initiated these proceedings by the filing of a petition with the Commissioner to compel the Board to recognize her as a regular full-time teacher for the 1973-1974 school year, to provide her retroactively with the emoluments to which a regular full-time teacher was entitled and to employ her for the 1974-1975 school year by virtue of *N.J.S.A.* 18A:27-10. As stated, the Commissioner agreed with petitioner's views as to her right to be retroactively regarded as a full-time staff teacher and to be paid accordingly by the local board, but only from October 15, 1973 instead of September 6, 1973. The Commissioner rejected petitioner's right to be employed as a regular staff teacher for the following school year for a reason unrelated to petitioner's primary claim. We need not discuss this aspect since petitioner has filed no cross-appeal challenging the Commissioner's rejection of this secondary relief.

Before proceeding with the merits of the issue projected in this case, we note that the Attorney General has submitted a statement in lieu of brief on behalf of the State Board, purportedly pursuant to *R.* 2:6-4. The State Board espouses the position of petitioner by urging that this court uphold the decision of the Commissioner as affirmed by the State Board. We have considered the contents of the statement in lieu of brief notwithstanding that neither the Commissioner nor the State Board is a party to these proceedings, inasmuch as there has been no motion to strike it. *Hasbrouck Heights v. Division of Tax Appeals,* 48 *N.J. Super.* 328, 335 (App. Div. 1958).

The hearing examiner recommended to the Commissioner that the latter direct the local board to compensate petitioner retroactively on findings that petitioner actually performed all the duties of a regular teacher during the 1973-1974 school year and, although she was originally employed as a substitute

teacher and knew that she would receive the compensation accorded that position and not the emoluments, rights and privileges of a regular teacher, when the local board learned that Voss had for all practical purposes abandoned her position, this "resulted in the inequitable employment of petitioner." However, the examiner's report as adopted by the Commissioner noted a finding that the local board was without malice or bad faith. "The [local board] acted in good faith and believed petitioner was a substitute."

The Commissioner's determination adopted the examiner's report with a minor modification. He held that Voss's refusal to respond to the local board's letter "coupled with the [local board's] inaction was prejudicial to petitioner in that petitioner was *** performing the duties of a regular teacher with none of the emoluments of that position." We disagree and reverse.

The principles governing this case are iterated in *Biancardi v. Waldwick Bd. of Ed.*, 139 *N.J. Super.* 175 (App. Div. 1976), aff'd o.b. 73 *N.J.* 37 (1977), which was decided by us after the determination of the Commissioner but before the affirmance by the State Board.

Biancardi was similarly concerned with the contention of a teacher employed as a substitute that during the teaching period (about two months) she actually performed the duties of a regular teacher, so that she should be considered as such. In that case the teacher sought to add that period to additional time during which she served as a regular member of the teaching staff for the purpose of securing tenure under the statute, *N.J.S.A.* 18A:28-5. In the instant case the matter of tenure is not a factor, only the question of retroactive compensation and other benefits.

Biancardi held that when a board of education hires a teacher as a substitute it may not be compelled to convert her status to that of a regular teacher for the purpose of adding the time served as a substitute to the time served as a regular teacher in order to provide her with the time necessary to effect tenure. This is so notwithstanding the fact she did the work of a regular teacher. See *Biancardi, supra,* at 179.

Both petitioner and the State Board, as in *Biancardi,* urge that we must give deference to the findings of the Commissioner because they are supported by substantial credible evidence in the record. *Parkview Village Asso. v. Bor. of Collingswood,* 62 *N.J.* 21, 34 (1972); *Close v. Kordulak Bros.,* 44 *N.J.* 589, 599 (1965). However, as stated in *Biancardi*:

> *** As in *Schulz* [132 *N.J.L.* 345 (E. & A. 1945)] there are no disputed facts in this case, and our task is to apply the law to these undisputed facts. *Schulz, supra* at 349. Where the issue is one of law the Commissioner's decision does not carry a presumption of validity, and it is for the court to decide whether his decision (and that of the State Board) is in accordance with the law. See *Fanwood v. Rocco,* 59 *N.J. Super.* 306, 315 (App. Div.), aff'd 33 *N.J.* 404 (1960); *Kopera v. West Orange Bd. of Ed.,* 60 *N.J. Super.* 288, 296 (App. Div. 1960). As was said in *Mayflower Securities v. Bureau of Securities,* 64 *N.J.* 85, 93 (1973): "An appellate

tribunal is *** in no way bound by the agency's interpretation of a statute or its determination of a strictly legal issue." [139 *N.J. Super.* at 177]

This case is decided specifically on the Commissioner's finding that the local board did not act in bad faith in employing petitioner as a substitute teacher. We do not agree with the Commissioner that petitioner was inequitably treated by reason of the action (or inaction) of Voss.

We disagree that there was such an abandonment on the part of Voss or such wrongful inactivity on the part of the local board to dismiss Voss as to warrant the retroactive award. A unilateral determination that Voss abandoned her position could have resulted in expensive litigation should Voss have sought to return during the balance of the school year. Moreover, it could have resulted in the payment to Voss of her normal compensation as well as the payment to petitioner of similar compensation if given a contract as a regular teacher for the balance of the school year.

A tenured teacher may only be involuntarily dismissed pursuant to *N.J.S.A.* 18A:6-10 *et seq.*, the Tenure Employees Hearing Law. Thus the local board had no real freedom of action as to Voss. See *In re Tenure Hearing of Grossman,* 127 *N.J. Super.* 13 (App. Div. 1974), certif. den. 65 *N.J.* 292 (1974). If such proceedings to dismiss Voss were instituted, unquestionably they probably would have consumed more time than the eight months for which, according to the Commissioner, petitioner was entitled to the compensation and benefits of a regular teacher. Consequently the Commissioner failed to accord to the local board that body's right as well as responsibility to exercise its discretion under the circumstances. In the face of the acknowledged facts that petitioner was engaged as a substitute teacher with the knowledge that she would receive the compensation of a substitute teacher and made no protest or demand throughout that period of service, the action of the Commissioner would appear to be unfair and unjust to the local board.

In addition to what has been said as to the local board's discretion, there was also its right to exercise its discretion as to the employment of a regular teacher other than petitioner if it became apparent during the school term that petitioner was employed that a regular teacher was required.

In sum and to again resort to language of *Biancardi,* to compel the local board to retroactively regard petitioner as a regularly employed teacher under these circumstances "would effectively negate and contravene the local board of education's statutory authority to hire [petitioner] as a substitute teacher." 139 *N.J. Super.* at 179.

For the foregoing reasons the determination from which the local board has appealed is

REVERSED.

ALLCORN, P.J.A.D. (dissenting)

I would affirm the determination of the State Board substantially for the reasons set forth by the Commissioner of Education.

I do not agree that the present case is controlled by *Biancardi v. Waldwick Bd. of Ed.*, 139 *N.J. Super.* 175 (App. Div. 1976), aff'd o.b. 73 *N.J.* 37 (1977), for it is not at all apposite. In *Biancardi,* the teacher with full knowledge of all the surrounding circumstances undertook to accept a position as substitute for a fixed period–namely, from late April through the end of the school year, a period of approximately two months. In short, there was an express agreement between the board of education and the teacher that she would serve as a substitute for a fixed and definite term. In the present case, the petitioner did not agree to accept nor was she offered the position of permanent substitute for the full school year. Instead her appointment as substitute was simply to stand in for regular staff teachers from time to time for relatively short periods when a regular staff teacher was absent due to illness or other cause.

Thus, when petitioner here was asked to substitute for the regular teacher (Mrs. Voss) at the beginning of the school year, she plainly contemplated that it would be of short duration–and, unless the board was acting in bad faith, it also must have been of the same view. After the regular teacher failed to return early in September pursuant to the ultimatum of the board, it took no affirmative action whatever to resolve the situation. Fair and honorable dealing required that the board, at the very least, then advise petitioner of the situation that had developed, and make accordant arrangements to fill the abandoned position for the balance of the school year under some mutually acceptable terms–whether it hired the petitioner or some other qualified teacher for the purpose. Instead of so doing and without disclosing to petitioner the true situation, the board just protracted petitioner's employment in the capacity of a substitute from day to day, until she had worked for the entire school year, performing all of the duties of a regular full time staff teacher–in the status and at the rate of pay of a substitute, at a considerable saving to the board.

In these circumstances, the petitioner is entitled to be considered and to be compensated as a regular full time staff teacher.

Pending before New Jersey Supreme Court

Patricia Fallon,

Petitioner-Respondent,

v.

Board of Education of the Township of Mount Laurel, Burlington County,

Respondent-Appellant.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Decided by the Commissioner of Education, February 28, 1975

Decided by the State Board of Education, June 4, 1975

Argued February 15, 1977 – Decided February 25, 1977

Before Judges Halpern, Allcorn and Botter.

On appeal from State Board of Education.

Mr. Marshall Family argued the cause for appellant (Mr. Benjamin Marmer, attorney).

Mr. Joel S. Selikoff argued the cause for respondent (Hartman, Schlesinger, Schlosser & Faxon, attorneys).

PER CURIAM

The Board of Education of the Township of Mount Laurel appeals from a decision of the State Board of Education, as implemented by the Commissioner of Education, reversing the decision of the Commissioner dated February 28, 1975. As a result of the State Board's decision, respondent was awarded her teacher's salary for a period of 30 days, less "mitigation of her earnings during the month of September 1974."

The basis for the State Board's decision was that respondent was entitled to be re-employed for the school year commencing September 1, 1974 as a result of appellant's failure to strictly comply with the provisions of *N.J.S.A.* 18A:27-10 in notifying her of appellant's intention not to offer her re-employment for the new school year. In these circumstances the State Board found that respondent had a binding contract for the year commencing September 1, 1974 subject to termination on 30 days' notice effective, however, not sooner than 30 days after September 1.

Although appellant had not given respondent formal notice of its intentions prior to April 30, 1974 as required by *N.J.S.A.* 18A:27-10,

respondent had been forewarned of appellant's intention to abolish her position as a Spanish teacher and to combine the Spanish and French teaching position into one. At its April 9, 1974 meeting appellant resolved to make this change on a trial basis, and that action was reported to all teachers on April 11, 1974. However, formal notice of the Board's action was not given to respondent until May 20, 1974. Additionally, on June 12, 1974 the Board notified respondent that her claimed right to re-employment in September was terminated as of September 1, 1974. (It was held below that the "employment contract" between appellant and respondent was subject to cancellation by either party on 30 days' notice.)

The Commissioner had held that appellant had abolished respondent's position in good faith and had the lawful authority to do so. *N.J.S.A.* 18A:28-9. The right of appellant to abolish the position is not challenged on this appeal. *N.J.S.A.* 18A:28-9 provides:

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

For the purposes of this appeal it may be assumed that respondent had the right to re-employment for the school year beginning in September 1974. It was held below that that re-employment was on the same terms as before, which included the mutual right of termination on 30 days' notice, as provided in the 1972-73 contract which was deemed continued for the 1973-74 school year. On this basis we hold that appellant rightfully abolished respondent's position and gave her more than 30 days' notice of that action and the resultant termination of her employment. The local board's right to abolish the position in question in good faith for reasons of economy or otherwise as provided in *N.J.S.A.* 18A:28-9 is unqualified, except possibly by respondent's implied right to 30 days' notice of that action because of its concomitant termination of her employment. On the facts of this case the local board had given respondent all the notice of its action that she could claim, whether or not the notice of its intended action given to respondent before April 30th complied with the requirements of *N.J.S.A.* 18A:27-10. In these circumstances we disagree with the holding of the State Board that the notice of termination could not begin to run until the commencement date of the new school year. *Canfield v. Board of Education of Pine Hill Boro.*, 51 *N.J.* 400 (1968), reversing on Judge Gaulkin's dissent, 97 *N.J. Super.* 483 (App. Div. 1967) is distinguishable. We note also that a decision of the State Board in a companion case, *Armstrong v. Board of Education of the Tp. of East Brunswick, Middlesex County,* was affirmed by this court in an earlier unreported decision. But we disagree with that holding to the limited extent that it affirmed the State Board's ruling that notice of termination of employment due to the abolition of a teacher's position cannot commence in effect until the new school year begins.

Accordingly, the decision of the State Board is reversed and the award of damages to respondent is vacated.

Cert. denied by Supreme Court of New Jersey, May 3, 1977 (74 *N.J.* 275)

Anna Gill,

Plaintiff-Appellee,

v.

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

Respondent-Appellant.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Decided by the Commissioner of Education, July 8, 1976

Decided by the State Board of Education, October 6, 1976

Submitted: November 15, 1977 – Decided: December 7, 1977

Before Judges Lynch, Bischoff and Kole.

On appeal from the State Board of Education.

Mr. Sam Monchak, attorney for appellant.

Messrs. Balk, Jacobs, Goldberger, Mandell, Seligsohn & O'Connor, attorneys for respondent (appellee) (Mr. Jack Mandell, on the brief).

Mr. William F. Hyland, Attorney General of New Jersey, filed a Statement in Lieu of Brief on behalf of New Jersey State Board of Education.

PER CURIAM

The Clifton Board of Education (hereinafter Clifton) appeals from a decision of the State Board of Education directing it to pay to Anna Gill $800, which it had withheld from her on the theory that this sum was an "increment" that it was entitled to withhold under *N.J.S.A.* 18A:29-14. The State Board of Education affirmed the decision of the Commissioner of Education (the Commissioner) for the reasons he gave.

The Commissioner agreed with Clifton that the disputed amount was an "increment", as opposed to a salary increase, but found that in withholding the "increment", Clifton had failed to comply with the 10-day notice requirement of *N.J.S.A.* 18A:29-14 by giving her timely notice of the reasons for its denial of the increment. Thus, Clifton was ordered to pay the $800.

There was no hearing. The matter was submitted to the Commissioner on the pleadings, exhibits and briefs.

In its pleadings before the Commissioner, Clifton proceeded on the theory it had denied an annual "increment" to Gill pursuant to *N.J.S.A.* 18A:29-14 for the 1974-75 school year predicated on excessive absenteeism. Indeed, even though the notice to Gill of June 27, 1974, refers to a withholding of any "increment and/or salary increase for the 1974-75 school year pending final determination and subsequent notification", Clifton's letter to Gill of October 18, 1974, stated that a resolution had been adopted pursuant to *N.J.S.A.* 18A:29-14 to withhold from her "the annual increment for the 1974-1975 school year, which commenced on July 1, 1974".

In a pretrial conference agreement, it was asserted that the following "agreements", among others, were reached: "Did the Board violate *N.J.S.A.* 18A:29-4.1 by withholding or not granting a salary increase to petitioner as set forth in the Board's policy for 1974-75." But it appears from the decision of the Commissioner that it was Gill who was claiming a violation of that statutory provision and that Clifton in fact relied on the increment statute, *N.J.S.A.* 18A:29-14. The Commissioner seems to have rejected Gill's argument that *N.J.S.A.* 18A:29-4.1, relating to salary schedules, had been violated or was involved.

We affirm the determination of the State Board of Education essentially for the reasons set forth in the opinion of the Commissioner.

Having lost with the legal theory advanced below, Clifton asserts the opposite thesis on appeal: the amount was not an increment but rather a salary increase which, it argues, may be withheld without regard to the procedural requirements of *N.J.S.A.* 18A:29-14.

We would ordinarily decline to consider this ground, since it appears not to have been relied on below by Clifton and is inconsistent with the legal theory that it then asserted. See *Winston v. Bd. of Ed. So. Plainfield,* 125 *N.J. Super.* 131, 145-146 (App. Div. 1973), aff'd 64 *N.J.* 582 (1974).

However, in view of the pretrial conference agreements we have mentioned, we will consider the issue thus raised.

On July 1, 1973, a collective negotiation agreement was entered into between the Clifton Education Association and Clifton, which set forth the salary schedules for the 1973-1974 and 1974-1975 school years. The schedules provided for Gill, who was in receipt of the maximum for her level of training, a salary of $15,365 for the school year 1973-1974 and $16,165 for the school

year 1974-1975, a difference of $800. On April 17, 1974, Clifton unilaterally adopted a resolution which may be interpreted as having intended to change the right to salary increases, as well as salary increments, by requiring that before they be considered earned, the superintendent and Clifton would have to find affirmatively that the employee had performed satisfactorily.[1]

This resolution treats salary increases and increments in the same fashion. Accordingly, assuming that the payment of $16,165 by reason of the salary scale for the 1974-1975 school year represented a salary increase, rather than an increment, we have concluded that, on the present record, in the interest of fairness, Clifton would have been prohibited from withholding the increase without at least complying with the notice requirements of *N.J.S.A.* 18A:29-14.

We need not and do not decide whether there is a difference between salary "increment" and "increase" with respect to the right of a board of education to withhold either, predicated upon unsatisfactory employee performance. In the context of the present case an "increase" might be considered the increased salary at the same employment level in the salary schedule for the second year of the agreement. We note that although *N.J.S.A.* 18A:29-4.1 provides for the adoption of salary schedules which shall be binding for a period of 2 years, it also provides that nothing therein shall prohibit payment of salaries higher than in the schedules or the later adoption of schedules providing for "higher salaries, *increments* or adjustments". (Emphasis supplied). In general on this issue, see *Kopera v. West Orange Bd. of Ed.*, 60 *N.J. Super.* 288 (App. Div. 1960), decided before the enactment, in 1965, of what is now *N.J.S.A.* 18A:29-4.1; *Clifton Teachers v. Clifton Bd. of Ed.*, 136 *N.J. Super.* 336 (App. Div. 1975), decided thereafter and also after enactment of the New Jersey Employer-Employee Relations Act (*N.J.S.A.* 34:13A-1 *et seq.*). See also *Newark Teachers Assn. v. Bd. of Ed. of Newark*, 57 *N.J.* 100, 104, 106 (1970); *Cliffside Park Borough Bd. of Ed. v. Mayor & Council*, 100 *N.J. Super.* 490 (App. Div. 1968).

Affirmed.

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[1] Clifton in its statement of procedural history (paragraph 7) refers to this resolution as "undated". In its appendix, it refers to it as "having been adopted in 1973". However, the Commissioner in his opinion (and Gill in her brief), states that the resolution was adopted April 17, 1974. It would appear to us not to have been specifically a part of the collective agreement entered into in 1973, at least to the extent it intended to condition the earning of a "salary increase" as well as a salary increment, upon satisfactory performance. However, as hereafter indicated, this factor is of no significance in our decision.

**Green Village Road School Association,
Ellen M. Browning, Edgar M. Coster, Daniel A. D'Andrea,
Loretta Q. Pickens, and Frances W. Weller,**

Petitioners-Appellants,

v.

Board of Education of the Borough of Madison, Morris County,

Respondent-Respondent.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Decided by the Commissioner of Education, July 26, 1976

Decided by the State Board of Education, November 3, 1976

Argued September 27, 1977 – Decided October 13, 1977

Before Judges Matthews, Crane and Antell.

On appeal from the State Board of Education.

Ms. Phyllis B. Strauss argued the cause for petitioners-appellants (Messrs. Kerby, Cooper, Schaul & Garvin, attorneys).

Mr. Thomas P. Cook argued the cause for respondent-respondent (Messrs. Smith, Cook, Lambert and Miller, attorneys).

PER CURIAM.

On September 16, 1975 the Board of Education of the Borough of Madison ("Madison") decided to close the Green Village Road School. The action so taken was designed to reduce Madison's excess school capacity. On January 20, 1976 the petitioners filed their petition with the Commissioner of Education seeking review of Madison's decision. After an extensive hearing the Commissioner rendered a comprehensive opinion pursuant to which the petition was dismissed on July 26, 1976. This was supplemented by an inspection report dated September 24, 1976. The action of the Commissioner was affirmed by the State Board of Education on November 3, 1976.

The principal contention on this appeal is that the agency erred by acquiescing in Madison's decision to continue Old Central School in operation while terminating the Green Village Road School. After a careful review of the record we conclude that although there are inadequacies in the physical condition of Old Central, a fact which was recognized at various levels of the administrative establishment, we are nevertheless satisfied that the findings and conclusions made below could reasonably have been reached on sufficient credible evidence present in the record, considering the proofs as a whole and

with due regard to the agency's expertise. *Close v. Kordulak Bros.*, 44 *N.J.* 589, 598-599 (1965); *Morgan v. Bd. of Review, Div. of Employ. Sec.*, 77 *N.J. Super.* 209, 213 (App. Div. 1962).

> It is established law in this State that a local board of education may in the exercise of its discretionary powers discontinue the use of a public school within the boundaries of its jurisdiction. *Silverman v. Bd. of Ed., Tp. of Millburn,* 134 *N.J. Super.* 253, 259 (Law Div. 1975), aff'd 136 *N.J. Super.* 435 (App. Div. 1975).

What petitioners ask us to review is an exercise of judgment by an administrative agency upon a matter coming within its special competence. Absent a showing of dishonesty, fraud or illegality, there is no basis for judicial intervention. *Boult v. Bd. of Ed. of Passaic,* 135 *N.J.L.* 329, 330 (Sup. Ct. 1947), aff'd 136 *N.J.L.* 521, 523 (E. & A. 1948).

We note that the shortcomings of the Old Central building have not been overlooked by the Commissioner. They were the subject of his careful consideration and he dealt with them by directing Madison to complete certain renovations within a prescribed period of time.

The petitioners' claim that they have been denied procedural due process by the State Board of Education is clearly without merit. *R.* 2:11-3(e)(1)(E).

The determination of the State Board of Education dated November 3, 1976 is affirmed essentially for the reasons stated by the Commissioner of Education in his written opinion dated July 26, 1976, as supplemented by the inspection report of September 24, 1976.

In the Matter of the Tenure Hearing of Consuelo Garcia Lefakis, School District of the Borough of Midland Park, Bergen County.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, September 16, 1976

For the Petitioner-Appellee, Podesta, Myers & Crammond (John H. Crammond, Esq., of Counsel)

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

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

March 2, 1977

Long Branch Education Association and William Cook,

Appellants,

v.

Board of Education of the City of Long Branch, Monmouth County,

Respondent.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Decided by the Commissioner of Education, December 31, 1975

Decided by the State Board of Education, May 5, 1976

Argued May 17, 1977 – Decided July 11, 1977

Before Judges Lynch, Milmed and Antell.

On appeal from a final decision of the State Board of Education.

Mr. Michael D. Schottland argued the cause for appellants (Messrs. Chamlin, Schottland, Rosen & Cavanagh, attorneys; Mr. Schottland and Mr. Thomas W. Cavanagh, Jr., on the brief).

Mr. John W. Wopat, III argued the cause for respondent (Messrs. McOmber & McOmber, attorneys; Mr. Richard D. McOmber and Mr. Wopat, on the brief).

Mr. William F. Hyland, Attorney General of New Jersey filed a Statement in Lieu of Brief on behalf of the State Board of Education (Ms. Erminie Conley, Deputy Attorney General, of counsel. Mr. Mark Schorr, Deputy Attorney General, on the Statement).

PER CURIAM

Appellant, William Cook, a non-tenured high school industrial arts teacher in the Long Branch school system, was notified toward the end of his second year of teaching that his employment contract would not be renewed. He appealed to the Commissioner of Education who, after reviewing the record in the matter, "including the Memoranda of Law, the hearing examiner report and the exceptions filed thereto by respective counsel," dismissed the petition of appeal, expressing specifically the reasons for his determination in a comprehensive written opinion. The State Board of Education affirmed the decision, adopting the reasons stated by the Commissioner.

From our review of the record before us we are satisfied that the State agency's determination in this matter is supported by sufficient credible evidence on the record as a whole, and that the issues of law raised are clearly without merit. *R.* 2:11-3(e)(1)(D) and (E).

Accordingly, the decision of the State Board of Education under review is affirmed substantially for the reasons expressed by the Commissioner of Education in his written opinion of December 31, 1975.

Long Branch Education Association, Inc.,

Petitioner-Appellant,

v.

Board of Education of the City of Long Branch, Monmouth County,

Respondent-Respondent.

SUPREME COURT OF NEW JERSEY

Decided by the Commissioner of Education, December 10, 1974

Decided by the State Board of Education, April 2, 1975

Argued May 9, 1977 – decided June 24, 1977

On certification to the Superior Court, Appellate Division, whose opinion is reported at 150 *N.J. Super.* 262 (1976). [1976 *S.L.D.* 1149]

Mr. Michael D. Schottland argued the cause for appellant (*Messrs. Chamlin, Schottland, Rosen & Cavanagh,* attorneys; *Mr. Schottland* and *Mr. Thomas W. Cavanagh,* on the brief).

Mr. Richard D. McOmber argued the cause for respondent (*Messrs. McOmber & McOmber,* attorneys; *Mr. McOmber* and *Mr. John W. Wopat, III,* on the brief).

PER CURIAM

The judgment is affirmed substantially for the reasons expressed in the opinion of the Appellate Division.

(73 *N.J.* 461)

"M.D." and "R.D.,"

Petitioners-Appellants,

v.

Board of Education of the City of Rahway, Union County,

Respondent-Appellee.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, March 31, 1976

For the Petitioners-Appellants, Ralph Neibart, Esq.

For the Respondent-Appellee, Magner, Abraham, Orlando, Kahn & Pisansky (Leo Kahn, Esq., of Counsel)

This is an appeal by petitioners from a decision of the Commissioner of Education denying them full reimbursement for private school tuition expenses for their son. The facts and a summary of the testimony taken in this case are aptly set out in the Hearing Examiner Report, dated September 9, 1975. They will be more briefly stated here.

The petition was brought by the parents of I.D., a pupil enrolled in the Rahway public schools. They alleged that the program provided by Rahway was inappropriate to their son's needs and that they should be reimbursed for tuition and transportation costs they incurred as a result of their withdrawing I.D. from the Rahway schools and enrolling him in a private school.

The hearing examiner found—and his findings are well supported by substantial credible evidence in the record before him—that I.D. is a child of average or slightly below average intelligence who, by the Fall of 1973, had experienced great difficulty in acquiring basic learning skills. Recognizing that I.D. was perceptually impaired, Rahway provided him with special tutorial help beyond his regular class placement.

It was the virtually unanimous opinion of those experts who testified that the program of supplemental instruction was insufficient and that nothing short of enrollment in a special class for the perceptually impaired would suffice. Indeed, even the Director of Rahway's Child Study Team admitted that the opportunities offered I.D. in the Rahway schools were unsatisfactory and so attempted to find a placement for him in classes for the perceptually impaired in Elizabeth and Scotch Plains at the outset of the 1973-74 school year. Those efforts proved unsuccessful, and I.D. was continued in the Rahway schools in a program identical to the one that had failed him. Following the recommendation of Dr. Avrum L. Katcher, Director of Child Evaluation, Hunterdon County Medical Center, petitioners removed I.D. from the Rahway public schools and enrolled him, at their own expense, in the Adams School in New York City, an

institution devoted exclusively to the education of learning disabled and emotionally disturbed children. Shortly after enrolling I.D. at the Adams School, petitioners sought reimbursement for their expenses from respondent. When respondent refused, petitioner appealed, first to the county and then to the State Department of Education. After having been informed by the latter that they were not entitled to reimbursement, they initiated this action.

Respondents refused to authorize reimbursement on the ground that the State Department of Education had interpreted the rules of the State Board of Education as authorizing payment of private school tuition costs only for those children labelled "neurologically impaired." The Commissioner found this reading of the rules to have been erroneous. We agree. There is no warrant, either in the rules of the State Board or in the statutes, for disparate treatment of children labelled "neurologically impaired" and those labelled "perceptually impaired." *N.J.S.A.* 18A:46-8; *N.J.A.C.* 6:28-1.1 Children in both classifications may manifest identical disabilities, which may in turn respond to identical treatment. Further, a local board's responsibility to provide a suitable education program to a perceptually impaired child is no less than the responsibility it owes to children with other learning handicaps. Hence, the same range of placement opportunities should be open to the perceptually impaired. To say less would be to deny those children the education they are guaranteed by law.

As to the reimbursement of petitioners' expenses, the Commissioner ruled that they were entitled to one-half of the tuition charges approvable by the State Department of Education for school years 1974-75 and 1975-76.[1] The Commissioner also concluded that a preliminary review of the options for I.D.'s placement should be undertaken by the Child Study Team with full funding of tuition costs, if appropriate.

When this case was first before us, we affirmed so much of the Commissioner's decision as called for a review by the Child Study Team and full funding outside of the Rahway schools if the team found that necessary. We then retained jurisdiction and referred to the Attorney General the question of what financial remedy was proper. This advice has been received, and the parties have been given an opportunity to submit their comments thereto.

Having carefully reviewed the Commissioner's reasoning, the record below, and the Attorney General's opinion that petitioners be fully reimbursed, we now decide that the petitioners should be fully reimbursed for all tuition charges approvable by the State Department of Education for the years 1973-74, 1974-75, and 1975-76.[2] In doing so, we do not depart from the long-standing rule that private school tuition will not be returned to parents who, in a dispute

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[1] The Commissioner modified the recommendation of the Hearing Examiner that petitioners be reimbursed for all approvable tuition expenses for school years 1973-74 and 1974-75.

[2] We understand petitioners to have abandoned their claims for transportation expenses. In any case, that aspect of the Commissioner's decision is consistent with State Board rules and is affirmed.

over a reasonable and procedurally correct classification of a local board, voluntarily withdraw their child from public school. See, e.g. *"R.D.H." and "J.D.H." v. Board of Education of the Flemington-Raritan Regional School District,* 1975 *S.L.D.* 103, aff'd State Board of Education 111, aff'd Docket No. A-3815-74 New Jersey Superior Court, Appellate Division, November 8, 1976; *K.K. v. Board of Education of Westfield,* 1971 *S.L.D.* 234, aff'd 1973 *S.L.D.* 34 (State Board of Education), aff'd Docket No. A-1125-73 New Jersey Superior Court, Appellate Division, February 13, 1975 (1975 *S.L.D.* 1086). Under the peculiar circumstances of this case, that rule has no application. First, and probably most important, it was recognized by virtually everyone involved in this matter that I.D. was in need of special class placement. Certainly, respondent cannot be faulted for refusing to reimburse petitioners for private school tuition since that refusal was based on a departmental interpretation of State Board rules subsequently found to be arbitrary. However, that interpretation did not relieve respondent of its obligation to provide I.D. with an education suited to his needs. *N.J.S.A.* 18A:46-13 As stated above, even respondent's own Child Study Team has concluded that the program in which I.D. was placed was not the proper one. In light of that conclusion and pursuant to Dr. Katcher's advice that I.D.'s continuance in the program might prove damaging, petitioners' action in withdrawing their son was justified. Finally, once I.D. was no longer in attendance in the Rahway schools, petitioners promptly sought reimbursement from the local board and exhausted all administrative avenues open to them before filing their Petition of Appeal.

In accordance with this opinion, the decision of the Commissioner of Education is modified to the extent that respondent is directed to reimburse petitioners for all tuition expenses approvable for the years in question and further that respondent be reimbursed from State funds to the extent allowed by law. *N.J.S.A.* 18A:46-14, 21 As so modified, the decision of the Commissioner of Education is affirmed.

One other matter before us warrants comment. In responding to the opinion of the Attorney General, counsel for respondent has indicated that reimbursement of petitioners in one budget year would put a considerable strain on respondent's finances. The Commissioner is therefore directed to investigate respondent's fiscal situation to ascertain the impact of this decision on its budget and programs, and to consider the use of emergency funds if it is determined that respondent cannot bear the additional expense.

March 2, 1977

Mary Ann McCormack, Robert R. Yundzel, and Elwyn F. Spangler,

Petitioners,

v.

Boards of Education of the Northern Highlands Regional High School District or the Borough of Fair Lawn, Bergen County,

Respondents.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, August 20, 1976

For the Petitioners-Appellants, Goldberg, Simon & Selikoff (Theodore M. Simon, Esq., of Counsel)

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

For the Respondent Northern Regional Board, Scafuro & Gianni (Albert O. Scafuro, Esq., of Counsel)

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

January 5, 1977

Helen P. Means,

Petitioner,

v.

Board of Education of the City of Newark, Essex County,

Respondent.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, November 12, 1976

For the Intervenor-Appellant, Liss and Meisenbacher (Raymond Meisenbacher, Esq., of Counsel)

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

For the Respondent, Pickett & Jennings (Robert T. Pickett, Esq., of Counsel)

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

March 2, 1977

Lawrence Parachini,

Petitioner-Respondent,

v.

Board of Education of the City of Union and Robert Menendez, Hudson County,

Respondents-Appellants.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Decided by the Commissioner of Education, May 5, 1976

Decided by the State Board of Education, July 14, 1976

Submitted February 22, 1977 – Decided March 2, 1977

Before Judges Bischoff, Morgan and King.

On appeal from State Board of Education.

Mr. Scipio L. Africano, attorney for appellants.

Mr. Sydney I. Turtz, attorney for respondent.

Mr. William F. Hyland, Attorney General of New Jersey, filed a Statement in Lieu of Brief on behalf of the State Board of Education (Ms. Mary Ann Burgess, Deputy Attorney General, of counsel).

Per Curiam.

The Board of Education of the City of Union appeals from a decision of the State Board of Education affirming a decision of the Commissioner of Education which awarded petitioner Lawrence Parachini salary as Secretary of the Board of Education from April 8, 1974 to June 30, 1974.

Petitioner was appointed Secretary to the Board on December 20, 1972, "effective December 26, 1972 at a salary calculated on the basis of $16,500 per year, payable in 24 semi-annual installments."

On February 21, 1973, by a resolution worded substantially the same as the original appointment, petitioner was again appointed Secretary of the Board, effective January 21, 1973. Neither resolution stated a fixed term of office.

In November of 1973, by referendum, the City of Union elected to change its school district from Type One to Type Two. Pursuant to *N.J.S.A.* 18A:9-10, the membership of the Board was increased from 5 to 9 by the election of additional members at an election held on February 23, 1974.

On April 8, 1974 the Board adopted the following resolution:

> "RESOLVED that the services of Lawrence Parachini as Secretary of the Board of Education of the City of Union City in the County of Hudson, State of New Jersey, be and they are hereby terminated effective as of April 8, 1974.

Petitioner demanded that he be paid his salary up to June 30, 1974 and, upon the refusal of the Board to do so, filed a petition with the Commissioner of Education who held that petitioner was entitled to be paid for that period of time. The State Board of Education affirmed the decision, and this appeal followed. We affirm.

N.J.S.A. 18A:17-5 provides:

> Each secretary shall be appointed by the board, by a recorded roll call majority vote of its full membership, for a term to expire not later than June 30 of the calendar year next succeeding that in which the board shall have been organized, but he shall continue to serve after the expiration of his term until his successor is appointed and qualified. . . .

This statute requires that a Secretary be appointed "for a term."

While the parties may provide in a contract of employment for a term of any duration (subject to the maximum time period established in *N.J.S.A.* 18A:17-5), where no term is mentioned we infer that the parties intended the contract of employment to extend for the maximum period permissible. We reject the argument of the Board that the absence of a stated term indicates the intention of the parties that the employment be at the will of the Board. Such an interpretation is contrary to the express public policy that the contract be "for a term" and the policy which protects a Secretary from dismissal during the term for which he was appointed "except for neglect, misbehavior or other offense. . . ." *N.J.S.A.* 18A:17-1.

We conclude that the dismissal of petitioner on April 8, 1974 without cause was improper, and petitioner is entitled to be paid the salary for the balance of his term which, as the Commissioner of Education indicated, runs to June 30, 1974.

Affirmed.

David Payne,

Petitioner-Appellant,
Cross-Respondent,

v.

Board of Education of the Borough of Verona, Essex County,

Respondent-
Cross-Appellant.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Decided by the Commissioner of Education, May 5, 1976

Decided by the State Board of Education, December 1, 1976

Argued October 18, 1977 – Decided October 31, 1977

Before Judges Halpern, Larner and King.

On appeal and cross-appeal from a decision of the State Board of Education.

Jack Wysoker argued the cause for appellant, cross-respondent (Mandel, Wysoker, Sherman, Glassner, Weingartner & Feingold, P.A., attorneys; Richard H. Greenstein on the brief).

George H. Buermann argued the cause for respondent, cross-appellant (Booth, Bate, Hagoort, Keith and Harris, attorneys; George H. Buermann on the brief).

William F. Hyland, Attorney General of New Jersey, submitted a statement in lieu of brief on behalf of respondent, State Board of Education (Susan P. Gifis, Deputy Attorney General, of counsel and on the statement).

PER CURIAM

David Payne, a teacher in the Borough of Verona's school system, appeals from a determination of the New Jersey State Board of Education denying his claim to be reinstated as a teacher, with the attendant right of tenure, due to the wrongful termination of his contract by the Verona Board of Education. The Verona Board of Education cross-appeals from the State Board of Education's determination requiring it to pay Payne his full salary for the 1974-75 school year, together with the benefits which would have accrued to him for said school year.

No useful purpose would be served in reciting the detailed facts leading up to this controversy because they are fully set forth in the report of the hearing

examiner and the opinion of the Commissioner of Education. Suffice it to say, we find sufficient credible evidence in the record to support the findings and conclusions of the State Board. *In re Tenure Hearing of Grossman,* 127 *N.J. Super.* 13, 22-23 (App. Div. 1974), certif. den. 65 *N.J.* 292 (1974). We are in full accord with its decision that even though the exercise of the 30 day termination clause by the Board of Education was arbitrary and unreasonable, it did not result in Payne's being entitled to reinstatement and tenure since he did not teach during the 1974-75 school year. *Canfield v. Bd. of Ed. of Pine Hill,* 97 *N.J. Super.* 483 (App. Div. 1967), rev'd on Judge Gaulkin's dissent 51 *N.J.* 400 (1968). However, in view of the arbitrary action of the Board of Education in terminating Payne's contract of March 1974 in June 1974, under the circumstances here existing, the imposition of damages, to the extent imposed, was proper. See *English v. College of Medicine and Dentistry of N.J.,* 73 *N.J.* 20 (1977); *Zimmerman v. Bd. of Ed. of Newark,* 38 *N.J.* 65 (1962), *cert.* den. 371 *U.S.* 956 (1963).

We affirm the determination of the State Board of Education essentially for the reasons expressed in the Hearing Officer's report of February 25, 1976 and the opinion of the Commissioner of Education dated May 5, 1976 and adopted by the State Board of Education as its final decision.

Affirmed.

"R.D.H." and "J.D.H.,"

Plaintiff-Appellant,

v.

Board of Education of Flemington-Raritan Regional School District, Hunterdon County,

Defendant-Respondent.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Decided by the Commissioner of Education, February 26, 1975

Decided by the State Board of Education, June 4, 1975

Argued October 25, 1976 – Decided November 8, 1976

Before Judges Carton, Kole and Larner

On appeal from Decision of State Board of Education.

Mr. David Schechner argued the cause for appellant (Messrs. Schechner and Targan, attorneys; Mr. David Schechner of counsel and on the brief).

Mr. Wesley L. Lance argued the cause for respondent (Mr. Wesley L. Lance, attorney, of counsel and on the brief).

Mr. William F. Hyland, Attorney General of New Jersey, attorney for State Board of Education, filed a Statement in Lieu of Brief on behalf of the State Board of Education (Ms. Jane Sommer, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

From our examination of the record, we are satisfied that the parents of EDH are not entitled to the relief sought–EDH's reclassification by the respondent school district board of education (the district) as neurologically impaired, her placement in a private school at the expense of the district and reimbursement by the district for her past private school expenses.

Her parents should have pursued and exhaused the appellate hearing route under the school laws within a resonable time after her initial classification in May 1971 by the school authorities or at least after they became aware of her assignment to the educable mentally retarded class for the school year 1971-1972. Instead, they unilaterally withdrew her from the district public school system, placed her in a private school and failed to pursue their remedies under the school laws until March 1, 1974, when their petition was filed with the Commissioner of Education. See *N.J.S.A.* 18A:6-9, *et seq.* She was never reenrolled in the district public schools. Because of this unreasonable delay in pursuing their administrative remedies, EDH's parents forfeited such rights, if any, as they may have had to be reimbursed for the private school expenses prior to that date.

In any event, at the hearing on the petition, there was sufficient credible evidence in the record as a whole to support the conclusion that the initial classification was not so unreasonable as to constitute an abuse of discretion. In this setting, the classification issue separating the parents, on the one hand, and the district on the other, was a debatable one with respect to which the district acted reasonably; and, by statute and regulation, any further identification and classification of the child would be required only if EDH were in attendance at a public, not a private, school. *N.J.S.A.* 18A:46-6; *N.J.A.C.* 6:28-1.8(a).

Since EDH was still not in attendance at a public school in the district even at the time of the State Board's determination of June 4, 1975, and, admittedly, for the school year commencing September 1975, came under the jurisdiction of the Board of Education operating the Hunterdon Central

Regional High School, neither she nor her parents were entitled to any of the monetary or other relief sought from the respondent district.

In view of our determination, we need not pass on the question of whether circumstances may not exist under which the requirement of enrollment in the public school system may be deemed unnecessary as a condition precedent for an application for classification or reclassification under *N.J.S.A.* 18A:46-6, 18A:46-13 and *N.J.A.C.* 6:28-1.8(a).

Affirmed.

Iris Sachs,

Petitioner-Appellant,

v.

Board of Education of the East Windsor Regional School District, Dr. John Hunt, Superintendent of Schools and Mrs. Mary Lee Fitzgerald, Principal, Mercer County,

Respondents-Respondents.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Decided by the Commissioner of Education, February 25, 1976

Decided by the State Board of Education, July 14, 1976

Submitted February 28, 1977 – Decided March 10, 1977

Before Judges Carton, Kole and Larner.

On appeal from the New Jersey State Board of Education.

Mr. Robert D. Farkas, attorney for petitioner-appellant.

Mr. Henry G. P. Coates, attorney for respondents-respondents.

Mr. William F. Hyland, Attorney General of New Jersey, filed a Statement in lieu of brief (Ms. Mary Ann Burgess, Deputy Attorney General, of counsel and on the statement).

PER CURIAM

We affirm the decision below essentially for the reasons set forth in the opinion of the Commissioner of Education, which was affirmed by the State Board of Education.

We have considered the contentions advanced by appellant on this appeal and find them to be without merit.

Affirmed.

Gloria Ulozas,

Petitioner-Appellant,

v.

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

Respondent-Respondent.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Decided by the Commissioner of Education, August 21, 1975

Decided by the State Board of Education, November 5, 1975

Argued January 10, 1977 – Decided February 3, 1977

Before Judges Bischoff, Morgan and Rizzi.

On appeal from New Jersey State Board of Education.

Mr. Emil Oxfeld argued the cause for appellant (Messrs. Rothbard, Harris & Oxfeld, attorneys; Mr. Oxfeld, of counsel).

Mr. Vincent C. DeMaio argued the cause for respondent Matawan Board of Education (Messrs. DeMaio & Yacker, attorneys; Mr. DeMaio, of counsel).

Mr. William F. Hyland, Attorney General of New Jersey, attorney for State Board of Education (Mrs. Erminie L. Conley, Deputy Attorney General, of counsel and Ms. Mary Ann Burgess, Deputy Attorney General, on the brief).

PER CURIAM.

This is an appeal from the decision of the State Board of Education, affirming a determination of the Commissioner of Education which dismissed appellant's Petition of Appeal on the ground of laches. We have reviewed the record and hold that there is sufficient evidence in the record to conclude that the appellant had been guilty of laches. Cf. *In re Tenure Hearing of Grossman,* 127 *N.J. Super.* 13, 22-23 (App. Div. 1974), certif. den. 65 *N.J.* 292 (1974); *State v. Johnson,* 62 *N.J.* 146, 162 (1964). See *Board of Education of Garfield v. State Board of Education and Rosenthal,* 130 *N.J.L.* 388 (Sup. Ct. 1943); *Borough of Park Ridge v. Salimone,* 36 *N.J. Super.* 485 (App. Div. 1955), aff'd 21 *N.J.* 28 (1956); *Atlantic City v. Civil Service Commission,* 3 *N.J. Super.* 57 (App. Div. 1949). The dismissal of appellant's Petition of Appeal was therefore proper.

Affirmed.

Constance Vieland,

Petitioner-Appellee,

v.

Board of Education of the Princeton Regional School District, Mercer County,

Respondent-Appellant.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, November 12, 1976

For the Petitioner-Appellee, Joseph N. Dempsey, Esq.

For the Respondent-Appellant, Smith, Cook, Lambert, Knipe & Miller (Thomas P. Cook, Esq., of Counsel)

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

Mrs. Marion Epstein abstained in this matter.

March 2, 1977

Wall Township Education Association and Wall Township Education Association on behalf of Athan P. Anest, Harry W. Baldwin, John Carras, John R. Convery, Francis W. Groff, Dave Harris, Martin Herman, George Hooker, John M. Hanusek, Robert Livingston, Harry C. Madsen, William J. Meir, Powers McLean, Robert R. Smith, Leonard M. Sarr, Don Tober, Richard Van Duyn, Gerald J. Warner, Ralph Whittaker, Harry Whittley and George Williams,

Petitioners-Respondents,

v.

Board of Education of the Township of Wall, County of Monmouth,

Respondent-Appellant,

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Decided by the Commissioner of Education, March 24, 1976

Decided by the State Board of Education, July 14, 1976

Argued: February 28, 1977 – Decided: March 16, 1977

Before Judges Carton, Kole and Larner.

On appeal from New Jersey State Board of Education.

Mr. William C. Nowels argued the cause for respondent appellant (Messrs. Mirne, Nowels, Tumen, Magee & Kirschner, attorneys).

Mr. Peter S. Falvo, Jr. argued the cause for petitioners-respondents (Messrs. Morgan & Falvo, attorneys).

Mr. William F. Hyland, Attorney General, attorney for New Jersey State Board of Education, filed Statement in Lieu of Brief (Ms. Mary Ann Burgess, Deputy Attorney General, of counsel).

PER CURIAM:

The primary issue posed by this appeal is whether the military service credit granted to teachers by *N.J.S.A.* 18A: 29-11 applies to eligibility for longevity increments contained in the collective negotiating agreement in the school district of Wall Township. The statute entitles a teacher who has served in the armed services to receive "equivalent years of employment credit for such service as if he had been employed for the same period of time in some publicly owned and operated college, school or institution of learning in this or any other state" limited to a maximum of four years.

The teachers on whose behalf the litigation was instituted are all eligible for the benefits of the statute and were in fact advanced on the salary guide in

accord with their respective periods of military service. The Board of Education, however, refused to compute the military service credit in recognizing their eligibility for longevity increments pursuant to a contractual provision which reads as follows:

> Longevity Increments: An additional $450 increment for teachers entering their 15th and 18th years of teaching as a fully certified teacher.
>
> An additional $450 increment for teachers entering their 21st year of teaching in Wall Township.

At first, the Association proceeded through the grievance procedure and advisory arbitration but thereafter discontinued the arbitration and filed a petition of appeal with the Commissioner of Education. The matter was heard by the Commissioner pursuant to a stipulation of facts and cross-motions for summary judgment. The Commissioner determined the issue in favor of the teachers and was affirmed by the State Board of Education. The local board appeals from that decision.

Preliminarily, we reject the contention of the appellant that the matter was cognizable before the Public Employee Relations Commission and not the Commissioner. Appellant proceeded with the hearing before the Commissioner without objection. Furthermore, the issue is purely one of substantive law involving the construction of the legislative enactment—a matter arising under the school laws within the jurisdiction of the Commissioner of Education. *N.J.S.A.* 18A:6-9.

The other peripheral contention that the teachers are barred from relief because of laches is equally without merit. This defense, raised for the first time on appeal, is not supported by evidence of the necessary elements of undue delay and resultant prejudice. See *West Jersey Title, &c.,Co. v. Industrial Trust Co.*, 27 *N.J.* 144, 153 (1958); *Auciello v. Stauffer*, 58 *N.J. Super.* 522, 530 (App. Div. 1959).

Turning to the substantive issue involved herein, we agree with the Commissioner that the credit for military service entitles a teacher to a status equal to that of a teacher who has had employment credit for the same period of time up to a maximum of four years. This credit is not limited to the benefits of his status on the salary guide but extends also to any other benefits granted to other teachers because of longevity experience in the teaching field. We find nothing in the statute suggesting a contrary construction. As a consequence, when a teacher with military service is advanced on the salary guide because of the statutory credit, he remains in that position for equal treatment with those on the same step because of teaching experience. The statute is clear and unambiguous in its intent.

Appellant also urges that the longevity increments under the collective negotiating agreement should only apply to service for the requisite years in the Wall Township system and that military service credit therefore should not be counted. As we read the pertinent provision which we have quoted above,

teachers in Wall Township are entitled to longevity increments when they enter their 15th and 18th year of "teaching as a fully certified teacher" in whatever system they have acquired their experience. A veteran therefore is entitled to the same increments if his total service as a fully certified teacher plus his military service credit equals the number of years required for eligibility. Since the statute mandates equivalency, the local board cannot apply the agreement in a manner which is violative of the statutory requirement.

Our construction of the contractual provision is confirmed by the final sentence which deals with an additional increment for teachers "entering their 21st year of teaching in Wall Township." By contrast with the remainder of the increments for the 15th and 18th years, this provision limits the 21st year increment to service for the entire period in Wall Township. As already noted, veterans are granted equivalency with non-veterans; they are therefore equally subject to the provisions of the negotiating agreement which are not in conflict with the legislative policy. And since the 21 year increment is based upon such total service in the Wall community, credit for military service cannot be utilized in determining eligibility for this additional increment. The statutory credit applies as if the veteran had been employed for the period of his military service in "*some* publicly owned and operated college, school or institution of learning". (Emphasis added). Since the military service is not equated in the statute with employment in the same school system, the credit cannot be applied for eligibility for the extraordinary longevity increment due because of service in Wall Township.

In accord with the foregoing, we affirm the decision of the Commissioner and State Board of Education that, under the current bargaining agreement, military service credit is to be afforded to the teaching staff in connection with longevity increments commencing the 15th and 18th year of teaching. We further hold that such credit is not applicable to the additional increment commencing the 21st year of teaching in Wall Township.

(149 *N.J. Super.* 126 (*App. Div.* 1977))

Howard J. Whidden, Jr.,

Appellant,

v.

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

Respondent.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Decided by the Commissioner of Education, April 14, 1976

Submitted December 21, 1976; Decided January 28, 1977

Before Judges Crane, Michels and Pressler

On appeal from Decision of the Commissioner of Education of the State of New Jersey.

Messrs. Pendleton & Latzer, attorneys for appellant (Mr. Roy R. Claps, on the brief).

Mr. Robert P. Swartz, attorney for respondent Board of Education of the City of Paterson.

Mr. William F. Hyland, Attorney General, attorney for New Jersey State Board of Education (Mr. Mark Schorr, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

This is an appeal by a teacher from a determination of the Commissioner of Education regarding his entitlement to credit for military service pursuant to *N.J.S.A.* 18A:29-11. The petitioner did not pursue the administrative remedy available to him by filing an appeal with the State Board of Education in accordance with *N.J.S.A.* 18A:6-27. Nevertheless, all parties agree that the facts are not in dispute, that the resolution of the matter essentially concerns an interpretation of law and that the matter is ripe for determination. Accordingly we see no need to apply the doctrine of exhaustion of administrative remedies. See *Matawan Borough v. Monmouth Cty. Tax Bd.*, 51 *N.J.* 291, 297 (1968); *Deaney v. Linen Thread Co.*, 19 *N.J.* 578, 580-581 (1955).

The petitioner served for three years on active duty in the United States Marine Corps. He received his discharge from active duty in 1970 and commenced employment as a teacher by the Paterson Board of Education in January 1971. His salary was fixed at that time at the minimum salary step for a certified teacher with a Bachelor of Arts degree. He continued in employment until the end of the school year in 1975, receiving the normal increments applicable to a teacher without military service.

Petitioner claimed to be entitled to $4590 representing the difference between what he was paid and what he claims he should have been paid. The respondent Board of Education did not dispute petitioner's computation but contended that his claim was barred by laches and that his agreement to accept the entrance grade salary barred any claim for additional compensation.

The Commissioner determined that petitioner's claim was not barred by laches. He also determined that the establishment of petitioner's salary at the lowest step of the range for teachers with a bachelor's degree was permissible under *N.J.S.A.* 18A:29-9 but that petitioner was entitled to an adjustment increment of $150 a year as defined in *N.J.S.A.* 18A:29-6 "until the full three years of his military service had been recognized." The Commissioner directed the Paterson Board of Education to pay the petitioner the sum of $600 representing four adjustment increments of $150. The respondent Board of Education has not cross-appealed.

In construing a statute, full force and effect must be given, if possible, to every word, clause and sentence. *State v. Canola,* 135 *N.J. Super.* 224, 235 (App. Div. 1975), certif. den. 69 *N.J.* 22 (1975). A construction that will render any part of a statute inoperative, superfluous or meaningless is to be avoided. *State v. Sperry & Hutchinson Co.,* 23 *N.J.* 38, 46 (1956); *Hoffman v. Hock,* 8 *N.J.* 397, 406-407 (1952).

In our view, the Commissioner's determination failed to accord full force and effect to all relevant sections of the statute, *N.J.S.A.* 18A:29-1, *et seq.* The operative language of *N.J.S.A.* 18A:29-11, insofar as it relates to this appeal, is as follows: "Every member who . . . hereafter shall serve, in the active military or naval service of the United States . . . shall be entitled to receive equivalent years of employment credit for such service as if he had been employed for the same period of time. . ." The clear import of this section of the statute is that petitioner's starting salary should have been fixed by the local school district at the minimum step he would have attained had he been employed for the three years he served in the military forces. The legislative use of the word "shall" ordinarily indicates that the statute is intended to have an imperative rather than a permissive effect; the intent of the legislature is to be gathered from the context in which the words appear. *Harvey v. Essex County Board of Freeholders,* 30 *N.J.* 381, 391-392 (1959). It is true, as the Commissioner observed, that *N.J.S.A.* 18A:29-9 authorizes a school district to place a newly employed teacher at an initial place on the salary schedule as may be agreed upon between the member and the employing board of education. Nothing in the language of that section, however, suggests that the legislature intended to authorize a waiver of or a departure from the requirement of *N.J.S.A.* 18A:29-11 that credit be given for military service. See *Bd. of Ed. Englewood v. Englewood Teachers,* 64 *N.J.* 1, 7 (1973).

The determination of the Commissioner is modified and the respondent Board of Education of the City of Paterson is directed to compensate petitioner in the sum of $4590, representing the additional compensation he would have received during the years of his employment had he been given proper credit for his years of military service.

Thelma Wisner,

Petitioner-Appellant,

v.

Harold Y. Bills, Monmouth County Superintendent of Schools, Monmouth County,

Respondent-Appellee.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, October 29, 1976

For the Petitioner-Appellant, Pickett & Jennings (Robert T. Pickett, Esq., of Counsel)

For the Respondent-Appellee, William F. Hyland, Attorney General of New Jersey (Mark Schorr, Deputy Attorney General)

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

April 6, 1977

State of New Jersey
Department of Education
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