NEW JERSEY SCHOOL LAW DECISIONS

Indexed

January 1, 1981 to December 31, 1981

vol. 1

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

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FRED G. BURKE
COMMISSIONER OF EDUCATION

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

DECISIONS RENDERED BY THE STATE BOARD OF EDUCATION
SUPERIOR COURT AND SUPREME COURT
1981

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 3216-80

AGENCY DKT. No. 413-10/79A

IN THE MATTER OF:

ROBERT VIRGIL,

Petitioner,

v.

WEST ORANGE BOARD OF EDUCATION,

Respondent.

Record Closed: October 8, 1980

Received by Agency: 11/21/80

Decided: November 17, 1980

Mailed to Parties: 11/25/80

APPEARANCES:

Nancy Iris Oxfeld, Esq. for Petitioner (Rothbard, Harris & Oxfeld, attorneys)

Samuel A. Christiano, Esq. for Respondent

BEFORE **KEN R. SPRINGER,** ALJ:

This matter concerns whether a board of education acted properly in withholding a teacher's employment and adjustment increments for the 1979-80 school year under N.J.S.A. 18A:29-14 because of alleged excessive absenteeism. On October 24, 1979, petitioner Robert Virgil ("Virgil") filed a verified petition with the Commissioner of Education against respondent West Orange Board of Education ("Board") claiming that the denial of his increment, amounting to $1,100 over his previous salary, was arbitrary, capricious and unreasonable. Originally, this case was consolidated for hearing together

with several related cases in which similar claims were brought by other teachers in the same school district. A hearing was scheduled for April 14, 1980. Due to medical reasons, Virgil was unable to attend that hearing, so his case was severed from the others and set down for a separate hearing at a later date. Meanwhile, the related cases proceeded to immediate hearing, resulting in a determination adverse to the teachers involved. Angelucci, et al. v. West Orange Bd. of Educ., OAL DKT. No. EDU 5461-79 (decided July 17, 1980), adopted by the Commissioner of Education, 1980 S.L.D. (decided September 15, 1980).

Since the outcome of each increment withholding case may depend upon the particular facts, a hearing was held on July 29, 1980 to develop the facts in Virgil's case. Stipulations reached at a prehearing conference have been listed below as factual findings No. 1 through 4. Witnesses who testified and documents considered in deciding this case are listed in the appendix. Upon receipt of proposed findings of fact and conclusions of law submitted on behalf of the parties, the record closed as of October 8, 1980.

As in Angelucci, the factual differences between the present parties were very narrow. Here the Board questioned the frequency with which Virgil happened to be absent on Fridays, but did not otherwise challenge the legitimacy of the reason which kept Virgil out of school. Nor did the Board express any dissatisfaction with the quality of Virgil's performance while he was actually in the classroom. Rather, the factual disagreement revolved around the effect of repeated teacher absences on the continuity of instruction for the students, and also on whether Virgil had received sufficient notice that continued absences for whatever cause could result in the withholding of future pay increases.

Virgil, a science and math teacher, testified that his absences were caused by emotional problems arising from his transfer to another teaching position. Until September 1978, Virgil had been assigned to Lincoln Junior High School where he primarily taught general science classes to ninth graders. He felt a personal loyalty to his school, having taught there for 16 years, and was deeply involved in outside school activities such as chaperoning dances and coaching basketball. During his years at Lincoln School, he had developed strong ties to the local community and had made many friends.

With only 24 hours warning, Virgil was suddenly notified in May 1978 that he would be reassigned to Edison Junior High School starting in September 1978. At Edison, Virgil's assignment was switched to teaching eighth grade science exclusively. Even though Virgil had a scientific background, he did not think that he was properly qualified to teach that subject. In his words, he felt like a fraud whenever he stood up in front of his class to teach earth science. He realized that the transfer was made at the request of the school administrators because of his proven ability to handle a classroom of difficult students. Moreover, he recognized that the Board had the legal authority to transfer him to any other teaching assignment within the scope of his certification. Nonetheless, he complained that he had been treated "like a piece of meat," and that the best interests of his students had not been adequately considered. Other teachers at Lincoln who were more experienced in teaching earth science were transferred to general science, while he was taken out of general science which he knew how to teach and assigned instead to teach earth science.

As a result of his involuntary transfer, Virgil claimed to have experienced an intense emotional reaction which caused him to miss school. After learning about the transfer, he lay awake all night thinking about the consequences and suffering from a painful throbbing sensation in his head. During the following months, the stress and tension kept building regardless of Virgil's attempts to cope with the situation. His attendance record worsened because he found it necessary to back away from the source of his anxiety to obtain relief. Eventually, the pressures became so unbearable that Virgil sought psychiatric help and took an extended leave of absence from his teaching duties. Currently, he is receiving regular treatment from a professional psychologist.

Neither side presented any medical evidence relating Virgil's psychological condition to his increasing absentee rate. Representatives of the Board acknowledged that Virgil was never asked to provide any medical certifications to justify his absences. Despite the fact that he was under a psychologist's care, at the hearing Virgil did not offer any documentation identifying his illness or supporting his contention that it interfered with his ability to attend classes.

School attendance records revealed that Virgil missed teaching classes on 16 days during the 1978-79 school year. Of these 16 days, 9 were Fridays. Although Virgil agreed that this coincidence looked funny to an observer, he did not give any satisfactory

explanation as to why it had occurred. Over the past years, Virgil's attendance had been much better. For example, in 1977-78, he was absent 8 days, in 1976-77 he was absent 5 days and in 1975-76 he was absent 10 days. Because he had used less than 10 days per year during many of the preceding years, he had accumulated 58 1/2 sick leave days by the end of the 1978-79 school year. Therefore, Virgil could not understand why the Board objected to his taking 16 days off in that particular year.

However, Virgil admitted that on May 29, 1979 he was informed by his principal that his attendance record for the 1978-79 school year was unsatisfactory. Notwithstanding this criticism, Virgil was absent three more times during the next seven days. Moreover, at the beginning of the school year Virgil had received a set of guidelines for the evaluation of teachers. One of the evaluative criteria expressly mentioned in these guidelines was teacher attendance.

At a meeting of the Board on August 14, 1980, the sponsor of the motion to deny a salary increment to Virgil gave his reasons for this action. He objected to "the high cost of hiring substitutes" and also to the "dislocation that occurs when substitute help is not available." More importantly, he noted that "the quality of instruction suffers when permanent employees are replaced by temporaries." (Exhibit J-4).

Two qualified school administrators were called by the Board to express opinions on the harmful effect of frequent teacher absences. An assistant superintendent thought that a substitute cannot possibly be as effective as a regular teacher who knows the individual needs of each student. In his view, such absences disrupt the continuity of the educational program. An intermittent pattern of repeated absences like Virgil's, he added, is more detrimental to the learning process than a single continuous absence for an equivalent length of time. He further described the difficulty which West Orange had encountered in finding suitable substitutes, especially in the field of science. Similarly, the assistant principal of Edison Junior High School explained that seven different substitutes had to be procured to cover Virgil's absences in 1978-79. None of the substitutes which the administration could obtain were science teachers. He too felt that a substitute does not possess the knowledge to carry out the lesson plan with the same degree of success as the regular teacher.

After careful review of the testimony and the documentary evidence, I FIND the following facts:

1. Petitioner Virgil is a tenured teacher in the West Orange School District.

2. Virgil was notified by letter dated April 27, 1979 from Theodore D'Alessio, Superintendent of Schools of the West Orange School District, that the Board had approved his appointment for the 1979-80 school year.

3. In July 1979, the Board voted to approve the 1979-80 contract with the West Orange Education Association.

4. On August 14, 1979, the Board voted to withhold Virgil's employment increment and adjustment for "excessive absenteeism." Notification of this vote was mailed to Virgil on August 15, 1979.

5. Virgil received advance notice that teacher attendance was one of the evaluative criteria on which performance would be judged. Furthermore, Virgil continued his pattern of absences even after a conference with his principal at which his poor attendance record was brought to his attention. As an experienced teacher, Virgil was well aware of the negative impact of excessive absences on the continuity of instruction.

6. Virgil missed 16 days in 1978-79, of which 9 absences occurred on Friday. No satisfactory explanation was given as to why his illness should recur more frequently on Friday than on any other day. On these occasions, Virgil's students were deprived of the benefits of a regular teacher one day each week while Virgil enjoyed a long three-day weekend.

7. No medical proof was presented to establish the legitimacy of Virgil's absences.

8. Irrespective of the reason for these absences, frequent absences of the regular teacher inevitably have an adverse effect on the learning which

takes place in the classroom. The children of West Orange are deprived of the substantial benefits derived from a full-time teacher who knows their individual needs and rate of progress. Often it is difficult for school administrators to find an available substitute. Even if available, no substitute can teach from a lesson plan with the same effectiveness as the regular teacher who is thoroughly familiar with the curriculum and understands his own students.

9. As established by expert testimony, Virgil's 16 absences in 1978-79 were excessive.

10. Considering the primary responsibility of the Board to provide a thorough and efficient education for the children in the district, it cannot be said that its determination to withhold Virgil's 1979-80 employment and adjustment increments was arbitrary, capricious or unreasonable.

Based on the facts adduced at the hearing and the applicable law, I **CONCLUDE** that the Board's discretionary exercise of its statutory authority to withhold increments should not be overturned in this instance.

Most of Virgil's arguments were previously considered and rejected in Angelucci, et al. v. West Orange Bd. of Educ., supra. Initially, it was observed that the burden of proving unreasonableness rests upon the party challenging the board's action. Following the ruling in Trautwein v. Bd. of Educ. of Bound Brook, unpublished opinion, Superior Court of New Jersey, Appellate Division, Docket No. A-2773-78 (decided April 8, 1980), certif. den. __ N.J. _____ (decided June 12, 1980), it was declared in Angelucci that,

> However harsh or unwise the policy adopted by the Board may appear to petitioners, it cannot be regarded as irrational or illogical in terms of the permissible objectives which the Board sought to accomplish. (at page 6)

Petitioner seeks to distinguish Trautwein by pointing out that there the teacher was absent for an average of 20.6 days per year over the course of many years, as compared to Virgil's absence of 16 days. Significantly, Trautwein was only absent 13 days in the year that her increment was actually withheld. But even assuming that

Trautwein represents a much worse example of absenteeism than Virgil, it would still be impossible to conclude that the Board acted arbitrarily and without any rational basis merely because it decided to draw the line at 16 absences rather than 20.6 absences in order to protect the quality of education in the district.

Another feature emphasized by petitioner is the lack of repeated warnings regarding excessive absenteeism. In the factual findings above, however, it was determined that Virgil was given adequate advance warning that excessive absenteeism would not be tolerated. He chose to ignore that warning at his own peril.

Finally, petitioner argues that he was discriminated against because he suffered a mental rather than a physical illness. On the same day that Virgil's increment was withheld, the Board also voted to withhold the increments of six other teachers, including Barbara Angelucci and Sheila Nehemiah, for essentially the same reason. Both Angelucci and Nehemiah attributed their absences to physical problems. Clearly Virgil was included in a general crackdown by the Board against excessive absenteeism, and was not singled out for special treatment because of the nature of his illness.

For the foregoing reasons, the determination of the Board of Education of West Orange to withhold Virgil's 1979-80 employment and adjustment increments is **AFFIRMED.**

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, FRED G. BURKE,** who by law is empowered to make a final decision in this matter. However, if Fred G. Burke does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

OAL DKT. NO. EDU 3216-80

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

DATE

KEN R. SPRINGER, ALJ

Receipt Acknowledged:

November 21, 1980
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

November 25, 1980
DATE

Ronald L. Parker/sg
OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

LIST OF WITNESSES

1. Robert M. Virgil
2. Gerald Lichtenstein
3. Frank D'Alonzo

LIST OF EXHIBITS

NUMBER	DESCRIPTION
J-1A	Attendance Record of R. Virgil for 1967/68 (1 page)
J-1B	Attendance Record of R. Virgil for 1968/69 (1 page)
J-1C	Attendance Record of R. Virgil for 1969/70 (1 page)
J-1D	Attendance Record of R. Virgil for 1970/71 (1 page)
J-1E	Attendance Record of R. Virgil for 1971/72 (1 page)
J-1F	Attendance Record of R. Virgil for 1972/73 (1 page)
J-1G	Attendance Record of R. Virgil for 1973/74 (1 page)
J-1H	Attendance Record of R. Virgil for 1974/75 (1 page)
J-1I	Attendance Record of R. Virgil for 1975/76 (1 page)
J-1J	Attendance Record of R. Virgil for 1976/77 (1 page)
J-1K	Attendance Record of R. Virgil for 1977/78 (1 page)
J-1L	Attendance Record of R. Virgil for 1978/79 (1 page)
J-1M	Attendance Record of R. Virgil for 1979/80 (1 page)
J-2	Summary of Salary, Absences and Assignment Records of R. Virgil for 1962/80 (1 page)
J-3	Letter dated August 9, 1979 from Superintendent of Schools to R. Virgil.
J-4	Minutes of the Special Meeting of the School Board dated August 14, 1979
J-5	Minutes of the Closed Meeting of the School Board dated August 14, 1979
J-6	Letter dated August 15, 1979 from Superintendent of Schools to R. Virgil.

J-7 Evaluation of R. Virgil dated February 16, 1968 (1 page)

J-8 Evaluation of R. Virgil dated March 1971

J-9 Evaluation of R. Virgil dated March 22, 1974 (1 page)

J-10 Evaluation of R. Virgil dated January 12, 1977 (observation) and January 21, 1977 (conference) (1 page)

J-11 Evaluation of R. Virgil dated March 2, 1977 (observation) and March 4, 1977 (conference) (1 page)

J-12 Final Evaluation of R. Virgil for 1976/77 (2 pages)

J-13 Contract 1978/79, 1979/80

P-1 Letter dated June 21, 1979 from R. Virgil to Mr. Carola in response to R-1

R-1 Letter dated June 15, 1979 from Mr. Carola to R. Virgil

R-2 Teacher's Supervision Packet dated September 26, 1979

ROBERT VIRGIL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law.

The Commissioner observes that exceptions were filed by petitioner pursuant to the provisions of N.J.A.C. 1:1-16.4a, b, and c.

Petitioner excepts to the determination by the Honorable Ken R. Springer, ALJ that it was reasonable to conclude from the facts herein that respondent's increment should be withheld. Petitioner argues that he was frequently absent Fridays because his emotions had so climaxed by the end of the week that he was too emotionally upset to teach on Friday. He states that he is currently receiving a disability pension from TPAF.

The Commissioner is constrained to observe that given the totality of circumstances in this matter he finds the action of the Board in withholding petitioner's 1979-80 employment and adjustment increments a proper one. The Board cannot be expected to effectuate a four day work week at full pay for selected teachers irrespective of the legitimacy of their reasons for absenteeism. To claim, as petitioner does herein, that Trautwein, supra, is not applicable because the number of listed absentee days is not identical places form over substance. Union Beach Board v. N.J.E.A et al., 53 N.J. 29, 39

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

January 2, 1981

ROBERT VIRGIL,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT-APPELLEE.	:	

Decided by the Commissioner of Education, January 2, 1981

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

For the Respondent-Appellee, Samuel A. Christiano, Esq.

The State Board of Education affirms the Commissioner's decision for the reasons expressed therein.

Ruth Mancuso opposed in the matter.

May 6, 1981

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5679-79

AGENCY DKT. NO. 332-1/79A

IN THE MATTER OF:

RICHARD KLINGER,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF CRANBURY, MIDDLESEX COUNTY,
Respondent.

Record Closed: October 10, 1980 Decided: November 19, 1980

Received by Agency: 11/24/80 Mailed to Parties: 11/26/80

APPEARANCES:

For Petitioner: **Joseph F. DeFino, Esq.** (Morgan & Falvo)

For Respondent: **Philip H. Shore, Esq.** (Golden, Shore, Zahn, & Richmond)

BEFORE **ERIC G. ERRICKSON**, ALJ:

Petitioner, a tenured teacher of physical education who has been employed by the Cranbury Board of Education (Board) for approximately twenty-one (21) years, alleges that the Board's action on April 11, 1979 reducing his working hours and salary to 7/10 of a full time position (J-2) was a violation of his tenure and seniority rights.

The Board, conversely, asserts that under its managerial prerogative, it properly abolished its two (2) full time physical education positions because of declining enrollment and established instead two (2) part time positions with reduced hours and salary for petitioner and its other physical education instructor.

PROCEDURAL RECITATION:

The Petition of Appeal was filed before the Commissioner of Education on August 10, 1979 together with a Notice of Motion for Interim Relief requesting that the Board immediately reinstate petitioner to a full time position. After a timely Answer had been filed by the Board, the Commissioner on November 21, 1979 issued an Order denying the emergent relief requested. Thereafter the matter was transferred to the Office of Administrative Law on December 9, 1979 as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. A Joint Stipulation of Facts was filed on April 9, 1980 after which a hearing was conducted at Freehold on July 16, 1980. Post hearing briefs were filed completing the record on October 10, 1980.

UNCONTESTED FACTS:

Petitioner is a physical education teacher who had been employed on a full time basis by the Board for twenty-one (21) years when this action was filed. The Board also employed during 1978-79 one (1) female physical education teacher on a full time basis. The hours and salary of both were reduced to 7/10 of full time basis by Board action in May 1979, effective September 1979. Thereafter, the female physical education instructor, who in May 1979 had not yet attained tenure, took a leave of absence and was replaced by a substitute on a 7/10 time basis.

The overriding issue presented is whether petitioner, within this factual context, was entitled by reason of tenure and seniority rights to continued employment on a full time basis.

TESTIMONY OF WITNESSES:

Petitioner testified that he teaches physical education classes which range in size from 14 to 34 pupils. He also testified that the Board's only other physical education

teacher is a woman who shares jointly the assignment duties and responsibilities for instruction of each and every one of those same classes. That this is so was corroborated by the Board's Administrative Principal (Principal).

Petitioner testified further that he was first advised in February 1979 by the Administrative Principal that his hours of employment and salary could be reduced in the ensuing year. He testified and the principal corroborated that he was never notified by anyone of the date or time when the Board would meet to consider taking action regarding his employment status for the 1979-80 school year. He further testified that he had never been notified of his seniority status after the Board effected its reduction in force.

The Principal testified that, because of declining enrollment, program reorganization, and budgetary problems, he had recommended that the Board reduce its physical education staff to 7/10 of one full-time position. He testified that, after the 1979-80 budget was initially prepared to provide for 7/10 time of one physical education teacher, the Board decided to more closely approximate the 1978-79 program by employing two (2) physical education teachers on the 7/10 time-salary basis. (J-1,2) The Principal testified that K-12 enrollment had declined in the past ten (10) years from 414 to 249 in 1979. (R-1) He also testified that a number of other part time positions have been created because of this decline. (J-3) When asked whether he believes one physical education teacher could teach a class of 34 pupils, he responded affirmatively citing former class sizes as large as 54.

FINDINGS ON ADDITIONAL RELEVANT FACTS:

Having considered the testimony of witnesses and the documents entered into evidence, I **FIND** that by a preponderance of credible evidence, the following facts have been established:

1) There was no compelling necessity arising from inflexibility of scheduling of pupils to compel the Board to hire two (2) part time physical education teachers.

2) Petitioner was by training and experience qualified to teach, without assistance from a co-teacher, the classes to which he was assigned or the smaller classes which he would have had with rescheduling of the school's 249 pupils into a larger number of smaller classes. This finding is grounded on the convincing testimony of both petitioner and the principal.

DISCUSSION AND DETERMINATION:

The Board unquestionably had the legal right to reduce the instructional time provided for physical education in its school. When acting to do so, however, it was obligated to act in compliance with the following applicable statutes and rules of the State Board of Education.

> "18A:28-10. Reasons for dismissals of persons under tenure on account of reduction
>
> "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."
>
> "18A:28-11. Seniority; board to determine; notice and advisory opinion
>
> "In the case of any such reduction the board of education shall determine the seniority of the persons affected according to such standards and shall notify each such person as to his seniority status,***"
>
> "N.J.S.A. 18A:28-13 Establishment of standard of seniority by the commissioner
>
> "The Commissioner in establishing such standards shall classify insofar as practicable the fields or categories of *** teaching or other educational services and may, in his discretion, determine seniority upon the basis of years of service and experience within such fields or categories of service as well as in the school system as a whole, or both."
>
> "N.J.A.C. 6:3-1.10 Standards for determining seniority
>
> "(a)*** "(h) Whenever any person's particular employment shall be abolished in a category, he shall be given that employment in the same category to which he is entitled by seniority. If he shall have insufficient seniority for employment in the same category, he shall revert to the category in which he held employment prior to his employment in the same category, and shall be placed and remain upon the preferred eligible list of the category from which he reverted until a vacancy shall occur in such category to which his seniority entitles him.***"

Petitioner's full time employment and the full time employment of another physical education teacher were abolished and in its stead the Board established two (2)

part time positions to which they were then appointed. Petitioner, however, was tenured with twenty-one (21) years of service seniority. By contrast, the other teacher was, at that time, not tenured. Nor was her replacement who was hired as a substitute tenured.

The New Jersey Supreme Court in Board of Education of the Town of Kearny v. Vincent P. Horan, et al, 11 N.J. Misc. 751 (1933) enunciated the principle of long standing which in the instant matter is controlling:

> "***The opinion rendered by this court in Seidel v. Board of Education of Ventnor City, 110 N.J.L. 31; 164 Atl. Rep. 901, seems dispositive of the question. It was there held, ***that a teacher in a public school,*** who, by service for three years or more, has come under the protection of the statute providing for an indefinte period thereafter may not be dismissed for reasons of economy while other teachers not so protected, whose assignments such teacher is competent to fill, are retained under employment.*** [T]he Seidel case is authority for the proposition that that movement for economy is not to be accomplished by dismissing teachers who are under the protection of the statute providing for indefinite tenure while other teachers not so protected are retained.***
>
> "As was said in the Seidel case:
>
> '*** [T]he protection afforded by the statute would be little more than a gesture if such local board were held entitled to make that reduction by selecting for discharge teachers exempt by law therefrom and retaining the non-exempt. If such reduction is to be made at all, and a place remains which the exempt teacher is qualified to fill, such teacher is entitled to that place as against the retention of a teacher not protected by the statutes.'***"
>
> (Emphasis supplied.) (11 N.J. Misc. at 752-753

See also Marie Sheridan v. Board of Education of the Township of Ridgefield Park, Bergen County, 1976 S.L.D. 995 and Mary Ann Popovich v. Board of Education of the Borough of Wharton, 1975 S.L.D. 745.

The Board's actions which resulted in fewer hours of employment and decreased salary for petitioner constituted a reduction in force as contemplated by N.J.S.A. 18A:28-10 et seq. and N.J.A.C. 6:3-1.10(h). Petitioner had seniority rights which exceeded any rights to continued employment of the untenured physical education teacher. Being untenured, she had no seniority rights at all. Horan, supra; Popovich, supra. I CONCLUDE, therefore, that, when the Board chose to continue to provide for more than the equivalent of one (1) full time instructional position in physical education

effective September 1979, it was obligated to continue to employ and compensate petitioner on a full time basis. Popovich, supra. I FURTHER CONCLUDE that the Board's action abolishing his full time position, while it may have been an act resulting from nescience, was within this factual context improper. To hold otherwise would subvert the expressed intent of the Legislature and the State Board to insure that, when effecting a reduction in force, the more senior tenured teaching staff members will continue, without reduction in time and salary, as others with less seniority or without tenure or seniority are released.

Petitioner is entitled to be made whole on these expressed principles of education law. To address the remaining arguments concerning the technicalities of the Board's compliance or noncompliance with notice of meetings, seniority status and the propriety of the Board's voting procedures would serve no useful purpose, since the end result would not be altered.

Based on the above stated conclusions and interpretations of law, IT IS ORDERED that the Board reinstate petitioner retroactively to his former full time teaching position effective the beginning of the 1979-80 school year, together with all salary, emoluments and benefits to which he was entitled as a full time teacher.

This recommended decision may be affirmed, modified or rejected by the COMMISSIONER OF THE DEPARTMENT OF EDUCATION, FRED G. BURKE, who by law is empowered to make a final decision in this matter. However, if Fred G. Burke does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

OAL DKT. NO. EDU 5697-79

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

November 19, 1980
DATE

Eric G. Errickson
ERIC G. ERRICKSON, ALJ

Receipt Acknowledged:

November 24, 1980
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

November 26, 1980
DATE

Ronald L. Parker
FOR OFFICE OF ADMINISTRATIVE LAW

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EXHIBITS

J-1 Cranbury Township Board of Education Minutes, March 14, 1979

J-2 Cranbury Township Board of Education Minutes, April 11, 1979

J-3 Cranbury Township Board of Education Minutes, May 23, 1979

P-1 Cranbury Township Board of Education Agreement With Teachers Under Contract

P-2 Letter from Charles Argento to Richard Klinger, dated May 1, 1979

R-1 Cranbury School Enrollments, 1963-77

RICHARD KLINGER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CRANBURY, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law.

The Commissioner observes that timely exceptions and reply exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b, and c.

It is observed that petitioner concurs with Judge Errickson's ultimate determination of this matter which grants the relief requested by him herein. However, petitioner does take exception to the fact that a determination with respect to the issue involving the propriety and legality of the Board's action to abolish his full-time teaching position in the first instance was not reached by Judge Errickson.

The Board in its reply to petitioner's exception rejects this contention and considers any determination with respect to said issue merely petitioner's attempt to place form over substance. The Board does, however, take issue with Judge Errickson's determination that petitioner is entitled to be restored to his full-time teaching position as of the 1979-80 school year by virtue of the facts set forth in the record of the matter controverted herein. In this regard the Board takes the position that the action complained of by petitioner fell within its discretionary authority to organize and structure its instructional programs as it deems necessary in view of educational considerations and financial constraints.

The Board argues that its actions are entitled to a presumption of correctness absent a showing of impropriety or legality. It maintains that petitioner has failed to show by a preponderance of credible evidence that such was the case herein. The Board contends that the issue raised herein with respect to petitioner's seniority is spurious inasmuch as it does not deny the fact that he is the only one of the two physical education teachers with tenure and seniority status. It does insist, however, that such facts are not pertinent in the adjudication of this matter.

Finally, the Board argues that, should petitioner prevail, the sum of money owing and due him by the Board as a full-time teaching staff member for the employment periods controverted herein should be mitigated by any sources of income he may have received from alternative employment. The Board in support of its position herein relies on a number of prior decisions of the Commissioner and the courts which are included in its exceptions and incorporated by reference herein. (Respondent's Exceptions to the Initial Decision, at pp. 1-7)

Petitioner likewise relies on similar prior case law of the Commissioner and the courts in rejecting the Board's exceptions to the initial decision. (Petitioner's Reply to Exceptions)

Petitioner maintains that his seniority to a full-time position is relevant to this determination inasmuch as the Board does not deny he has legally acquired such entitlement and, further, that the facts of this matter clearly establish that only one full-time physical education teacher is necessary to provide an adequate program for the pupils in the Cranbury School District.

The Commissioner has carefully reviewed and considered the exceptions of the parties filed in this matter.

In the Commissioner's judgment it is clear that the Board has the authority to promulgate rules and regulations and take those actions it deems necessary for the efficient management and operation of its school district.

Such discretionary authority vested in local school districts by the Legislature may not, however, contravene other statutory mandates. Given the facts set forth in the record of this matter, the Commissioner may not ignore the legal citations and applicable case law set forth by Judge Errickson in support of his conclusions of law giving rise to his initial determination of the instant matter. The Commissioner affirms the findings and determinations of Judge Errickson and hereby adopts them as his own with one modification.

The Board is directed to reinstate petitioner retroactively to his former full-time teaching position effective as of the beginning of the 1979-80 school year with all salary and other emoluments owing and due him. The amount of petitioner's full-time salary for said periods of employment is to be mitigated by those earnings already received in his less than full-time position together with those earnings, if any, he may have received from alternative employment.

Accordingly, the relief requested by petitioner is hereby granted in accordance with the terms set forth in the Commissioner's directive herein.

COMMISSIONER OF EDUCATION

January 8, 1981

Pending State Board of Education

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4595-79
AGENCY DKT. NO. 383-9/79A

IN THE MATTER OF:

Mary K. Comaskey,
Petitioner,
v.
Fort Lee Board of Education

Record Closed: October 25 1980 Decided: November 21, 1980

Received by Agency: 11/25/80 Mailed to Parties: 11/26/80

APPEARANCES:

Marcia K. Baer, Esq., for Petitioner
(Hogan & Palace, attorneys)

Irving C. Evers, Esq., for Respondent
(Parisi, Evers & Greenfield, attorneys)

BEFORE **NAOMI DOWER-LABASTILLE,** ALJ:

Mary K. Comaskey (Petitioner) disputes her seniority calculation and termination of her employment as a teacher by the Fort Lee Board of Education (Board). Specifically, she alleges two maternity leaves must be included in calculating her seniority status pursuant to N.J.A.C. 6:3-1.10. The matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

At prehearing it appeared that, contingent upon discovery and subsequent stipulations, the controversy might be determinable without hearing upon a motion for dismissal. This proved to be the case. The factual record therefore includes:

P-1 Petitioner's factual stipulations, including documentary exhibits

R-1 Respondent's admissions in response to the stipulations

If petitioner's legal position were sustained, teacher Mildred Neiland, whose employment includes no maternity or other extended unpaid leave, would incur possible termination and petitioner would gain reinstatement. Neiland is not a party to this case, but the disposition herein, if accepted, does not require participation and notice to her. There is no evidence that any teacher against whom petitioner contends for seniority (or any teacher in the system) has been granted seniority credit for any extended unpaid leave period. Had there been such evidence, the hearer would have required notice to such persons as necessary parties.

Petitioner argues that the Board's rule in effect at the time of her first maternity leave mandated an eighteen (18) month unpaid leave and that her leave was therefore not voluntary. Castellano v. Linden Bd. of Ed., decided by the Appellate Division on March 27, 1978 (158 N. J. Super. 350), held that no Board, whether by rule or negotiated contract, could mandate the taking of extended maternity leave, since such conduct would violate the Law Against Discrimination. That holding was affirmed by our Supreme Court (79 N.J. 407). Unlike Castellano, petitioner did not contest the Board's maternity leave rule; the holding cannot be applied retroactively here to other parties in different circumstances. Absent timely protest, I cannot conclude that petitioner's first leave was involuntary. In any event, voluntariness of extended leaves is not the dispositive legal factor here.

When petitioner received her second maternity leave, from September 1978 to September 1979, it was under a negotiated contract which permitted a teacher to request such leave without pay and required that the Board grant the request subject to certain conditions. The only other extended leave noted in the contract (additional sick leave allowance) is referenced to another section describing the conditions under which teachers can obtain partial salary if extended leave due to illness or injury is approved by the

Board's medical director. Petitioner does not argue that her second leave was involuntary, but that the contract provision denying time credit toward tenure, placement on the salary guide or seniority, controverts N.J.S.A. 18A:28-10 and N.J.S.A. 10:5-12(a).

If petitioner had presented evidence that the Board granted credits for extended leaves without pay for other noneducationally related purposes and denied such credit for maternity leave, she would have presented a strong case for a conclusion of discrimination based upon sex. Petitioner's argument that the extended sick leave provision of the contract does not specify the effect of that leave on seniority credit shows no sexual discrimination; it applies equally to men and women, and there is no reason to believe it would not be applied in the event that a woman's illness was pregnancy related.

In New Jersey it is clear that tenure can only be attained upon service during employment for the requisite period. Canfield v. B.O.E. of Pine Hill, 51 N.J. 400 (1968). In Lascari v. Bd. of Ed. of Lodi, 36 N.J. Super. 428 (App. Div. 1955), in interpreting the same seniority rule language in effect today, the court did not count a two-year leave of absence for personal illness in the total seniority of a Board employee. In Hussey v. Bd. of Ed. of Westfield, 1976 S.L.D. 1019, the Commissioner upheld Board policy not to credit time spent on maternity leave for placement on the salary guide unless the teacher served for more than one semester during a school year.

The court recently commented in In re Fidek, 76 N.J. 340 at 344 (1978) with reference to the Civil Service law and rules: ". . .[T] he Commission is justly concerned that if seniority credit were obtained with every approved leave, those who have remained at work developing their skills would suffer unfairly when promotional and layoff decisions are made. Such a result would not be in accord with the salutary objective of the Civil Service System." This rationale was espoused by the Commissioner in interpreting N.J.A.C. 6:3-1.10(b). See Berkowicz et al. v. Bd. of Ed. of Scotch Plains-Fanwood Regional School Dist., 1980 S.L.D. _____ (decided July 29, 1980) reversing a decision in OAL DKT. NO. EDU 3931-79.

The meaning of the last sentence in N.J.A.C. 6:3-1.10(b) is that the then existing seniority status a teacher attains prior to occasional absences and leaves of absence shall remain the same upon the employee's return to work. The rule precludes the divestiture of accumulated job seniority disapproved in Nashville Gas Co. v. Satty, 54

L. Ed. 2d. 356 (1977) and forbidden under the 1978 amendments in 42 U.S.C. 2000e § 701 (K) if applied to pregnant women and not to other persons similar in their ability or inability to work.

The reasons for occasional absences or leaves of absence are not relevant to the intent of the rule. Thus, an attack upon the rule or a Board's conduct or negotiated contract following the rule on grounds of sexual discrimination cannot succeed. The petitioner points to no provisions in the Board's contract which grant seniority credit for extended leaves without pay. The Board's factual statement that it has not done so is uncontroverted.

No invidious discrimination against pregnant women is engendered by the Board's contract or conduct in refusing to grant seniority credit for extended unpaid leaves. If petitioner's argument prevails, the inequity of the result is readily seen: petitioner, with about three school years of leave, would obtain the same seniority credit as a woman who took no leave or one who chose to bear her children and return to work after a short disability leave. If the system complained of is discriminatory, it is fairly and properly discriminatory in granting service credits to those who are willing and able to perform services. Petitioner's proposition suggests that pregnant women who opt to take maternity leave should be accorded more favored treatment than women who do not. Consistent with that assessment, petitioner argues that the hearer may take judicial notice of the public policy in favor of reproduction of the species. I know of no such universal public policy. Indeed, given the arguably finite nature of present economic resources, considerable controversy would attend the adoption of such a precept as public policy.

Based upon the stipulations, admissions and included documents, I FIND:

1. The Board hired petitioner on May 6, 1968 to commence work in September 1968.

2. Petitioner attained tenure in September 1971.

3. The Board placed petitioner on maternity leave of absence from September 1, 1972 to September 1, 1974 pursuant to the then governing regulations which mandated an 18-month maternity leave.

4. Petitioner returned to her full-time teaching position in September 1974.

5. Petitioner commenced a second maternity leave ending September 1, 1979 either on January 3, 1978 (Board's allegation) or September 1, 1978 (petitioner's allegation). By the Board's calculation the leave was seven months longer than by petitioner's calculation.

6. The negotiated contract applicable at the time of petitioner's second maternity leave made such leave permissive and not mandatory. It noted the leave would not result in credit toward seniority. It had no provision for seniority credit for any extended leave without pay.

7. Petitioner would have returned to full-time teaching on September 1, 1979.

8. On June 26, 1979, the Board terminated the employment of petitioner and of Magda Eshel effective June 30, 1979 as a result of a reduction in teaching staff positions.

9. Excluding time absent on maternity leave, petitioner is entitled to eight years credit for seniority as of September 1, 1979 or seven and one-half years, the difference resulting from the variation described in paragraph 5 above.

10. If time spent on maternity leave is concluded to be includible in time for seniority purposes, petitioner would be entitled to claim eleven years of service as of September 1, 1979.

11. Petitioner is certified in Spanish and French and taught in the Foreign Language Department.

12. Prior to the Board's June 26, 1979 resolution of termination, the Board employed eleven teachers in the Foreign Language Department, including petitioner and Magda Eshel.

13. Three of the eight teachers of foreign language as of September 1, 1979 had the same or less seniority as petitioner if her time spent on maternity leave is included:

    John Battaglia, 11 years;
    Stella Kokolis, 5-6 years;
    Mildred Neiland, 10 years.

    One teacher, Vincent Taffaro, with seven years is currently teaching English.

14. Of the three teachers listed above, two, namely John Battaglia and Mildred Neiland, teach Spanish, a subject area in which petitioner is certified. Their seniority is not affected by maternity leave.

15. Magda Eshel, who was terminated at the same time as petitioner, was on maternity leave from February 1, 1973 to

September 1, 1974. If leave were counted for seniority purposes, her total period of employment would be less than nine years, and her discharge would not be affected by the outcome of petitioner's case. The Board does not admit or deny this paragraph, but states it is immaterial.

16. The Board's policy is not to grant seniority credit for extended leaves without pay. Such credit has not been granted within the knowledge of the affiant assistant superintendent.

I CONCLUDE, in accordance with the findings and discussion of the legal issues above, that petitioner's seniority calculated without credit for extended unpaid leaves of absence for maternity is correct and petitioner is not entitled to reinstatement after termination of employment due to the abolition of positions for reasons of economy. I CONCLUDE N.J.A.C. 6:3-1.10, properly interpreted, mandates this result and that neither the rule, the negotiated contract nor the facts as applied to petitioner are violative of N.J.S.A. 18A:28-10, N.J.S.A. 10:5-12(a) or 42 U.S.C. 2000e § 701 (K).

It is therefore ORDERED that the petition of Mary K. Comaskey be DISMISSED WITH PREJUDICE.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, FRED G. BURKE,** who by law is empowered to make a final decision in this matter. However, if Fred G. Burke does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

November 31, 1980
DATE

Naomi Dower-LaBastille
NAOMI DOWER-LABASTILLE, ALJ

Receipt Acknowledged:

November 25, 1980
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

December 26, 1980
DATE

Ronald L. Parker
FOR OFFICE OF ADMINISTRATIVE LAW

gyd

MARY E. COMASKEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law.

The Commissioner observes that exceptions to the initial decision were filed by petitioner pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Petitioner in her exceptions rejects the findings and determination of Judge Dower-LaBastille denying her seniority credit for her maternity leaves of absence while in the Board's employ on the following grounds:

1. The Board never informed her of her seniority status until it determined to abolish several teaching positions, including her own, at the conclusion of the 1978-79 school year.

2. Petitioner rejects Judge Dower-LaBastille's determination denying her seniority credit for each of her maternity leaves of absence while in the Board's employ. Petitioner's position in this regard is that the Board was without authority to mandate that she take her first maternity leave as of the 1972-73 school year in light of the subsequent ruling of the Court in Castellano, supra. Moreover, petitioner argues that during her second voluntary maternity leave of absence she was led to believe that seniority credit would accrue to her pursuant to N.J.A.C. 6:3-1.10(b) and that it was not until the Commissioner rendered his decision in Berkowicz, supra, that she realized such seniority credit would be denied to her. It is petitioner's position that she should not be penalized through the loss of her seniority credit while on her first and second maternity leaves of absence by virtue of the Board's illegal action and by the ambiguity the language set forth in N.J.A.C. 6:3-1.10(b).

The Commissioner has carefully considered and reviewed the exceptions hereto filed by petitioner. The Commissioner

finds and determines said exceptions to be without merit for the reasons expressed by Judge Dower-LaBastille in her initial decision rendered in this matter. The Commissioner adopts those findings and determination set forth in the initial decision as his own.

Accordingly, the instant Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

January 9, 1981

MARY K. COMASKEY,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,	:	DECISION
RESPONDENT-APPELLEE.	:	

Decided by the Commissioner of Education, January 9, 1981

For the Petitioner-Appellant, Newman & Baer (Marcia K. Baer, Esq., of Counsel)

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

The State Board of Education affirms the Commissioner's decision for the reasons expressed therein.

May 6, 1981

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
AGENCY DKT. NO. 337-10/75

IN THE MATTER OF:

PETER C. FUJARCYK,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,
Respondent.

Record Closed: April 3, 1979
Received by Agency: 11/26/80

Decided: November 25, 1980
Mailed to Parties: 12/2/80

APPEARANCES:

John Cervase, Esq., for Petitioner

Marvin W. Wyche, Esq., for the Respondent

BEFORE **LILLARD E. LAW,** ALJ:

Petitioner, a teaching staff member who acquired a tenure status as a supervisor of recreation in the employ of the Board of Education of the City of Newark (Board) alleges that his employment was improperly and illegally terminated on June 30, 1975 and asserts that he had more seniority than those individuals employed by the Board to replace him. The Board denies the allegations and asserts that it properly abolished petitioner's title of supervisor of recreation and reassigned him to the position of director which petitioner formally held.

A hearing was conducted in this matter on January 28, March 22 and May 11, November 21, 1977 and January 17, 1978. Thereafter, the parties submitted Briefs and Memorandum of Law and the matter was closed on April 2, 1979.

Subsequently, on July 2, 1979 the matter was transferred to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

STATEMENT OF FACTS

1. Petitioner had been in the Board's employ for a period of forty-two (42) years in its Department of Recreation and taught under a physical education teachers certificate issued December 1, 1941.

2. Petitioner was first employed by the Board for the 1932-33 school year to the position of play leader without a valid teaching certificate having been issued by the Board or the New Jersey Department of Public Instruction.

3. Petitioner had not acquired a teacher status with the Board between the school years 1932-1936.

4. In the 1934-35 school year petitioner was promoted from play leader to assistant director to director of the Lafayette Playground and Community Center and held such position until 1954.

5. Petitioner has held the title of supervisor of recreation since 1954.

6. Petitioner was issued a Permanent Subject Supervisor Certificate in physical education by the New Jersey Department of Education dated June 18, 1957.

7. Petitioner was in receipt of a letter dated June 24, 1975 from the Board's Assistant Superintendent in charge of Personnel which stated, in part, as follows:

> "***This is to inform you that due to a lack of funds available for the 1975-76 school year, it is necessary to terminate your present position effective at the end of the work day on June 26, 1975.
>
> ***You will be reassigned to a position based on your status prior to promotion to your present position.***" (P-11) (Emphasis in text)

8. On August 19, 1975, at a special public meeting, the Board passed a resolution to eliminate several positions due to budget reductions as well as petitioner's position of Supervisor of Recreation effective July 1, 1975 (Exhibit B) (R-1)

9. On August 26, 1975, at its regular public meeting, the Board passed a resolution to transfer petitioner from the position of Supervisor of Recreation to Director at the Montgomery School effective September 1, 1975. (Exhibits C and D) (R-1)

10. On September 18, 1975 petitioner was in receipt of a letter from the Board Secretary which stated:

> "At the meeting of the Board of Education held August 26, 1975, you were granted a transfer from Supervisor of Recreation to Director of Recreation, Montgomery Street Elementary School, effective September 1, 1975.***". (P-18)

11. Petitioner did not report for duty on September 1, 1975 or thereafter during the course of these proceedings and was on sick leave of absence.

12. As the result of a reduction in its 1975-76 budget current expenses the Board effectuated a reduction in forces of approximately 1700 positions.

13. Approximately twenty-five (25) to thirty (30) positions in the Board's Department of Physical Education and Recreation were reduced in force for the 1975-76 school year.

TESTIMONY

Petitioner testified that prior to July 1, 1975 he held the position of Supervisor of Recreation along with three other individuals. His responsibilities included the supervision of approximately twenty-five (25) schools with approximately fifty-two (52) employees for after school playground and recreation activities between the hours of 3 p.m. and 9 p.m. each school day. He stated that the four supervisors were required to work one month each during the summer months and were granted one month vacation.

He testified that three (3) of the four (4) supervisory positions were terminated by the Board in June 1975. (P-11)

Petitioner testified that he interpreted the notice of June 24, 1975 (P-11) as the termination of his services with the Board rather than a termination of his position as supervisor. He stated that between the time he was in receipt of the June 24, 1975 (P-11) notice and the end of the 1974-75 school year, no one had informed him or notified him that he was to be demoted in rank to his last tenured position of Director of Recreation and reassigned for the 1975-76 school year. Petitioner also admitted that no one had notified him that he had been dismissed from the Board's employ.

Petitioner claims that he was duly certificated and had more seniority than those individuals who assumed his supervisory duties subsequent to his demotion from supervisor to director. He claims that the Board should have assigned him to one of those positions rather than the individuals who had less seniority. He further asserts that the Board failed to employ him for the summer program in 1975, however, admitted that he had received his "vacation pay" of one month for 1975.

Petitioner testified that at the end of the 1974-75 school year he applied for and was granted unemployment compensation for six or seven weeks during the summer of 1975. He stated that he was given notice by the Board to report to his duty station as a Director of Recreation on September 2, 1975, however, he did report for duty because he was in a very poor emotional state. He admitted that he was in receipt of his bi-monthly paychecks in September 1975 and thereafter, and at the same rate of pay he received as a supervisor.

The Board's Assistant Superintendent in charge of Personnel testified that the Board was faced with a budget reduction for its 1975-76 school year which required the termination of 1,700 professional and non-professional positions. He stated that the 1975-76 school budget provided for one (1) Supervisor of Recreation and that the remainint three (3) supervisors would be demoted to their former tenured positions. He testified that the individual with most seniority was retained as a Supervisor of Recreation while petitioner was assigned to his last tenured position of Director of Recreation and the remaining two (2) individuals voluntarily retired.

With regard to petitioner's assertion that individuals with less seniority had been assigned to petitioner's former position of Supervisor of Recreation, the Assistant Superintendent testified that the playgrounds went unsupervised for the first half of the 1975-76 school year from September 1975 until January 1976. He testified that in January 1976 the daytime Physical Education Supervisors volunteered to supervise the after school playground and recreation activities. He stated that the Physical Education supervisors were not relieved of any of their daytime duties nor were they compensated by the Board when they voluntarily assumed the supervisory responsibilities for the after school activities.

The Board argues that it clearly had the authority to abolish peititoner's position due to reasons of economy and pursuant to N.J.S.A. 18A:28-9 which states:

> "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 of for other good cause upon compliance with the provisions of this article."

The Board contends that it complied with the statute by reducing its staff when faced with a budget reduction. It asserts, and petitioner admits, that the one (1) individual retained as a supervisor of recreation had more seniority than petitioner. The Board avers that it did not employ supervisors of recreation with less seniority than petitioner as he asserts but, rather, staff members came forward to volunteer to assume the duties and responsibilities of the former supervisors without compensation.

The Board finally argues that petitioner was not employed for the summer of 1975 by virtue of its action to abolish petitioner's twelve (12) month position and reassign him to an eleven (11) month position commencing September 2, 1975. It asserts that since petitioner was no longer a supervisor he then had to request summer employment which he did not do. The Board contends that its action to reassign petitioner to his former position as director of recreation was proper and within its statutory authority.

DISCUSSION

It is necessary at this juncture to refer to the applicable rules of the State Board of Education with regard to a reduction in force as well as the pertinent statutes to N.J.S.A. 28-9 et seq., as follows:

N.J.S.A. 18A-28-10 provides that:

> "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."

N.J.S.A. 18A:28-11 provides that:

> "In the case of any such reduction the board of education shall determine the seniority of the persons affected according to such standards and shall notify each such person as to his seniority status, and the board may request the commissioner for an advisory opinion with respect to the applicability of the standards to particular situations, which request shall be referred to a panel consisting of the county superintendent of the county, the secretary of the state board of examiners and an assistant commissioner of education designated by the commissioner and an advisory opinion shall be furnished by said panel. No determination of such panel shall be binding upon the baord of education or any other party in interest or upon the commissioner or the state board if any controversy or dispute arises as a result of such determination and an appeal is taken therefrom pursuant to the provisions of this title."

N.J.S.A. 18A:28-12

> "If any teaching staff member shall be dismissed as a result of such reduction, such person shall be and remain upon a preferred eligible list in 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 and in determining seniority, and in computing length of service for reemployment, full recognition shall be given to previous years of service, and the time of service by any such person in or with the military or naval forces of the United States or of this state, subsequent to September 1, 1940 shall be credited to him as though he had been regularly employed in such a position within the district during the time of such military or naval service."

N.J.A.C. 6:3-1.10, in part provides:

***

"(b) Seniority, pursuant to N.J.S.A. 18A:29-9 et seq., shall be determined according to the number of academic or calendar years of employment, or fraction thereof, as the case may be, in the school district in specific categories as hereinafter provided. Seniority status shall not be affected by occasional absences and leaves of absences.

"(c) Employment in the district prior to the adoption of these standards shall be counted in determining of these standards shall be counted in determining seniority.

***

"(h) Whenever any person's particular employment shall be abolished in a category, he shall be given that employment in the same category to which he is entitled by seniority. If he shall have insufficient seniority for employment in the same category, he shall revert to the category in which he held employment prior to his employment in the same category, and shall be placed and remain upon the preferred eligible list of the category from which he reverted until a vacancy shall occur in such category to which his seniority entitles him.

***

"(k) The following shall be deemed to be specific categories but not necessarily numbered in order of precedence:

***

"27. Secondary. The word 'secondary' shall include grades 9-12 in all high schools, grades 7-8 in junior high schools, and grades 7-8 in elementary schools having departmental instruction. Any person holding a secondary certificate shall have seniority in all subjects or fields covered by this certificate, except those subjects or fields for which a special certificate has been or shall be required by the State Board of Education. However, if a person has held employment in the school district in any special subject or field endorsed on his secondary certificate, such special subject or field shall, for the purposes of these regulations, be regarded as any other subject or field endorsed upon his certificate;

> ""28. Elementary. The word 'elementary' shall include Kindergarten, grades 1-6 and grades 7-8 with or without departmental instruction, including grades 7-8 in junior high schools;
>
> ***
>
> "30. Additional categories of specific certificates issued by the State Board of Examiners and listed in the State Board rules dealing with Teacher Certification."

It was uncontroverted that petitioner's service with the Board was conducted under a Permanent Teacher's Certificate in Physical Education. (P-4) It was further uncontroverted that petitioner was the holder of a Permanent Subject Supervisor's Certificate in Physical Education issued by the State of New Jersey Department of Education (P-3) There was no showing that the State Board of Examiners issues a specific certificate for the category of teacher and/or supervisor of recreation. To the contrary, the evidence clearly demonstrates that a "physical education certificate (to be the) most appropriate certificate (for) a city recreation teachers license." (P-9)

Thus it is evident that no such category of teacher of recreation exists and that petitioner performed his duties under a certificate in physical education.

The sequence of events in this matter also raises questions with regard to the Board's action to terminate petitioner's position. The evidence makes it clear that petitioner was notified June 24, 1975 that "***due to lack of funds available for the 1975-76 school year, it is necessary to terminate your present position effective at the end of the work day on June 26, 1975." (P-11) The record is absent, however, of any formal action by the Board of Education to terminate petitioner's position prior to the June 24, 1975 notice. It is observed that the action of the Board to terminate petitioner's position took place on August 19, 1975, effective July 1, 1975 (Exhibit B) It is further observed that the Board took its action to transfer petitioner on August 26, 1975, effective September 1, 1975. There was no showing that the Board terminated petitioner and transferred him "***on the basis of seniority according to standards *** established by the commissioner with the approval of the state board." N.J.S.A. 18A:28-10 Nor was it shown that the Board established a "preferred eligible list" pursuant to N.J.S.A. 18A:28-12.

Having considered the entire record in the instant matter **I FIND** the Statement of Facts as set forth hereinbefore are adopted by reference as **FINDINGS OF FACT**.

I FURTHER FIND that:

1. The unilaterial administrative determination to terminate petitioner's position as Supervisor of Recreation on June 26, 1975 was taken without formal action by the Board and, therefore, was ultra vires.

2. By virtue of petitioner's holding a certificate as a Permanent Subject Supervisor in Physical Education he was and is eligible to hold the position of Supervisor of Physical Education subsequent to the Board's action on August 19, 1975 to terminate his position as Supervisor of Recreation.

I CONCLUDE, therefore, that the Board failed to comply with the statutory provisions as set forth in N.J.S.A. 18A:28-9 et seq. **I FURTHER CONCLUDE** that the Board failed to consider petitioner's seniority under his appropriate certificate and category pursuant to N.J.A.C. 6:3-1.10.

Accordingly, **IT IS ORDERED** that the Board of Education establish petitioner's seniority rights for the position of Supervisor of Physical Education as of July 1, 1975 pursuant to statutes and administrative rules. The Commissioner has admonished boards of education that "The burden of determining seniority rights rests squarely on the Board in such instances." Mary Ann Popovich v. Board of Education of the Borough of Wharton, Morris County, 1975 S.L.D. 737 (Emphasis supplied at 745) In the event it is determined that petitioner had acquired more seniority than at least one (1) of the Board's Supervisor's of Physical Education on July 1, 1975, **IT IS ORDERED** that petitioner be assigned to said position as of July 1, 1975.

IT IS FURTHER ORDERED that the Board provide petitioner with salary and other emoluments equal to the difference between that which he received and that which he would otherwise have been provided as a Supervisor of Physical Education from September 1, 1975, less any unapproved absence from duty.

AGENCY DKT. NO. 337-10/75

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, FRED G. BURKE,** who by law is empowered to make a final decision in this matter. However, if Fred G. Burke does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

25 November 1980
DATE

Lillard E. Law
LILLIARD E. LAW, ALJ

Receipt Acknowledged:

26 November 1980
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

December 2, 1980
DATE

Ronald A. Parker
OFFICE OF ADMINISTRATIVE LAW

ms

DOCUMENTS IN EVIDENCE

P-1 Statement of Eligibility, March 15, 1948, Limited High School Principal's Certificate

P-2 Certificate for Principal of Elementary Schools, October 24, 1952

P-3 Permanent Subject Supervisor's Certificate for Physical Education, June 18, 1957

P-4 Permanent Teacher's Certificate in Physical Education, December 1, 1941

P-5 Fifteen Page Document, including Functions, Goals and Objectives of the Recreation Department, but Limited to Pages One through Four

P-6 Board of Education, Newark, New Jersey, 1976-1977 Operating Budget, Proposed

P-7 Newark Public Schools Proposed 1976-1977 Budget

P-8 Letter, State Department of Education, September 23, 1952, to Frank Stover from Everett C. Preston

P-9 Letter, December 6, 1935, to Peter Fujarcyk from Lawrence S. Chase

P-10 Letter, August 29, 1939, to Peter Fujarcyk from W.A. Ackerman

P-11 Letter, June 24, 1975, to Mr. Fujarcyk from Mr. Brown

P-12 Memorandum of July 10, 1075 to Stanley Taylor from E. William Lauro, John P. Carolan and Peter Fujarcyk

P-13 Memorandum of September 29, 1969 to Franklin Titus from Arnold Hess

P-13A 58.1

P-14 Memorandum of March 4, 1970 from Arnold M. Hess to Joseph A. Liddy

P-15 Supervisory Assignments of Duties, Bulletin Number Seventeen, 1976

P-16 Supervisory Assignments, January 6, 1976-June 30, 1976

P-17 Memorandum from Robert D. Brown, August 31, 1976, re: Recreation Supervision

P-18 Letter dated 9/13/75

P-19A Unemployment Insurance Claim

P-19B Notice to Claimant of Benefit Determination

P-19C Handwritten Document

P-19D Handwritten Document with Typewritten Portion

P-19E Receipt of Certified Mail

P-19F Postcard from the U.S. Postal Service

P-19G Mr. Fujarcyk's Application to the Unemployment Compensation Commission

P-20 Employment Status Form, August 18, 1975

P-21 Envelope, September 19, 1975, from the Newark Board of Education

P-22 Envelope, September 22, 1975, from the Newark Board of Education

P-23 Employee Status Form, September 3, 1975

P-24 Letter dated May 20, 1977

P-25 Memorandum of Agreement between the Newark Board of Education and the City Association of Supervisors and Administrators of Newark, New Jersey 2-1-73 to 6-30-76

R-1 Affidavit of Richard Sims with attachments A-D

R-2 Statement of earnings and deductions

R-3 Letter dated 2/24/76

R-4 Letter dated 3/2/76

R-5 Supervisory Sheet dated 9/9/74

C-1 Letter dated 3-18-76 from Kittrels to Fujarcyk, letter to Molle from Pickett

C-2 Approval to return to work dated March 30, 1977 signed by John Bozzi

C-3 Prescription form of Dr. Klosk dated 9-8-76

C-4 Letter dated 5-16-77

PETER FUJARCYK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law.

The Commissioner observes that exceptions were filed by petitioner pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Petitioner in his exceptions argues that he was terminated from employment with the Board by letter of June 24, 1975. (P-11) Petitioner admits however to having received his bi-monthly paychecks in September 1975 and thereafter at the rate of pay he received as a Supervisor. Petitioner cannot have it both ways by claiming to have had his employment with the Board severed and still be paid as he was. Petitioner's contention that he is owed a month's salary for summer employment has merit.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

The Board is directed to establish petitioner's seniority rights for the position of Supervisor of Physical Education as of July 1, 1975 as prescribed by statutes and rules. If it is determined that petitioner has greatest seniority, as of that time, to a Supervisor of Physical Education position, petitioner shall so be assigned with salary and emoluments equal to the difference between that which he received and that which he would have received as Supervisor, less any unapproved absence from duty.

COMMISSIONER OF EDUCATION

January 12, 1981

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2711-80
AGENCY DKT. NO. 72-3/80A

IN THE MATTER OF:

CAROL OXFORD,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF POHATCONG, WARREN COUNTY,
Respondent.

Record Closed: October 14, 1980
Received by Agency: 12/1/80

Decided: November 25, 1980
Mailed to Parties: 12/3/80

APPEARANCES:

For Petitioner: **Stephen E. Klausner,** Esq. (Klausner & Hunter)

For Respondent: **James R. Swick,** Esq. (Swick & Swick)

BEFORE **ERIC G. ERRICKSON,** ALJ:

STATEMENT OF CASE:

Petitioner, a tenured teacher, appeals from an August 27, 1979 action of the Pohatcong Board of Education (Board) which unilaterally extended the termination date of her requested and approved maternity leave from March 31, 1980 to June 30, 1980. She

prays for an order directing the Board to compensate her on the basis of full time employment for the period April 1, 1980 through June 30, 1980. The Board, conversely, asserts that it has acted legally and in full compliance with both the requirements of education law and the terms of the negotiated agreement with its teachers' majority representative.

PROCEDURAL RECITATION:

The Petition of Appeal and a timely Answer were filed respectively with the Commissioner of Education on March 31, and April 24, 1980. Thereafter, the matter was transferred to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1, et seq. At a prehearing conference on July 24, it was agreed that all relevant facts would be stipulated. At that same conference, documents J-1 through J-8 were marked into evidence. The matter is ripe for summary decision in the form of Respondent's Motion for Summary Judgment, a complete Stipulation of Facts, documents marked in evidence and Briefs of counsel.

FACTUAL CONTEXT OF THE DISPUTE:

Petitioner in November 1978 requested the Board to grant her a maternity leave of absence effective from May 1, 1979 through June 30, 1979. The request was granted. (J-1) On May 3, 1979, petitioner requested that the termination date of her leave be extended to March 30, 1980. (J-2) This second request was granted on May 7, 1979.

In August 1979, however, respondent through its Administrative Principal (Principal) notified petitioner in writing that the Board on August 27 had unilaterally extended her maternity leave to the end of the 1979-80 school year for the following expressed reasons:

> "***Article VII ,of the negotiated agreement. specifically states that all extended leaves of absence shall be for a period of one year. The Board feels that it violated the contract when it approved a leave of absence for a period of less than a period of one year and that you violated that clause by requesting a leave for less than a period of one year.
>
> Also, Article XIV - A and C (copy enclosed) specifically indicates a contract violation. Thus, the Board moved immediately to make

all necessary attempts to correct any such contract violations. As a result of the implications of circumstances of the present situation, the Board officially moved at its meeting of August 27, 1979 to correct this apparent contract violation by extending the duration of your leave of absence thru the end of the 1979-80 school year (original duration was from September 1979 to March 30, 1980) as per terms of the Pohatcong Board of Education-Pohatcong Education Association Agreement Article VII - 3 and Article XIV - Sections a and C.***" (J-3)

Relevent provisions in the negotiated agreement on which the Board relied when unilaterally extending petitioner's maternity leave are as follows:

"Article VII Extended Leaves of Absence

"A. Conditions

"Unless otherwise indicated, the following conditions shall apply to extended leaves of absence:

"1. ***

"3. All extended leaves shall be for a period of one year. In cases of paternity or maternity, an additional year will be granted upon proper application to the chief school administrator who will pressent it for Board action at the next regularly scheduled Board meeting. Extended leaves shall be limited to no more than two consecutive school years.***"

"Article XIV

"A. This Agreement constitutes Board policy for the term of said agreement, and the Board shall carry out the commitments contained therein and give them full force and effect as Board policy.***"

"C. Any individual contract between the Board and an individual teacher *** shall be subject to an[d] consistent with the terms and conditions of this Agreement. If an individual contract contains any language inconsistent with this Agreement, this Agreement, during its duration shall be controlling.***" (J-8)

Petitioner never consented to the Board's unilateral action extending the termination date of her maternity leave from March 31 to June 30. During September 1979, however, petitioner and a Board committee met to discuss the disputed matter. When no agreement was reached, petitioner, by letter dated November 29, sought further clarification of what her employment status would be from April 1 through June 30 (J-4).

The Board responded to this inquiry by asserting again that its action was in compliance with the provisions of the negotiated agreement. When the Board also offered petitioner a half time position as a remedial reading teacher from April 1 to the close of the academic year, she accepted with the contingent proviso that she reserved her right to litigate her claim to benefits of full time employment for the period from April 1, 1980 through June 3, 1980. (J-5, 6, 7)

ANALYSIS AND CONCLUSIONS:

The Board twice granted petitioner's application for extended leave for the precise periods she requested. Neither period was for a full academic or calendar year. Nor did they, when added together, total a full academic year. The initial approval was for the two months of May and June at the end of the 1978-79 school year. This was extended by an additional seven months from September through March of the 1979-80 school year. Both requests, it is stipulated, were duly acted upon in regular public session. The first of these was honored by the Board without modification. The second request to extend the maternity leave until March 31, 1980 was also granted without modification on May 7, 1979, thus extending the leave to a total period of nine months spanning two academic years. It is noted that neither of the two periods separately requested and approved nor the total of those two periods corresponded to the proviso in the negotiated agreement which state that "***all extended leaves shall be for a period of one year.***" (J-8) It is also noted that the Board's unilateral extension by three months of petitioner's leave (which it had consensually extended to a total of nine months of a ten month academic year) to a total of twelve months spanning two academic years does not correspond precisely to a ten month academic year. Nor does the extension embracing the period from May 1, 1979 through June 30, 1980, a period of 14 calendar months, correspond precisely to a calendar year. Within such a factual context, the Board's argument must fall wherein it claims it was correcting the error of petitioner in asking for other than a full year's extended leave and its own error in granting her request.

As was stated by the Commissioner in Paul J. MacCormick v. Board of Education of the Hunterdon Central Regional High School District, 1978 S.L.D. 160, an action by a board of education taken in public session establishing an employment proviso may not be lightly disregarded. This principle was amplified in Agnes D. Galop v. Board of Education of the Township of Hanover, 1975 S.L.D. 358 wherein it was held that after

the Hanover Board had fixed Galop's salary as a tenured teacher, it could not thereafter reduce it for the fixed period despite an error in its computation. In reaching this holding, the Commissioner relied in part on James Docherty v. Board of Education of the Borough of West Paterson, Passaic County, 1967 S.L.D. 297, 300, wherein the Commissioner reaffirmed that which had been previously stated in Harris v. Board of Education of Pemberton Township, 1939-49 S.L.D. 164 as follows:

> "***If a teacher is under tenure, a board of education is authorized to increase her pay, but cannot reduce it except under the procedure set forth in the tenure statute***."
>
> And,
>
> "***An acquired right through the adoption of a resolution by a board of education cannot be invalidated by a rescinding of the resolution at a subsequent meeting.***" (Docherty, supra, at p. 300)

In the instant matter the Board, by official action, extended petitioner's leave to March 31. When it did so on May 7, 1979 it entered into a binding agreement that she could return to active duty on April 1. Petitioner, a tenured teacher, had every reason to rely on the Board's action as a basis for her expectation that she could return to that active employment on April 1, 1980. She had no right to unilaterally demand to return sooner but she had cause to rely upon the good faith action of the Board that her leave would not extend beyond March 31. The action requested by petitioner and the Board's approval of the precise terms of her request constituted an agreement binding on both parties.

The Board argues that it was compelled to act to bring the leave into compliance with terms in the negotiated agreement. This argument fails on two counts. First, the Board is statutorily empowered to exercise its discretionary authority by granting leaves of absence. A negotiated agreement may not supersede or set aside the exercise of its statutory discretion. Second, as previously shown, no one of the three actions taken by the Board brought the leave or its extensions into compliance with the exact perimeters of either a calendar year or an academic year.

The Board's notice on August 28, 1979 was a scant week prior to the opening of the school. Such late notice to a teacher placed her at a disadvantage in securing alternate employment for the portion of the school year for which she had already been

promised employment by the Board. It further placed her at a distinct disadvantage when considering whether she should withdraw her request for any extension of the maternity leave extension at all, under the unilaterally radically altered time schedule. I CONCLUDE that equitable principles demand that the Board's action be set aside.

I CONCLUDE also that the Board's unilateral alteration of the time frame of the request was violative of the binding agreement entered into by the parties in May 1979. I FURTHER CONCLUDE that, while it may have resulted from nescience and a belated attempt to adhere to wording of the negotiated agreement, it was an arbitrary and capricious act similar to that which was set aside for lack of good faith by the Commissioner in Arthur L. Page v. Board of Education of the City of Trenton, 1973 S.L.D. 704. I CONCLUDE ALSO that the Board's action consituted a reduction is salary for the 1979-80 school year without recourse to N.J.S.A. 18A 6-10.

Petitioner had every reason to believe that when the Board acted on her request, it was in possession of all facts it needed to know when taking that action. The Board, absent consensual alteration of the agreement, was then and now remains bound by its terms. Having created a vested right for petitioner to return on April 1, 1980, it was powerless under this factual context to unilaterally withdraw that right.

DETERMINATION:

In consideration of the conclusions set forth above, IT IS ORDERED that the Board, no later than sixty days after this decision becomes final, pay petitioner the difference between the salary she received as a half time employee from April 1, 1980 to June 30, 1980 and the amount which she would otherwise have received had she been employed on a full time basis during that period. IT IS ALSO ORDERED that petitioner be afforded all other emoluments to which she has successfully established entitlement as a full time active teaching staff member during that period. Judgment is entered in favor of petitioner. The Board's Motion for Summary Decision is DENIED.

The charges that petitioner was discriminated against by reason of sex and the numerous legal arguments relevant to that charge are not addressed herein. To do so would serve no useful purpose since the end result would not be altered thereby.

OAL DKT. NO. EDU 2711-80

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, FRED G. BURKE,** who by law is empowered to make a final decision in this matter. However, if Fred G. Burke does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

November 25, 1980
DATE

Eric G. Errickson
ERIC G. ERRICKSON, ALJ

Receipt Acknowledged:

December 1, 1980
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

December 3, 1980
DATE

Ronald D. Packer/sg
OFFICE OF ADMINISTRATIVE LAW

ms

EXHIBITS

J-1 Letter from Michael Frinzi to Mrs. Carol Oxford, dated December 5, 1978

J-2 Letter from Carol Oxford, dated May 3, 1979

J-3 Letter from Michael Frinzi to Mrs. Carol Oxford, dated August 28, 1979

J-4 Letter from Carol Oxford to Michael Frinzi, dated November 29, 1979

J-5 Letter from Michael Frinzi to Carol Oxford, dated December 4, 1980

J-6 Letter from Carol Oxford to Michael Frinzi, dated January 31, 1980

J-7 Letter from Michael Frinzi to Carol Oxford, dated February 5, 1980

J-8 Copy of Article VII, Section A., Extended Leaves of Absence (2 pages)

CAROL OXFORD,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF POHATCONG, WARREN COUNTY,	:	
RESPONDENT.	:	

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law.

The Commissioner observes that exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Respondent Board excepts to the determination by the Honorable Eric G. Errickson, ALJ that the Board's approval of petitioner's requests for maternity leave constituted an agreement binding on both parties. Respondent contends that its action did not comport with the provisions in the negotiated agreement and it was correcting its own error in granting petitioner's request. The Commissioner finds no merit in such argument. Petitioner relied on the Board's initial determination; and its notice to her dated August 28, 1979 unilaterally extending her leave of absence disadvantaged her in reaching any additional conclusions concerning her course of action. The Commissioner determines that the Board remains bound by the terms of its action on the requests made by petitioner for leaves of absence. James Docherty, supra; Agnes D. Galop, supra

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

Accordingly, the Board's motion for summary decision is denied and judgment is accorded petitioner. The Board is directed to pay petitioner the difference between the salary and emoluments received as a half-time remedial reading teacher in the employ of the Board from April 1, 1980 through June 30, 1980 and those which she would have received had she been employed on a full-time basis for that period of time.

COMMISSIONER OF EDUCATION

January 16, 1981

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. —
AGENCY DKT. NO. 94-2/78

IN THE MATTER OF:
KATHLEEN CARLSON,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF CRANFORD, UNION COUNTY,
Respondent.

APPEARANCES:

Gerald M. Goldberg, for petitioner (Goldberg & Goldberg, attorneys)

James F. Kervick, Esq., for respondent (Sauer, Kervick & Mulkeen, attorneys)

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

Petitioner seeks an order reinstating her as a full-time teacher with back pay to the beginning of the 1976-77 school year, the point at which the Cranford Board of Education (Board) assigned her to a half-time position. The Board denies Carlson is tenured and denies it has violated her seniority rights under the school laws and/or administrative code.

The matter was opened before the Commissioner of Education. On July 2, 1979, it was brought forward to the Office of Administrative Law by operation of N.J.S.A. 52:14F-1 et seq. The matter proceeds on cross-motions for summary judgment.

Basic facts are not in dispute. Carlson was employed as a full-time kindergarten teacher by the Board for the 1973-74, 1974-75 and 1975-76 school years. She was fully certificated to teach grades K-8. On April 12, 1976, the Board resolved to terminate Carlson's employment as of June 30, 1976 because of declining enrollments and she was so noticed. Thereafter, the Board determined that a kindergarten teacher would be needed on a half-time basis in 1976-77 at the Bloomingdale Avenue School. Carlson applied for the position as well as for several full-time positions. She was employed to fill the half-time kindergarten position. The next year, because of further declining enrollment, the Board decided to reduce the kindergarten program at the school from one and one-half full-time equivalent positions to one-half full-time equivalent position. A tenured, full-time kindergarten teacher was transferred to a first grade class and a notice of vacancy in the remaining half-time position was posted. Carlson applied for and was selected to fill the position. During the two years she taught on a half-time basis, Carlson expressed interest in full-time positions. The Board in those two years employed non-tenured elementary teachers in full-time positions. Carlson has been employed as a full-time teacher since the beginning of the 1978-79 school year.

Carlson claims full-time tenure status as of September 1, 1976, and seeks back pay for the time she served in a part-time position in the amount of the difference between the salary received and the salary she would have received had she been employed full-time.

The issues I am asked to decide are these:

1. Did or did not petitioner achieve tenure status by virtue of her employment in a half-time teaching position for the 1976-77 school year;

2. If petitioner has achieved tenure status, is it in a full-time or part-time capacity;

3. If petitioner has achieved tenure in a full-time capacity, to what relief, if any, is she entitled for her service in 1976-77 and 1977-78; and

4. If petitioner has achieved tenure in a part-time capacity, what is the part-time entitlement.

The first issue must be answered in the affirmative. N.J.S.A. 18A:28-5 sets forth the criteria for gaining tenure as a teaching staff member. In pertinent part, the statute reads

> The services of all teaching staff members including all teachers, principals, assistant principals, vice principals, superintendents, assistant superintendents...and 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 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 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:
>
> (a) three consecutive calendar years, or any shorter period 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; .... (Emphasis supplied).

Carlson plainly met the conditions established in (b). Upon her first day of service in September 1976 she acquired tenure. Zimmerman v. Newark Bd. of Ed., 38 N.J. 65 (1962). The fact that her former position was abolished and she served in 1976-77 in a new position is immaterial. A teacher achieves tenure in a district, not a position. What remains for determination here is whether that tenure is in a full-time or part-time capacity.

Carlson did not meet the conditions established by statute while in a full-time position albeit the entire probationary period was spent in a full-time position. Her tenure was achieved in a half-time capacity. Seniority comes into existence only when tenure exists. Thus, petitioner's seniority was as to other half-time teaching staff

members, similarly certificated, in the 1976-77 and 1977-78 school years. She had no claim as to full-time teaching positions but clearly had a claim to the half-time position posted for the 1977-78 school year. Since she was selected for that position there is no question in that respect.

Until her assignment to a full-time position in September 1978, Carlson had no seniority in a full-time capacity. There is no relief, therefore, to which she is entitled for her service in 1976-77 and 1977-78. Her tenure and, hence, her seniority were in a half-time capacity throughout the 1976-77 and 1977-78 school years. Upon the first day of service in September 1978 in a full-time position, Carlson achieved tenure in a full-time capacity and the seniority rights attendant.

In summary, **I FIND:**

1. Petitioner achieved tenure in a half-time capacity upon her first day of service in September 1976.

2. Petitioner's seniority rights at that time were as to other half-time (or less) teaching staff members similarly certificated.

3. There is no relief to which petitioner is entitled for the 1976-77 and 1977-78 school years.

4. As of her first day of service in September 1978 in a full-time position, petitioner achieved tenure in a full-time capacity with the attendent seniority rights.

In consideration of the above analysis and findings of fact, **I CONCLUDE** there is no relief upon this claim to which Kathleen Carlson is entitled.

Accordingly, the petition of appeal **IS DISMISSED**.

AGENCY DKT. NO. 94-2/78

This recommended decision may be affirmed, modified or rejected by **FRED G. BURKE COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is empowered to make a final decision in this matter. However, if Fred G. Burke does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

25 NOVEMBER 1980
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

December 1, 1980
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

December 3, 1980
DATE

Ronald L. Parker /ps
OFFICE OF ADMINISTRATIVE LAW

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KATHLEEN CARLSON,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF CRANFORD, UNION COUNTY,	:	
RESPONDENT.	:	
	:	

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law.

The Commissioner observes that no exceptions were filed in a timely fashion by the parties pursuant to the provisions of N.J.A.C. 1:16.4a, b and c.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

January 16, 1981

KATHLEEN CARLSON, :

PETITIONER-APPELLANT, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE TOWNSHIP OF CRANFORD, UNION COUNTY, : DECISION

RESPONDENT-APPELLEE. :

:

Decided by the Commissioner of Education, January 16, 1981

For the Petitioner-Appellant, Goldberg & Simon
(Gerald M. Goldberg, Esq., of Counsel)

For the Respondent-Appellee, Sauer, Kervick, Mulkeen & Keefe (James F. Kervick, Esq., of Counsel)

The State Board of Education affirms the Commissioner's decision for the reasons expressed therein.

May 6, 1981

Pending New Jersey Superior Court

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 0870-80
AGENCY DKT. NO. 17-1/80A

IN THE MATTER OF:

GREEN BROOK EDUCATION ASSOCIATION,
DONNA DELANOY, FRANCES FURINO,
MARY ANN FIORDALISO, JANET GOLESKIE,
SUSAN MORRIS, HELEN MOSKOWITZ,
ARLA PRIBNOW, DEBORAH DRELICH,
EILEEN CLANCY, BONNIE BIALKOWSKI,
AND NANCY GROSS,
Petitioners,
v.
BOARD OF EDUCATION OF GREEN BROOK
SOMERSET COUNTY, NEW JERSEY,
Respondent.

Record Closed: October 21, 1980
Received by Agency: 12/5/80

Decided: December 4, 1980
Mailed to Parties: 12/9/80

APPEARANCES:

For Petitioners, **Jack Wysoker,** Esq. (Mandel, Wysoker, Sherman, Glassner & Weingartner)

For Respondent, **Kenneth S. Meyers,** Esq. (Nichols, Thompson, Peek & Meyers)

OAL DKT. NO. EDU 0870-80

BEFORE ERIC G. ERRICKSON, ALJ:

ISSUE:

Petitioner Green Brook Education Association joins the individually named petitioners who, as comprehensive education instructors, allege that their employer, the Green Brook Board of Education (Board), violated applicable education law and its own negotiated salary agreement by failing to provide benefits, salary and emoluments to which individually named petitioners, hereinafter "petitioners," claim entitlement.

The Board, conversely, asserts that the benefits, salary and emoluments which it has provided petitioners constitute legal compliance with its salary policies, all education laws and the terms of employment to which individually named petitioners gave their assent when they were employed.

PROCEDURAL RECITATION:

After the Petition of Appeal and a timely Answer were filed respectively in January and February 1980 the matter was referred to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. In keeping with agreements reached at a prehearing conference held at Trenton on April 3, 1980, a plenary hearing of five days duration was conducted at the Green Brook Municipal Hall. Post-hearing Briefs were filed. When the Commissioner issued his Decision on Remand in Claire Bisgay v. Board of Education of the Township of Edison, 1980 S.L.D. ____ (decided September 8, 1980), counsel were granted opportunity to submit additional memoranda of law. A memorandum was submitted by counsel for petitioners.

UNDISPUTED FACTS:

The following facts, which are uncontroverted in the record, reveal the contextual setting of the dispute:

The Green Brook Education Association (Association) has been, since 1968, the majority representative for negotiating an agreement for teaching staff members with the Board pursuant to the provisions of N.J.S.A. 34:13A-1 et seq. The negotiated agreement has for many years listed in its recognition clause the category of "Supplemental

Teachers." (J-1) The Board began offering a program of supplemental instruction during the 1969-70 school year. The salary of its supplemental teachers was then funded by local board revenues other than those flowing from Federal or State subsidized categorical aid programs. Its supplemental teacher, Carol Jones and her replacement, Sheila Reidy, were paid on salary guide, enrolled in TPAF and considered to be serving in tenurable positions.

From September 1974 through June 1977 the Board participated in the Federally sponsored Title I Program which funded a part of the salary of Sheila Reidy who was then listed as a Title I teacher. Later, when the Board in December 1977 opened a resource room, it appointed Reidy as instructor with her salary funded by a Title VI Federal Program.

In March 1977 the Board responded to the State mandate to provide compensatory education for pupils whose scores on the 1976 Minimum Basic Skills (MBS) tests fell below an acceptable minimum. It then employed four part-time instructors whom it paid $7.00 per hour, the same rate of compensation which all of the petitioning compensatory education teachers have since been paid. From March until June 1977 Title I funds were utilized to pay compensatory education instructors. Thereafter, with the advent of the 1977-78 school year, State funding became available which has since been used to pay salaries of compensatory education teachers, hereinafter "C.E. teachers."

The Board's part-time, hourly-paid C.E. teachers are required to hold teaching certificates issued by the New Jersey State Board of Examiners. They work fewer hours than the regular school day, are not paid on holidays when school is not in session, and are not given yearly increments or adjustments in salary. They were not originally enrolled in a State pension plan but, at the direction of State officials, have since January 1, 1980 been mandatorily enrolled during their second and optionally enrolled during their first year of employment in the Public Employees Retirement System (PERS). (P-8; R-5A-D; R-6) Although they did not initially enjoy the benefits of sick leave, the Board later granted pro-rated sick leave benefits retroactive to September 1978. They do not receive paid health plan benefits or other fringe benefits. C.E. teachers begin instruction at least one week later than the beginning of the academic year. Their instruction and employment terminates some weeks prior to its close. They are not assigned to bus, cafeteria, hall, or homeroom duty and do not regularly attend the faculty meetings in their schools.

C.E. teachers generally teach pupils in groups of one to four for periods of twenty to thirty minutes. When they are absent no substitutes are procured to cover their classes.

TESTIMONY OF WITNESSES:

The Board's coordinator of compensatory education services testified that, when the C.E. program began in 1977, pupils whose MBS scores fell below the State's minimum acceptable level were given supplemental instruction by C.E. teachers. She also testified that others with higher MBS scores who also continued to need supplemental instruction were served individually or in small groups in the Board's Title I, "Special Needs," speech therapist and remedial reading programs by teachers who were paid on guide with full fringe benefits and enrolled in the Teachers Pension Annuity Fund (TPAF).

She testified that she had been present at interviews with the prospective C.E. instructors, none of whom raised objections to the $7.00 per hour compensation which was offered. That no objection was then raised was corroborated by testimony of petitioners, principals, and the Superintendent. The Coordinator also testified that, in her opinion, the small group or individualized remedial instruction provided by Title I teachers on guide with full fringe benefits was identical to that provided by C.E. instructors.

Similar comparisons were elicited in testimony from Sheila Reidy who testified that when she worked half-time as a Title I teacher and half-time as a C.E. teacher her instructional duties were in all points identical except that her C.E. pupils had greater need for remediation. She further testified that her later duties as a resource room teacher were to provide individualized or small group remedial instruction similar to that which she had previously provided to C.E. pupils.

The petitioning C.E. teachers testified that they had originally been provided letters of employment but that some had later been provided employment contracts. (P-9-11, 14-16, 19, 21, 24, 26-27) They testified that, although each spring they were notified that they would not be reemployed for the ensuing year, they were in some instances privately advised that this was a mere formality and that they could expect reemployment upon final approval of State funding. (P-12, 17, 18, 22, 25, 28)

Certain petitioners testified that, when they applied for unemployment benefits during the summer months, they were denied on the basis that the Board's agents had notified the employment agency that they would be reemployed in the ensuing academic year.

Petitioners testified that as C.E. teachers they were not required to attend regular faculty meetings and that when they attended workshops or special meetings at their principals' directions they were paid their hourly stipend for such time. They testified that they maintained files, prepared and followed daily lesson plans, did pre- and post-testing, adapted teaching materials to pupils' needs without benefit of a course of study, sent periodic pupil progress reports to school authorities and parents, and conferred regularly with their pupils' regular classroom teachers.

They testified that they were not regularly observed and that their evaluations, if any, were not the same formal evaluations given regular classroom teachers under guide. This was corroborated by testimony of the Board's principals.

The Board's elementary principal testified that the job posting, screening and selection process for C.E. teachers is less comprehensive than for regular classroom teachers. He testified with respect to the classroom management responsibilities of C.E. teachers as compared to those of regular classroom teachers, that:

> "***Most of the groups are composed of three or four youngsters, *** sometimes as many as five. The groups that are coming in are much more homogeneous by nature because they have come there for a specific need. We don't have twenty-five youngsters ranging from gifted and talented to youngsters who will just barely make it with a good deal of remediation and supplemental support. We have much less chance for interaction. With twenty-five youngsters in a room the chance for catalytic chemical reaction among all of these is compounded***. Furthermore, it isn't a total educational program that this [CE] teacher has to deal with.***"
>
> "We are not talking about a complete English program for twenty-five youngsters now, we are talking about perhaps some phonics help for three of them on a very remedial basis. The amount of management, therefore, is greatly reduced.***" (Tr. IV 46-47)

The elementary principal also testified that he perceives pre- and post-testing duties of C.E. teachers to be less important since in the pupil selection process the demonstrated need has already been established as contrasted to a speech therapist's duty

of both diagnosing and devising an appropriate program to meet the diagnosed needs. He testified further that the year end reports of Title I and resource room teachers are more detailed and formalized than those required by C.E. teachers. Similar testimony was elicited from the high school principal. Both they and the Superintendent testified that the beginning and ending dates of C.E. instruction are governed by the State allocation of funds which is not known with certainty until approximately three months before the beginning of the academic year.

The elementary principal testified that, although C.E. teachers send progress reports to parents and classroom teachers, they do not place grades on report cards. By contrast, the high school principal testified that he had authorized his C.E. teachers in a recent attempt to increase pupil motivation and reduce stigmatization, to assign grades for secondary C.E. pupils.

The high school principal testified that he knew of two of the C.E. teachers who had chosen to work at $7.00 per hour as C.E. instructor rather than accept full-time teaching positions elsewhere. He testified also that, because of improved pupil MBS scores, he anticipates a sharp cutback in funding with corresponding decrease in numbers of pupils eligible for C.E. services.

The Superintendent testified that he perceives the duties of C.E. teachers to be limited to remediation of already diagnosed deficiencies in math and language. He contrasted this to the diagnostic responsibilities required of remedial reading teachers who must have special certification in their positions.

FINDINGS OF FACT:

Having reviewed the transcripts of testimony elicited at the hearing and the documentary evidence entered I **FIND** the additional relevant facts to be considered together with previously enunciated undisputed facts in arriving at a determination of the dispute:

1. The Board at all times considered its supplemental teachers, Title I teachers, resource room teachers, reading teachers, speech therapist and special needs teachers to be serving in tenurable positions. As such they were given regular teaching contracts, were paid on guide, had full

fringe benefits, were paid for sick leave and holidays and were enrolled in TPAF.

2. By contrast the Board has employed the petitioning C.E. teachers and Petitioner Drelich, a bilingual education tutor, on an hourly basis without annual increment and without fringe benefits other than pro rata sick leave. (P-24) They were originally rehired annually by letter of employment and later by contract.

3. The Board and the Green Brook Education Association have not added the titles of compensatory education teacher, resource room teacher, bilingual education tutor or special needs teacher to the negotiated agreement recognition clause which does, however, list supplemental teachers, speech therapist, and remedial reading specialist.

4. Petitioners as hourly employees hold positions the authorized time of which fluctuates from year to year and occasionally within a given year. All are part-time employees since they work less than the regular school day and for less than a full academic year.

5. The Board has on occasion assigned compensatory education pupils to teaching staff members who were hired on guide with full benefits and considered by the Board to be in tenurable positions.

6. The resource room teacher, speech therapist, and the remedial reading specialist all are required to have specialized certificates issued by the State Board of Examiners. Title I teachers, supplemental teachers and C.E. teachers are not required to hold other than an elementary or secondary teacher's certificate.

7. The Board did not provide for formal evaluation of petitioners.

8. The Board is made aware early in the calendar year of the categorical State aid it may expect for compensatory education. Thus, it enters this amount in its budget advertised to the voters. By May or June it is advised of the precise amount it will receive in the enusing year.

9. On a few occasions pupils other than C.E. pupils were placed in petitioners' C.E. classes, with concurrence of the affected C.E. teachers, for primary rather than supplemental instruction. These proved to be temporary and were authorized by principals in an attempt to meet individual needs of those pupils.

10. Petitioners are paid monthly as contrasted to the twice-monthly payments made by the Board to those it considers covered by the negotiated agreement.

11. Several of the petitioners including Arla Pribnow, Bonnie Bialkowski, Susan Morris, Helen Moskowitz, Donna Delanoy, Nancy Grosso, Frances Furino, during the history of their employment served at times in full-time or part-time regular teaching positions. During those periods they were paid on guide with full or pro-rated benefits and were considered to be in tenurable positions.

12. The Title I teachers, supplemental teachers, remedial reading teachers, special needs teachers, resource room teachers and C.E. teachers all provide remedial, small group or individualized instructions to pupils who are educationally handicapped.

13. C.E. teachers have full responsibility for preparing for teaching, maintaining discipline and preparing progress reports for their classes of from one to five pupils. Those in the high school now assign grades to their pupils.

14. Pupils taught by petitioners have, prior to their assignment, been selected as having educational handicaps in the areas of mathematics and/or language arts on the basis of MBS scores or other criteria.

DISCUSSION AND CONCLUSIONS:

As the Board since 1977 has expanded its services to comply with the provisions of N.J.S.A. 18A:46A-1, et seq., it has employed numerous C.E. teachers and a bilingual tutor. Their primary function was to give supplemental instruction to pupils

whose MBS scores signified a need for such individualized or small group remedial and tutorial instruction in areas of mathematics and language. Their employment letters and contracts do not, however, refer to petitioners as supplemental teachers. I **CONCLUDE** from this consistent nomenclature used in their hiring that it was the conscious design of the Board, in complying with the statute to employ them as C.E. teachers rather than as supplemental teachers who had previously been listed in the recognition clause of the negotiated agreement.

I further **CONCLUDE** that there is no substantive difference in function between the Board's Title I teachers, supplemental teachers and C.E. teachers. All of these provide supplemental, remedial, small group or individualized instruction for handicapped pupils who receive their primary instruction from regular classroom teachers of mathematics and language arts. Thus the issue is raised as to whether the Board could, while employing tenurable supplemental and Title I teachers enrolled in TPAF, create the separate category of C.E. teachers, pay them on an hourly basis with limited fringe benefits, and deny them both tenure and enrollment in TPAF.

There can be no question that the Board is under mandate to provide the services performed by petitioners. The Legislature in N.J.S.A. 18A:7A-5 mandates that:

> "A thorough and efficient system of free public schools shall include the following major elements, which shall serve as guidelines for the achievement of the legislative goal and the implementation of this act: ***
>
> "e. Programs and supportive services for all pupils especially those who are educationally disadvantaged or who have special educational needs;
>
> "f. Adequately equipped, sanitary and secure physical facilities and adequate materials and supplies;
>
> "g. Qualified instructional and other personnel; ***" (Emphasis supplied.)

N.J.S.A. 18A:46A-1 enacted in 1977 states:

> "The Legislature hereby finds and determines that the welfare of the State requires that present and future generations of school age children be assured opportunity to develop to the fullest their intellectual capacities. It is the intent of this Legislature to insure

that the State shall furnish on an equal basis auxiliary services to all pupils in the State in both public and nonpublic schools." (Emphasis supplied.)

N.J.S.A. 18A:7A-6 directs that:

"The State board, after consultation with the commissioner and review by the Joint Committee on the Public Schools shall (a) establish goals and standards which shall be applicable to all public schools in the State, including uniform Statewide standards of pupil proficiency in basic communications and computational skills at appropriate points in the educational careers of the pupils of the State, which standards of proficiency shall be reasonably related to those levels of proficiency ultimately necessary as part of the preparations of individuals to function politically, economically and socially in a democratic society, and which shall be consistent with the goals and guidelines established pursuant to sections 4 and 5 of this act, and (b) make rules concerning procedures for the establishment of particular educational goals, objectives and standards by local boards of education." (Emphasis supplied.)

Pursuant to N.J.S.A. 18A:7A-6, the State Board of Education has promulgated rules setting forth uniform Statewide goals and standards of proficiency among which are the following:

N.J.A.C. 6:8-2.1

"(A) The State educational goals shall be the following outcome and process goals and shall be applicable to all public school districts and schools in the State.

"***

"(c) The public schools in New Jersey shall provide:

"1. Instruction which bears a meaningful relationship to the present and future needs and/or interests of pupils;

"2. Significant opportunities, consisent with the age of the pupil, for helping to determine the nature of the educational experiences of the pupil;

"3. Specialized and individualized kinds of educational experiences to meet the needs of each pupil;

"***

"8. Teaching staff members of high quality; *** (Emphasis supplied.)

N.J.A.C. 6:28-3.2(b)

"***

"(b) Supplemental instruction shall be instruction provided educationally handicapped pupils which is given in addition to the regular instructional program of such pupils. It shall meet the following criteria:

"1. Supplemental instruction for the educationally handicapped pupils shall be provided in a school or other facility operated and controlled by the local school district;

"2. Supplemental instruction shall be considered part of the planned curriculum for the educationally handicapped pupil for whom it has been prescribed by a basic child study team, or a speech correctionist and described in the pupil's individualized education program;

"3. Supplemental instruction for the educationally handicapped pupil may be given individually or in small groups, not to exceed three pupils;

"4. Supplemental instruction shall be provided in physical facilities conducive to learning;

"5. The teachers providing supplemental instruction shall be appropriately certified for the subject or level in which instruction is given." (Emphasis supplied.)

A reading of these statutes and rules of the State Board of Education leads to the conclusion that supplemental instruction, for those in need of such assistance by reason of demonstrated educational handicaps, is mandated under existing education law in New Jersey. It is further clear that teachers, under whatever title given, must not only exhibit highly developed skills in motivating and instructing the educationally handicapped but also possess proper certification as a guarantee that they have been properly trained to render such important educational instructions.

Petitioners assert that, by reason of their function of instructing in essential programs, they meet the criteria of teaching staff members set forth in N.J.S.A. 18A:1-1 which states that:

"***'Teaching staff member' means a member of the professional staff of any district or regional board of education, or any board of

> education of a county vocational school, holding office, position or employment 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 and includes a school nurse."

The Board denies that they are indeed teaching staff members and asserts that they are, instead, a tutorial class which does not meet the criteria for gaining tenure as set forth in N.J.S.A. 18A:28-5, which provides as follows:

> "The services of all teaching staff members including all teachers, *** 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:
>
> "(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;***"

The Board argues that petitioners are barred from receiving tenure because they are paid on an hourly basis, are not paid for holidays, are not enrolled in the TPAF, are not assigned to instruct classes as large as regular classroom instructors, are not employed for the entire school day and year, and are not assigned responsibility for supervision of homerooms, lunchrooms, playgrounds, bus loading and corridors.

Petitioners are regularly employed, albeit for less than a complete school day or year. By their function of instructing pupils as certificated teachers in essential programs they meet the facial criteria of staff member as set forth in N.J.S.A. 18A:1-1. Similarly, they meet the apparent requirements of N.J.S.A. 18A:28-5.

The State Board of Education, however, relying on the Appellate Court decision of March 27, 1980, Docket No. A-1980-78 in Point Pleasant Beach Teachers Association v. Board of Education of Point Pleasant Beach, reversed the Commissioner in a case with similar factual context in Hamilton Township Supplemental Teachers Association, et al. v. Board of Education of the Township of Hamilton, 1979 S.L.D. ___ (decided by the Commissioner November 30, 1979, decided State Board October 1, 1980). Therein, the State Board, in ruling that only one Hamilton supplemental teacher served in a tenurable position, stated that the employment of the other supplemental teachers:

> "***is basically temporary and variable, depending upon the needs of children of the district from time to time. For example, in one year a school might need three supplemental reading teachers, while in the next year only two would be required; or if three were retained, their respective hours could be greatly shortened. Even though the general program for the handicapped is mandated, it requires, as the Appellate Division said of Title I, 'a flexibility in operation which would be impeded if its instructors were granted tenure.' Point Pleasant Beach, supra, slip opinion page 7."

In another supplemental teacher case, Claire Bisgay, et al. v. Board of Education of the Township of Edison, 1980 S.L.D. ___ (decided September 8, 1980) the Commissioner, on the basis of similar facts to those found in Hamilton, reached a similar conclusion that certain supplemental teachers were not tenurable when he stated:

> "***In many instances, as in the case herein, these pupils are screened by the local child study team and an educational program is designed by a learning disabilities teacher consultant in accordance with each pupil's individual needs. The supplemental teacher is then required to implement the individualized educational program as designed by the learning disabilities teacher consultant on a small group individual basis. The supplemental instruction afforded to each child is removed from the regular classroom setting; however, the overall responsibility for decision making with respect to each child's educational achievement by and large ultimately remains that of the learning disabilities teacher consultant and his or her regular classroom teacher. In this regard the supplemental teacher serves as the catalyst through which the educational goals in certain basic skills areas are achieved to eventually mainstream the affected pupils.
>
> "It is clear from a reading of the provisions of N.J.S.A. 18A:27-2 that a person who is not the holder of an appropriate teaching certificate may not provide instruction to pupils in the public schools of New Jersey. However, the Courts have held in Biancardi, supra, and Point Pleasant Beach, supra, possession of an appropriate teacher's certificate is not the sole basis upon which a

person may lay claim to a tenure status pursuant to N.J.S.A. 18A:28-5, or, in fact, be eligible for many of the benefits otherwise accorded to regular teaching staff members pursuant to statutory prescription. The Commissioner is constrained to observe that supplemental instructional services which local boards of education must provide to certain of their pupils who require remediation in the basic skills areas are actually an extension of an educational program which a regularly certificated classroom teacher would provide to such pupils. The severity of the educational handicaps of these pupils requires a more intensified and individualized instructional program than that which could be attained in the regular classroom environment. In any event, the ultimate goal to be achieved in affording educationally handicapped pupils supplemental instruction is to have them return to their regular classroom on a full time basis.

"In the Commissioner's judgment those persons who serve as supplemental teachers actually assist the regular classroom teacher by providing such remedial instruction for certain limited periods of time during the school day in accordance with an educational plan developed, not by the supplemental teacher, but rather by a specially certificated learning disabilities teacher consultant. Supplemental instruction which is provided under these circumstances is analogous to the character and nature of employment services which, in effect, could be provided by appropriately certified substitute teachers who are, in fact, taking the place of a regular classroom teacher with the expectation that these pupils will be returned to the regular classroom teacher upon their attainment of minimum proficiency in the basic skills subject matter areas. The Commissioner so holds.

"In arriving at the above findings and determination the Commissioner does not intend to convey to local boards of education or their teaching staff members that a tenure status could not be acquired in a part-time or full-time position in which supplemental instruction is mandated by law. The Commissioner finds and determines herein that, when a local board of education determines that compliance with the mandate of a thorough and efficient education for certain of its pupils requires supplemental instruction which can be only provided by persons who are specially certificated and who possess those skills and abilities above and beyond those of the regular classroom teacher, then these persons are tenure eligible pursuant to the provisions of N.J.S.A. 18A:28-5.***"

Although the above decisions are now on appeal before the Appellate Division of the Superior Court and the State Board, respectively, they provide a precedent which must be considered in the case presented, herein, for determination.

Petitioning C.E. teachers argue that they are entitled under the negotiated agreement to be accorded all privileges as tenured teachers since they provide the same type of instructional service as those who have served and been named as supplemental teachers. While it is apparent that their functions are the same, it must be recognized that the circumstances of their employment contrasted sharply. At all times, the Board's named supplemental teachers were hired under contract, enrolled in the TPAF and afforded the same salary and fringe benefits of regular classroom teachers.

The dicta of the Appellate Court in Point Pleasant Beach, supra, a decision which the Commissioner, in Hamilton, supra, determined has relevance to teachers providing supplemental instruction, states:

> "***Each petitioner in this case was employed for the equivalent of three academic years within four consecutive academic years and held a position which required a teaching certificate issued by the Board of Examiners. They fall within the literal terms of N.J.S.A. 18A:1-1 and 18A:28-5, and therefore could be considered eligible for tenure. Moreover, petitioners performed teaching functions substantially similar to those performed by staff members. See Downs v. Bd. of Ed. of Hoboken, 13 N.J. Misc. 853 (Sup. Ct. 1935).
>
> "Substitute teachers would also appear facially to qualify for tenure under the statute. But it is now well settled that they are not 'teaching staff members' within the meaning of N.J.S.A. 18A:28-5 and time served as a substitute teacher is not to be counted toward tenure. Schulz v. State Bd. of Ed., 132 N.J.L. 345 (E. & A. 1945); Biancardi v. Waldwick Bd. of Ed., 139 N.J. Super. 175 (App. Div. 1976), aff'd o.b. 73 N.J. 37 (1977). Nor do guidance counselors working part time in an adult evening school established as an optional program acquire tenure in their position. Capella v. Bd. of Ed. Camden Cty. Voc. Tech. Sch., 145 N.J. Super. 209 (App. Div. 1976).
>
> "Whether a professional employee of a Board of Education qualifies as a teaching staff member eligible for tenure depends upon the nature of the employment tendered and accepted. This determination can only be made after an examination of the terms, conditions and duties of the employment and a consideration of the conduct of the parties. Biancardi v. Waldwick Bd. of Ed., supra at 213.
>
> "The facts presented here disclose many areas where the relationship between petitioners and the Board differed substantially from the relationship between the usual teaching staff member and the Board.

"Unlike the regular teaching staff, petitioners were hired annually without written contract, for the period starting October 1 continuing to June 'as needed' and were paid on an hourly basis. Petitioners individually submitted a written request for employment each year and waited for notification of re-employment, implicitly admitting they did not have tenure, were not eligible to acquire tenure (N.J.S.A. 18A:27-10) and that their employment was temporary and contingent upon federal funding. Biancardi v. Waldwick Bd. of Ed., supra at 177. While petitioners performed duties functionally similar to those of other teachers, they were restricted to the Title I program and acted primarily as tutors giving individual remedial aid to the children.

"N.J.S.A. 18A:27-3.1 requires that all non-tenured teaching staff members be evaluated at stated intervals and N.J.S.A. 18A:27-10 requires the Board of Education to give to each non-tenured teaching staff member either a written contract of employment or notice that such employment will not be offered. It is undisputed that petitioners were not evaluated and were not given either a written contract or notice of termination. And while petitioners must certainly have been aware that other teachers were being evaluated and tendered contracts, petitioners did not protest this disparate treatment either in person or through the union grievance procedure until the letter of December 1975. This letter, which was written three, four or five years after petitioners' employment, was their first assertion of any right to either tenure or fringe benefits. Moreover, petitioners never made application for membership in the Teachers Pension and Annuity Fund, N.J.S.A. 18A:66-1 et seq.

"A further element to be considered in determining if a professional employee qualifies as a teaching staff member is whether the program in which he is employed requires a flexibility in operation which would be impeded if its instructors were granted tenure. Capella v. Bd. of Ed. of Camden Cty. Voc. Tech. Sch., supra at 214-215. In that connection, the source of funds for the program is relevant. It relates directly to the question of whether petitioners were offered and accepted temporary employment. The source of the funds is relevant only insofar as it sheds light on the nature of petitioners' employment and it was in that manner that the State Board of Education considered it, stating:

"When because of uncertainty in the source of funding, a local board in good faith hires a professional employee on a basis plainly understood to be temporary, such appointment does not give the employee the status of a teaching staff member.

"The State Board held that petitioners were hired on a temporary basis, understood that to be the nature of their employment and accepted it as such. The record fully supports that conclusion, and the decision of the State Board of Education is affirmed."

Having carefully considered current precedents in case law, I CONCLUDE, after careful review of the terms, conditions and nomenclature of petitioners' hiring that the Board, in response to a statutory mandate newly enacted in 1977, created a flexible separate and distinct dategory of employees known as CE teachers. This category was not synonymous to the category it recognized in its negotiated agreement as "Supplemental Teachers." The Board at no time represented to petitioners that they would be other than part time CE teachers paid $7 per hour for time actually worked. It is uncontroverted that petitioners, prior to accepting that employment and in successive years reaccepting that employment, did not raise objection to those terms and conditions.

Petitioners argue that their only alternative to accepting such limited benefits was to remain unemployed. It is unrebutted, however, in this record that in at least two (2) instances, teachers are shown to have accepted the part time employment rather than accept full time positions elsewhere. In any event, the Court's holding in Point Pleasant Beach, supra provided sufficient precedent to sanction the right of a board to employ remedial instructors on a part time, hourly basis with limited benefits. Similarly, a precedent was set by the State Board in Hamilton, supra, holding that one part time supplemental teacher, by reason of her duties and terms of employment, was in a tenurable position as contrasted to other part time, non-tenurable supplemental teachers. In consideration of this precedent, I CONCLUDE that the Board could and did legally establish a class of CE teachers in non-tenurable positions with limited salary and benefits while at the same time continuing to employ tenured supplemental teachers on guide with full benefits.

The remaining issue raised by petitioners is a claim to equal treatment on constitutional grounds. Petitioners, asserting that the Board may treat different classes of employees differently only if there are logical and distinct differences between groups, state that there is, herein, no such distinction and that:

> "***there is no rational basis for the Board to treat petitioners different from other teaching staff members providing similar supplemental instruction, but on guide. The instant record is replete with numerous inconsistencies and contradictions, as set forth in our Proposed Findings of Fact, supra, that substantiate this contention.
>
> Petitioners urge that respondent Board has not even come close to sustaining that burden of proof. Teachers performing supplemental instruction are paid both on guide and hourly, hourly paid Comp.

> Ed. teachers also perform non-Comp. Ed. work without being paid on guide; and on guide teachers perform ostensibly Comp. Ed. work together with their on guide duties.
>
> In short, the simplistic dividing line urged by the Board simply does not (and cannot) stand up in the real world (or Green Brook School District) of carrying out an educational program for a large number of individual students, with a multitude of different educational needs and requirements. That actual practice, and its impact upon petitioners herein, cannot be characterized as other than patently irrational, contradictory, unreasonable and arbitrary, patently unfair, and violative not only of petitioners' constitutional right to equal protection of the laws, but their rights under New Jersey's Education Law as well.***" (Petitioner's Brief at p. 30)

Having considered the precedents set forth in case law in Point Pleasant Beach, supra, and Hamilton, supra, **I CONCLUDE** that the Board in 1977 had cause when complying with newly enacted N.J.S.A. 18A:46A-1, et seq., to insure a degree of flexibility by establishing a separate class of part time, hourly paid employees with subsequent fringe benefits limited to sick leave and enrollment in PERS. Accordingly, **I FURTHER CONCLUDE** that there was no violation of petitioners' constitutional rights.

DETERMINATION:

In the light of the holdings in Hamilton, supra, and Point Pleasant Beach, supra, and in consideration of the conclusions set forth above, petitioners' claims to relief in the form of retroactive additional salary and placement on the teachers salary guide with full fringe benefits and tenure are contraindicated. Judgment is entered in favor of the Board. Accordingly, **IT IS ORDERED** that the Board's Motion for Dismissal, entered on the fourth day of hearing and held in abeyance, is **GRANTED**. The Petition of Appeal is **DISMISSED**.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, FRED G. BURKE,** who by law is empowered to make a final decision in this matter. However, if Fred G. Burke does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

OAL DKT. NO. EDU 0870-80

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

December 4, 1980
DATE

Eric G. Errickson
ERIC G. ERRICKSON, ALJ

Receipt Acknowledged:

December 5, 1980
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

December 9, 1980
DATE

Gerald L. Parker/ss
OFFICE OF ADMINISTRATIVE LAW

ms

DOCUMENTS IN EVIDENCE:

J-1	1977-79 Negotiated Agreement
P-1	February 1977 Application for Title I funds
P-2	March 25, 1977 Williams to Lore
P-3	September 6, 1977 GBEA President to Kolchin
P-4	FY 1978 SCE Application
P-5	October 30, 1978 Grievance
P-6	Advisory Arbitration Award, August 31, 1979
P-7	Sheila Reidy SCE Time Sheets
P-8	October 24, 1978 Kolchin to Furino, et al.
P-9	September 27, 1977 Kolchin to Fiordaliso
P-10	April 27, 1979 Kolchin to Goleski
P-11	1979-80 Moskowitz Contract
P-12	April 15, 1980 Kolchin to Fiordaliso
P-13	November 1, 1977 Kampella and Codd to Inzano
P-14	September 26, 1977 Kolchin to Goleski
P-15	October 12, 1979 Goleski Contract
P-16	December 1, 1979 Goleski Contract
P-17	April 15, 1980 Kolchin to Goleski
P-18	April 15, 1980 Kolchin to Goleski
P-19	1979-80 Employment Contract - Morris
P-20	PERS Certification of Payroll Deductions - Goleski
P-21	1979-80 Employment Contract - Furino
P-22	Notice of Abolishment of Position - Furino
P-23	December 4, 1979 Posting
P-24	Notice of Abolishment of Position - Drelich

P-25	April 15, 1980 Kolchin to Drelich
P-26	1979-80 Contract of Employment - Delanoy
P-27	1979-80 Contract of Employment - Delanoy
P-28	April 15, 1980 Kolchin to Delanoy
P-29	High School Reading and Study Skills Brochure
R-1	Narrative Report - Drelich
R-2	October 22, 1979 Falcetano to Delanoy
R-3	October 12, 1979 Fertonani to Falcetano
R-4	1979 N.J. Public Employee Benefit Manual
R-5A-D	Certification of Payroll Deductions
R-6	PERS Enrollment Application - Moskowitz
R-7	Schedules of Goleski, Morris, Fiordaliso
R-8A,B	Delanoy's 1979-80 Schedule
R-9A,B	Certification Requirements for Speech Correctionist and Reading Specialist
R-10A,B	N.J. State Department Forms for Individual Pupil Services
R-11	March 30, 1977 Notice to Fiordaliso, et al.
R-12	September 26, 1977 Notice to Goleski, et al.
R-13	1979-80 Employment Contract - Moskowitz
R-14	June 30, 1978 State Department Notice of Comp Ed Aid
R-15	September 26, 1979 Kolchin Memo

GREEN BROOK EDUCATION ASSOCIATION ET AL.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF GREEN BROOK, SOMERSET COUNTY,	:	
RESPONDENT.	:	

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law.

The Commissioner observes that exceptions were filed by petitioners pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Petitioners except to the conclusion by the Honorable Eric G. Errickson, ALJ that the Board properly created a flexible separate and distinct category of employees known as CE teachers. Petitioners argue that such action was barred because the Board also employed tenured supplemental and Title I teachers enrolled in TPAF. Petitioners contend that the Board violated their constitutional rights to equal protection of the laws because there is no substantive difference of function between the Board's Title I teachers and supplemental teachers and CE teachers.

Petitioners cite with approval the State Board decision of October 1, 1980 in Hamilton Township Supplemental Teachers Association et al. v. Board of Education of the Township of Hamilton wherein it is ruled that one of the Hamilton supplemental teachers served in a tenurable position because of the similarity of work done to that of regular teaching staff members. The Commissioner cannot agree with petitioners' exceptions. Petitioners' argument that they were faced with a take it or leave it offer and that they must be afforded the same terms and conditions of employment as the Board's Title I and supplemental teachers on constitutional grounds is a conclusionary statement that must fail. Point Pleasant Beach, supra

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

January 19, 1981

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 0692-80
AGENCY DKT. NO. 461-12/79A

IN THE MATTER OF:

LOUIS STUKAS, et al.,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF WOODBRIDGE, MIDDLESEX COUNTY

Record Closed
Received by Agency: 12/4/80

Decided: 12/2/80
Mailed to Parties: 12/8/80

APPEARANCES:

Stephen B. Hunter, Esq., for Petitioners
(Klausner & Hunter, attorneys)

Joseph J. Jankowski, Esq., for Respondent
(Hutt, Berkow, Hollander & Jankowski, attorneys)

BEFORE **JAMES A. OSPENSON**, ALJ:

Nineteen teaching staff members (petitioners) appeal action of the Board of Education of the Township of Woodbridge (Board) in docking their pay 1/200 of their annual salaries for failing to report for work at 1:00 p.m. on the day on which a teachers'

and clerk/secretaries' strike in the district was settled. They claim the Board never telephoned them to do so. The Board alleges they were unlawfully absent from work throughout the strike, including the settlement date, and raises the equitable defense of unclean hands in that they took part in the illegal strike.

Petitioners joined their individual and several claims in a single petition filed in the Division of Controversies and Disputes of the Department of Education on December 17, 1979. The Board's answer was filed there on January 28, 1980. On February 6, 1980, the matter was transmitted to the Office of Administrative Law for hearing and determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. On April 1, 1980, a prehearing conference was held in the Office of Administrative Law and an order entered. Thereafter, hearing was scheduled for June 23-27, 1980 but was adjourned until October 1, 1980, when the matter was addressed as if on cross-motion for summary decision pursuant to N.J.A.C. 1:1-13.1 et seq., on a jointly filed stipulation of facts (J-3 evidence) and memoranda of law. The latter were filed by November 5, 1980, and the record was closed.

STIPULATED FACTS

The parties stipulated as follows:

1. Petitioners, Louis Stukas, Dianne Trenery, Martha Lucci, Diane Berkoben, Reinette Seaman, Arlene Volkin, June Hurley, Gert Concannon, Hud Sonnenbug, Robert Nauyoks, Lynette Johnson, Richard Stoner, Kathleen Marasco and Karen Demish, are all certified teaching staff members employed by the respondent Board of Education, are members of the Woodbridge Township Education Association and were members during the time period in question.

2. Respondent, Woodbridge Township Board of Education, Middlesex County, New Jersey, maintains its principal office at School Street, Woodbridge Township, New Jersey, and is responsible for the operation and supervision of the Woodbridge Township School District.

3. Commencing on September 4, 1979, an orientation day for teachers, and continuing on September 5, 6, 7, 11, 12, 13 and 14, 1979, the Woodbridge Township Federation of Teachers, Local 822, AFT, AFL-CIO (hereinafter referred to as Local 822) and the Woodbridge Township Clerks and Secretaries Federation, Local 1405, AFL-CIO (hereinafter referred to as Local 1405) engaged in concerted activities that were the subject of an Amended and Supplemental Order to Show Cause with Temporary Restraints executed by the Honorable David D. Furman, on September 8, 1979. A copy of this Order along with affidavits are attached thereto and appended to this Stipulation as Joint Exhibit J-1. The security measures directed by said Order, in addition to other security measures, were implemented by the Board. During the days set forth above, the schools were open in the school district.

4. All petitioners received and/or had knowledge of a letter under the signature of Norman Lunde, dated September 7, 1979, a copy of which is appended hereto and designated as Exhibit J-2.

5. The petitioners, all of whom had knowledge of the documents referred to in paragraphs 3 and 4 of the Stipulation marked as Exhibits J-1, and J-2, did not work as scheduled on the dates referred to in paragraph 3.

6. None of the petitioners were members of either Local 822 or Local 1405 during the time period at issue.

7. On or about September 17, 1979, the Board of Education and Local 822 entered into a Memorandum of Agreement at approximately 7:00 a.m. resolving the strike within the district.

8. Respondent Board of Education as part of the strike settlement agreed that all employees who reported by 1:00 p.m. in the secondary schools and by 1:30 p.m. in the elementary schools in the district would receive their daily salary for that date which would be treated as an orientation day for teachers. Local 822 had the sole responsbility for contacting teaching personnel concerning the 1:00 p.m. and 1:30 p.m. reporting times and the ending of the strike.

9. The Board of Education did not telephone any of the petitioners concerning the 1:00 p.m. and 1:30 p.m. reporting times nor did the Board contact any Executive Board Member of the Woodbridge Township Education Association.

10. None of the petitioners received telephone calls from representatives of Local 822, were unaware of the ending of the strike and did not report to work at 1:00 p.m. and 1:30 p.m. on the 17th of September 1979.

11. The respondent Board of Education withheld one two-hundredth (1/200th) of the annual salary of each of the petitioners, with the exception of Reinette Seaman, for failure to work on September 17, 1979. Mrs. Seaman received half pay that date when she worked from 3:30 p.m. to 5:30 p.m.

PRELIMINARY PROCEDURAL DISCUSSION AND CONCLUSION

At hearing on October 1, 1980, counsel for petitioners moved to withdraw and dismiss the names of Pat Randazzo, Peggy Armstrong, May Randolph, Jim Zilai, George Bates, and Dan Spina as parties petitioners. The reasons advanced were, variously, that two of the six had left the district, three were otherwise disinclined to press their claims further and one (Jim Zilai) had not in fact been docked 1/200 of his annual salary. There was no objection by respondent. The motion was **GRANTED**. Transcript October 1, 1980, pp. 4-5.

The petition of appeal as filed was verified by only one of the nineteen petitioners, Dianne Trenery, whose affidavit was dated December 13, 1979. N.J.A.C. 6:24-1.3 provides:

> "The petition must include the name and address of each petitioner, the name and address of or a description sufficient to identify each party respondent, and a statement of the specific allegation(s) and essential facts supporting them which have given rise to a dispute under the school laws, and must be verified by oath [emphasis added] . . ."

The prehearing order of April 1, 1980 provided:

> "As required by N.J.A.C. 6:24-1.3, all petitioners shall file verifications of the petition of appeal..."(par. 5).
>
> "This order is entered pursuant to N.J.A.C. 19:65-10.1(d) [now N.J.A.C. 1:1-10.1(d)] ..." (par. 16).
>
> (The latter provides the parties shall be deemed to have consented to the prehearing order and its terms if no objection is filed within five days of receipt of it. Petitioners filed no such objection.)

By time of hearing on October 1, 1980, none of the petitioners, except for petitioner Trenery, had filed verifications. Queried by the administrative law judge, petitioners' attorney pleaded oversight. The attorney for respondent declined to move to dismiss the petitions of non-verifying petitioners. The administrative law judge then interposed a motion, sua sponte, to dismiss the petition of appeal as to those petitioners still remaining in the cause, except for petitioner Trenery, for noncompliance with N.J.A.C. 6:24-1.3 and/or for noncompliance with a previous order of the Office of Administrative Law dated April 1, 1980 and specifically paragraph 5 thereof. Judgment on the motion was reserved. Leave after hearing to brief the issue but not to cure the defects was granted. See transcript, October 1, 1980, pp. 6-13. By November 7, 1980, nevertheless, the attorney for petitioners filed verifications for petitioners Stukas, Lucci, Berkoben, Seaman, Volkin, Concannon, Nauyoks, Johnson, Stoner, Marasco, Demish, Hurley and Sonnenbug.

The findings of fact and conclusions of law hereinbelow will deal substantively with the claims of all the numerous petitioners remaining in the case. Among them, there is a commonality, if not identity, of factual and legal issues as against respondent. Under

the particular circumstances of this proceeding, I believe it reasonable and proper that all claims be decided on substantive grounds rather than on procedural grounds. Accordingly, I **DECLINE** to rule on the motion to dismiss as interposed. Such declination is not to be construed as condonation of such practices as are hereinabove recited, nor should there be inferred an acceptance of petitioners' attorney's arguments in opposition to dismissal. On the contrary, such practices are **DISAPPROVED.**

DISCUSSION

Public employees in New Jersey, and teachers in particular, may not strike or by their concerted refusal to work frustrate performance of their public duty. Board of Education, Borough of Union Beach, 53 N.J. 29, 36-39 (1968); In re Block, 50 N.J. 494, 499-500 (1967); In re Buehrer, 50 N.J. 501, 508 (1967). The right of the public to untrammeled free public education is of constitutional origin. N.J. Constitution, Art. VIII, par. 4, sec. 1. Indeed, concerted work refusal, without more, may predicate actions in contempt against teachers specifically enjoined by the court against such refusal. See, for example, Block, supra, at p. 498 of 50 N.J.; and Buehrer, supra, at p. 506 of 50 N.J.

There is little doubt from the evidence here—indeed it is admitted by petitioners—that when Woodbridge Township School District was struck by Local 822 and Local 1405, and while district schools were open, petitioners were continuously absent from work from September 4, 1979 to September 17, 1980, day of the settlement. Par. 3 of J-3. Each one knew, moreover, that all district employees had been expressly ordered to report for assigned duties at regular reporting times, under pain of discharge, despite the strike. J-2; par. 4 of J-3. Each one knew striking personnel and ". . .all persons acting on behalf of or in concert with [such personnel]" had been enjoined by a Superior Court judge on September 8, 1979 ". . . to resume performance of all scheduled regular academic activities. . ." Each one knew the court had enjoined all such personnel from ". . . causing, instigating, promoting, encouraging, sanctioning, authorizing, carrying on, participating in, fostering, continuing, lending support or assistance to, aiding or abetting any strike, sit down, slow down, work stoppage, or other impediment to work including refusing to or counselling to refuse to cross any picket line . . . by any employees or employee of [the Board]." Par. 5 of J-3.

Petitioners argue their admitted refusal to work during the strike stemmed from fear of verbal and physical abuse if they were to have crossed picket lines. But the record does not support their assertion. Affidavits by O'Malley, Hoagland, Gabriel, Shaffer, Betor, Sanislow, Jordan and Coppola, all principals of district schools, detailed events and incidents of teacher harassment before issuance of the court restraining order on September 7, 1979. McIntyre, a substitute teacher, gave an affidavit about harassment on September 6, 1979. None of the affidavits dealt with events in the district during the period from September 8, 1979, when the court acted, until September 17, 1979, the day of settlement. The record does not disclose the personal or individual experiences of these plaintiffs at any time, nor does the evidence detail events subsequent to September 8, 1979, when court-ordered security measures were admittedly implemented by the Board and when schools were admittedly open. Par. 3 of J-3. Those measures included assignment of two armed and uniformed police officers at each district school at stations and locations as directed by the school principal. Should such measures have been inadequate, on certification of the district superintendent, the court enjoined, the county sheriff was ordered to assist in the keeping of order. Pp. 5-6 of court order of September 8, 1979.

Petitioners argue that because they were not members of the two striking locals, they are not to be stigmatized for their absences from work during the strike. Their petition of appeal alleged, in paragraph 3, the Board "was incapable of controlling the most elementary of labor situations . . ." as the reason for their absence. The evidence does not support the assertion: the record contains no evidence from which such inferential nexus between the strike and their absences could be drawn. On the contrary, an inference from evidence in the record can more readily be drawn that petitioners deliberately absented themselves from work in sympathetic concert with the striking locals and that they therefore violated the spirit, if not the letter, of the court's restraining order. On what basis? The evidential record constructed herein is entirely documentary: it contains no personal subjectively explanatory evidence from any petitioner, by way of affidavit, deposition or stipulation, that individually justifies his or her absence from work at any time during the strike. Failure of such proofs, when available, invites the inference they would not support the excuse alleged in the petition. See State v. Clawans, 38 N.J. 162, 170-75 (1962). I draw that inference here: such proofs were available and are obviously superior to objective circumstantial proof in written stipulations. Cf., Clawans, supra, p. 161 of 38 N.J.

Equally without weight, one senses, is petitioners' assertion the Board unlawfully failed to notify them to return at 1:00 p.m. on the day of settlement: plainly, had they reported for work as directed by the Lunde notice of September 7, 1980, had they obeyed the spirit and letter of the court order, they would have been paid and would not have put themselves in the position of not knowing the strike was over, if that were the case. In short, the record is clear the Board made reasonable efforts to end the strike, maintain teacher/pupil security and keep open district schools for the requisite statutory minimum daily period (N.J.S.A. 18A:58-16; N.J.A.C. 6:20-1.3). Cf., Camden Educ. Assn. v. Bd. Ed. City of Camden, 1978 S.L.D. _____ (May 30, 1979), aff'd St. Bd. 1979 S.L.D. ____ (June 22, 1979). It follows that Board action in not compensating petitioners for their absences on September 17, 1979 was reasonable, proper and, indeed, required by law. Cf., Borshadel v. Bd. Ed. Twp. North Bergen, 1972 S.L.D. 353, 360; Goldman v. Bd. Ed. Borough of Bergenfield, 1973 S.L.D. 441, 445-6; Greenberg v. Bd. Ed. City of New Brunswick, 1963 S.L.D. 59, 61; Highton v. Bd. Ed. City of Union, 1974 S.L.D. 193, 204-6, aff'd St. Bd. 1974 S.L.D. 207; Kotler v. Bd. Ed. Borough of Manville, 1972 S.L.D. 197, 204; and see Camden, supra, 1979 S.L.D. ___ (May 30, 1979), aff'd St. Bd. 1979 S.L.D. ____(June 22, 1979) (". . . that . . . teaching staff members elected not to attend to their duties and responsibilities during an illegal stoppage of work cannot inure to the detriment of the Board..."). A local board of education, it is said, has no authority in law to remunerate teaching staff members, school clerical staff or other employees for illegal absences, whether resulting from a strike or other causes. Highton, supra, p. 204 of 1974 S.L.D.

Based on the above, I hereby **FIND** and **DECLARE** as follows:

1. The foregoing discussion, to the extent of any mediate propositions of fact, is adopted herein.

2. The foregoing Stipulation of Facts (J-3) is adopted herein.

3. Nineteen teaching staff members (all as listed in the petition of appeal except petitioner Jim Zilai), members of a nonstriking education association, were absent from their assigned teaching positions in the district when, from September 4 to September 17, 1979, two other local bargaining associations struck the district.

4. By letter dated September 7, 1979, the superintendent's office gave notice to all personnel to report for work at assigned positions and at assigned times as usual.

5. Petitioners knew of that notice but did not comply with it.

6. On September 8, 1979, the Board obtained a restraining order from Superior Court enjoining the strike and all concerted activity in support of it and mandating local police measures at district schools in protection of life and property.

7. Until September 17, 1979, the day of the strike settlement, all district schools remained open.

8. Between at least September 8, 1979 and until strike settlement, there is no evidence in this record that petitioners' absence from work was justified by unreasonable risks of harm to their lives or property.

9. During that period, on the contrary, the inference is plain that petitioners elected to remain absent from work in sympathetic concert with other striking workers, contrary to legal duty imposed upon them as public employees of the district and to the court restraining order of which they had knowledge. In short, their absences were illegal.

10. Part of the strike settlement agreement effected on September 17, 1979 provided that personnel who reported for work as assigned by 1:00 p.m. or 1:30 p.m. would receive one day's salary.

11. That the provision was never specifically communicated to petitioners by the Board is without legal import.

12. The Board docked petitioners 1/200 of their salaries (Petitioner Seaman, who worked half day, was docked 1/400)

for their illegal absences from work on September 17, 1979.

13. Had petitioners reported for work on September 17, 1979 as previously required by law and enjoined by court order, they would have suffered no loss in pay.

14. Petitioners' loss in pay was a consequence of their own election not to work during an unlawful strike and not, as they allege, a consequence of any notification delinquency by the Board.

15. Their conduct, therefore, equitably bars them from relief herein.

16. The action of the Board in docking petitioners' pay for their failure to work on September 17, 1979 was reasonable and proper since remuneration of public employees for illegal absences from work is impermissible.

CONCLUSION

Based on the foregoing, I hereby **CONCLUDE** the petition for relief by all remaining petitioners, that is, petitioners Stukas, Trenery, Lucci, Berkoben, Seaman, Volkin, Hurley, Concannon, Sonnenbug, Nauyoks, Johnson, Stoner, Marasco and Demish, should be and is hereby **DISMISSED**.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, FRED G. BURKE,** who by law is empowered to make a final decision in this matter. However, if Fred G. Burke does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

December 2, 1980
DATE

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

December 4, 1980
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

December 8, 1980
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

thf

EXHIBITS MARKED IN EVIDENCE

J-1	Order to Show Cause with Temporary Restraints, dated September 8, 1979, Superior Court of New Jersey, Chancery Division, Middlesex County, by Hon. David D. Furman, JSC, i/m/o Woodbridge Twp. Bd. of Education v. Woodbridge Twp. Federation of Teachers, Local 822, AFT, AFL-CIO, et als.
J-2	Letter dated September 7, 1979, Norman Lunde, Assistant Superintendent, Woodbridge Twp. School District to employees of Woodbridge Twp. Board of Education.
J-3	Stipulation of Facts by parties, with attachments.

OAL DKT. NO. EDU 0692-80

LOUIS STUKAS ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WOODBRIDGE, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law.

The Commissioner observes that exceptions were filed in a timely fashion by petitioners pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Petitioners in their exceptions contend that the Honorable James A. Ospenson, ALJ improperly failed to consider the importance of the Stipulation of Facts accepted into the record which they contend was favorable to their pleadings. Further, petitioners by means of their exceptions attempt to supplement the record created in this contested case while under the aegis of the Court. The Commissioner finds no merit in such exceptions. A thorough examination of the record leads the Commissioner to conclude that Judge Ospenson properly weighed and evaluated the Stipulation of Facts. The Commissioner finds no merit in the news articles submitted by petitioners as part of their exceptions.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

January 19, 1981

LOUIS STUKAS, ET AL., :

PETITIONERS-APPELLANTS, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE TOWNSHIP OF WOODBRIDGE, MIDDLESEX COUNTY, : DECISION

RESPONDENT-APPELLEE. :

:

Decided by the Commissioner of Education, January 19, 1981

For the Petitioners-Appellants, Klausner & Hunter (Stephen B. Hunter, Esq., of Counsel)

For the Respondent-Appellee, Hutt, Berkow, Hollander & Jankowski (Joseph J. Jankowski, Esq., of Counsel)

The State Board of Education affirms the Commissioner's decision for the reasons expressed therein.

June 3, 1981

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. ——
AGENCY DKT. NO. 187-5/78

IN THE MATTER OF:

JUDITH WINSON, MARYANN TIERNEY
and **FRED MARSHALL,**
Petitioners,
v.
BOARD OF EDUCATION OF THE
TOWNSHIP OF RIDGEWOOD,
BERGEN COUNTY,
Respondent.

APPEARANCES:

Saul R. Alexander, Esq., for petitioner (Saul R. Alexander, attorney)

Stephen G. Weiss, Esq., for respondent (Greenwood, Weiss & Shain, attorneys)

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

Petitioners appeal from actions of the Ridgewood Board of Education (Board) withholding petitioners' salary and adjustment increments for the 1978-79 school year.

The matter was opened before the Commissioner of Education. Argument on petitioners' motion to dismiss the Board's amended answer was heard on November 21, 1978 and decision held in abeyance. Hearing on procedural aspects of the matter was held on December 21 at the Bergen County Vocational Satellite School, Teterboro and

posthearing submissions were timely filed. The matter was transferred to the Office of Administrative Law on July 2, 1979 pursuant to N.J.S.A. 52:14F-1 et seq.

Petitioners allege the Board withheld salary and adjustment increments from them for the 1978-79 school year but failed to comply with the controlling statute, N.J.S.A. 18A:29-14, in doing so. The statute provides withholding actions may be taken only upon recorded roll call vote of the full membership of the board of education and that the Board shall, within 10 days of the action, give written notice to the affected teaching staff member together with the reasons therefor. Petitioners also allege the action fails to comply with the statute because the reasons given are not sufficiently factual and lack detail. They ask restoration of the withheld increments.

The Board denies that it failed to comply with N.J.S.A. 18A:29-14 and states its actions were timely and appropriate. It argues that even if a violation of N.J.S.A. 18A:29-14 did occur, it was wholly technical in nature and minor in effect and nonprejudicial to any substantial right of any of the individual petitioners, all of whom were aware of the reasons for the Board's actions and none of whom have seen fit to challenge the actions on the merits. In its amended answer the Board states it determined to withhold the increments upon the recommendation of the superintendent of schools and the persons who evaluated the petitioners and that it did so in accordance with law. That determination was made at an executive session of the Board held on April 10, 1978. On April 3, each petitioner was noticed that the action would be considered and each was afforded an opportunity to have the matter discussed at the public meeting of April 17. None of the petitioners requested that this be done. The notices of April 3 also state, "Your immediate supervisor has already reviewed the reasons for the withholding of an increment during your formal summary evaluation conference."

The Board then determined in view of the absence of any objection from petitioners to instruct the superintendent to inform each petitioner that the Board had determined to withhold his or her increments. There is no record of Board action at a regular or special public meeting.

The instant petition was then filed and answered.

Subsequently, but prior to the end of the 1977-78 school year and on the advice of counsel, the Board determined to act by way of separate resolution at a public meeting

as to each petitioner. It did so by recorded roll call vote of a majority of its full membership on June 26, 1977 and on June 30 sent to each petitioner by registered mail, return receipt requested, a letter notice of the action setting forth in detail the reasons therefor. (J-7, J-9, J-10)

On July 5 the amended answer, to which petitioners object, was filed. On July 24, petitioners filed a motion for summary judgment alleging that the answer could not be amended or, in the alternative, that the amendment was untimely. The motion also urged a decision in favor of petitioners on the additional ground that the April action of the Board was ineffective by reason of not being taken at a public meeting.

From the pleadings and the parol and documentary evidence adduced at hearing I **FIND** the action of the Board taken in executive session on April 10 did not comply with the requirements of N.J.S.A. 18A:29-14 for two reasons. First, there is no evidence or even any claim that the action was taken at a regular or special meeting of the Board. That a board may act as a board only when it is in a duly constituted meeting is beyond argument. Formal actions may not be taken at executive or caucus sessions. "M.W." v. Freehold Reg. High School Dist. Bd. of Ed., 1975 S.L.D. 120 aff'd St. Bd. 1975 S.L.D. 137. Second, the notice of reasons for the withholdings was ostensibly given to petitioners before the Board action and the statute plainly requires formal notice within 10 days after the action.

The question of whether the answer could or could not be amended must be answered in the affirmative. The rule under which the amendment was made was N.J.A.C. 6:24-1.6 which stated, in pertinent part, "...any respondent may amend his answer, at any time and in any manner which the Commissioner deems fair and reasonable." The rule is clear and the record is clear that the Commissioner received and filed the amended answer without comment. The construction petitioners urge be adopted is too strained and too much at variance with the plain meaning of the words in the rule. No statute, ordinance, rule or regulation may be interpreted to achieve a meaning the words will not bear.

The matter then comes down to whether or not the withholding actions taken on June 26, 1978 were procedurally proper. I **FIND** they were. The joint exhibits (J-7, J-9 and J-10) are complete as to form and content and constitute proper notice as to the petitioners. The Board's minutes (R-6), as corrected, although incorrectly citing N.J.S.A.

18A:39-14 rather than 29-14, are clearly legally sufficient. The citation error appears to be typographical and is of such little magnitude as to be harmless. The correct statute was relied upon and complied with.

That a board of education can amend any action it has the power to take is long established. Hancock v. Scotch Plains-Fanwood Bd. of Ed., 1975 S.L.D. 716; "G.G." et al v. New Providence Bd. of Ed., 1975 S.L.D. 502; Hedgi v. Fieldsboro Bd. of Ed., 1972 S.L.D. 248.

On the basis of the above analysis and findings, **I CONCLUDE** the withholding actions complained of by petitioners in the matter were, in all respects, proper exercises of the Board's legislatively invested powers.

A thorough review of the record in this matter reveals that the only issue raised in the prehearing conference was whether or not the increments had been withheld properly and reveals that the verified petition of appeal raises only the procedural question. The merits of the actions not having been pleaded and the procedural question having been settled in favor of the board, **I CONCLUDE** there is no longer any justiciable issue before me.

Accordingly, the petition **IS DISMISSED**.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, FRED G. BURKE,** who by law is empowered to make a final decision in this matter. However, if Fred G. Burke does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

AGENCY DKT. NO. 187-5/78

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

2 December 1980
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

3 December 1980
DATE

Seymour Weis
DEPARTMENT OF EDUCATION

Mailed To Parties:

December 5, 1980
DATE

Ronald L. Parke/jd
OFFICE OF ADMINISTRATIVE LAW

plb

AGENCY DKT. NO. 187-5/78

DOCUMENTS IN EVIDENCE

R-1 Evaluation of Winson 3-31-78 by Cavaluzzo and McNally
R-2 Evaluation of Stevens 3-78 by Department Chairman
R-3 Evaluation of Tierney 3-31-78 by Department Chairman and Director, Health and Physical Education
R-4 Evaluation of Marshall 4-3-78 by Watts
R-5 Copy of minutes of special meeting of 6-26-78 for board members' review in advance of approval
R-6 Minutes of Special meeting of 6-26-78 as approved, pp. 196-221
R-7A Agenda for special meeting of 6-26-78
R-7B Handwritten notes of Assistant Secretary Yaniro of special meeting of 6-26-78, 8 pp.
R-7C Handwritten notes of Assistant Secretary Yaniro distilled from R-7B, 6 pp.

J-1 Letter 4-3-78 Stewart to Winson
J-2 Letter 4-3-78 Stewart to Stevens
J-3 Letter 4-3-78 Stewart to Tierney
J-4 Letter 4-3-78 Stewart to Marshall
J-5 Minutes of 4-10-78 executive session, pp. 46-53
J-6 Advance agenda of 6-26-78 special meeting
J-7 Registered letter 6-30-78 Sullivan to Winson
J-8 Registered letter 6-30-78 Sullivan to Stevens
J-9 Registered letter 6-30-78 Sullivan to Tierney
J-10 Registered letter 6-30-78 Sullivan to Marshall

JUDITH WINSON ET AL.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF RIDGEWOOD, BERGEN COUNTY,	:	
RESPONDENT.	:	
	:	

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law.

The Commissioner observes that no exceptions were filed in a timely fashion by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

January 19, 1981

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2943-80
AGENCY DKT. NO. 174-4/80A

IN THE MATTER OF:

JON CAROSELLI,
Petitioner,
v.
BOARD OF EDUCATION OF THE UPPER FREEHOLD REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,
Respondent.

Record Closed: November 3, 1980
Agency Received: 12/5/80

Decided: December 4, 1980
Mailed to Parties: 12/9/80

APPEARANCES:

Arnold M. Mellk, Esq., for the Petitioner (John B. Prior, Jr., Esq., on the Brief)

Peter P. Kalac, Esq., for the Respondent (Howard M. Newman, Esq., on the Brief)

BEFORE **LILLARD E LAW**, ALJ:

Petitioner, a teaching staff member in the employ of the Upper Freehold Regional Board of Education (Board) from September 1972 until his resignation effective August 31, 1979 alleges that the Board is legally obligated to compensate him and adjust his salary for the period July 1, 1979 to August 31, 1979 pursuant to the collective

negotiated salary agreement between the Board and the Upper Freehold Regional Education Association (Association) for the 1979-80 school year. The Board, conversely, denies petitioner's allegations and asserts in its counterclaim that it overpaid petitioner for the period from July 1, 1979 until August 3, 1979 and seeks an Order directing the return of the amount of the alleged overpayment.

This matter was filed before the Commissioner of Education on April 7, 1980 and, thereafter, was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. The matter is ripe for determination in the form of the pleadings, Cross Motions for Summary Judgment, a Stipulation of Facts, exhibits and Briefs of counsel. No essential facts are in dispute.

STIPULATION OF FACTS

1. Petitioner Jon Caroselli, residing at R.D. No. One, Box 388, Jackson, New Jersey has been employed by respondent, Upper Freehold Regional Board of Education since 1972.

2. Petitioner has been an employee under contract with the Board for each school year beginning with the 1972-73 school year up to and including the 1979-80 school year.

3. For the 1974-75 school year, petitioner was employed from September 1, 1974 through June 30, 1975 with salary paid in twenty (20) equal semi-monthly installments (Exhibit A).

4. For the 1975-76 school year, petitioner was employed from September 1, 1975 through June 30, 1976 with salary paid in twenty equal semi-monthly installments. (Exhibit B).

5. Beginning in the 1976-77 school year and continuing each year thereafter, petitioner was employed from July 1, of each year through June 30 of each year, except for the 1977-78 school year when, for reasons not relevant here, the school year began August 1 and continued through June 30. (Exhibits C, D and E)

6. For the 1978-79 school year, petitioner was employed from July 1, 1978 through June 30, 1979 at an annual salary of $19,946.30 which was paid in equal semi-monthly installments.

7. The terms and conditions of petitioner's employment for the 1978-79 school year were governed by the Negotiations Agreement in effect between the Board and the Association. Article VI of the Agreement recognizes only two (2) types of teacher contracts: ten-month (10) contracts and twelve-month (12) contracts. Article VI provides that for twelve-month (12) personnel: "the in-school work year of teachers employed on a twelvemonth basis shall not exceed 206 days."

8. In addition to the days worked during the normal school year which ended June 30th of each year, petitioner was required to work during the summer months. As compensation for this additional service, petitioner received additional salary equal to ten percent (10%) of his base salary.

9. Petitioner's salary was calculated as follows: to petitioner's base salary was added an amount equal to ten percent (10%) of petitioner's base salary. This sum was then paid in twenty-four (24) equal semi-monthly installments.

10. As of July 1, 1979, petitioner was paid according to Step 15, Masters Level, of the Teachers' Salary Guide. All salary payments received by petitioner during July and August, 1979 were in accordance with the 1978-79 salary levels since negotiations on the 1979-80 teachers' salary guide had not been completed.

11. During July and August, 1979, petitioner was paid equal semi-monthly installments as follows:

July 15	$861.00
July 31	861.00
August 15	861.00
August 31	861.00

12. On August 29, 1979, petitioner resigned his position, effective September 1, 1979.

13. Petitioner's resignation was accepted without condition by respondent.

14. Subsequent to petitioner's resignation, negotiations were completed on the 1979-80 teachers' salary guide. According to the newly negotiated salary guide, petitioner's base salary at Step 15 of the Master's guide was $19,362.00. Petitioner's total annual salary, including the ten percent (10%) of base salary for summer employment amounts to $21,198.00 That amount divided into twenty-four (24) equal semi-monthly payments equals $887.42.

15. Since August 31, 1979, petitioner has not received any salary other than the four semi-monthly payments received during July and August, 1979.

16. On January 9, 1980, the Superintendent of Schools advised petitioner that due to his resignation, his salary was being retroactively re-calculated. According to the Superintendent's calculations, petitioner had been overpaid by the Board and owed them $1,508.00.

17. On April 7, 1980, petitioner filed a Petition to the Commissioner of Education seeking resolution of this dispute.

18. On April 24, 1980, respondent filed an Answer and Counterclaim to the Petition. An Answer to the Counterclaim was filed by petitioner on May 2, 1980.

DISCUSSION

Having carefully considered the entire record in this matter, I **FIND** that the Stipulation of Facts are hereby adopted by reference as **FINDINGS OF FACT**.

It is clear that the Board's policy with regard to its schedule of payments to its teaching staff members was and is pursuant to N.J.S.A. 18A:27-6(3) which provides that:

> "***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 and not later than five days after the close of the month in the case of monthly installments while the school is in session, a month being construed, unless otherwise specified in the contract, to be 20 school days or four weeks of five school days each;."

Thus, it was the Board's policy to pay petitioner "in equal semimonthly installments." It is additionally clear that petitioner's salary payments were in twenty-four (24) semimonthly installments as a twelve month (12) employee pursuant to the Board's policy as provided in Article VI of the Agreement between the Board and Association.

There was no showing that the Board had enunciated a policy to make salary payments to petitioner, or other teaching staff members similarly situated, in a manner other than in semimonthly installments. The Board acknowledges that the salary of petitioner should not be recalculated on a per diem basis as advised by the superintendent. It additionally acknowledges that petitioner was entitled to the 1979-80 negotiated salary retroactive to July 1, 1979. It asserts, however, that the Commissioner's decision in the matter of Gladys Bruner v. Board of Education of Upper Freehold Regional, Monmouth County 1980 S.L.D. (decided September 23, 1980) requires that petitioner's salary be calculated on a monthly basis. Pursuant to Bruner the Board calculated petitioner's 1979-80 salary as follows:

1979-80 10-month negotiated salary	$19,362.00
(186 working days)	
1979-80 1-month negotiated salary	
(10% of salary - 20 working days)	1,936.00
Total 1979-80 11-month salary	21,198.00
Divided by 11 months, equals	1,936.18
Multiplied by one month (20 working days	1,936.18
(Actual entitlement)	
Amount paid to petitioner	3,444.00
Less actual entitlement	-1,936.18
Amount of overpayment required to be refunded	$ 1,507.82

I cannot agree with the Board's contention nor its calculations in this matter. This is so based upon the Stipulation of Facts set forth hereinbefore and the additional **FINDINGS OF FACT** as follows:

1. Petitioner was considered to be a twelve (12) month employee and was compensated as such by the Board.

2. The Board erred when it calculated petitioner's salary on an eleven (11) month basis rather than on a twelve (12) semimonthly basis.

3. Petitioner's 1979-80 annual salary was projected to be $21,198, pro-rated equaled $887.42 per payment.

4. The difference between petitioner's entitlement of $887.42 in semi-monthly payments and that which he received in the amount of $861.00 equals an amount of $26.42 for one (1) semimonthly pay period.

5. Petitioner is entitled to an additional amount of salary of $105.68 for the four (4) semimonthly pay periods July 1, 1979 through August 31, 1979.

Accordingly, the Board is **ORDERED** to pay petitioner the additional amount of $105.68 of his salary entitlement. The Board's claim for recoupment of salary is hereby **DENIED**.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, FRED G. BURKE,** who by law is empowered to make a final decision in this matter. However, if Fred G. Burke does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

OAL DKT. NO. EDU 2943-80

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

4 December 1980
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

5 December 1980
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

December 9, 1980
DATE

Ronald L. Parker/sl
OFFICE OF ADMINISTRATIVE LAW

plb

OAL DKT. NO. EDU 2943-80

JON CAROSELLI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE UPPER FREEHOLD REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The Commissioner has reviewed the entire record of the matter herein controverted including the initial decision rendered by the Office of Administrative Law.

The Commissioner observes that timely exceptions and reply exceptions were filed respectively by the respondent Board and petitioner pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Board takes exception to the initial decision by Judge Lillard E. Law, ALJ on the grounds that it is contrary to the Commissioner's decision in Gladys Bruner v. Upper Freehold Regional School District, Monmouth County, 1980 S.L.D. _____ (decided September 23, 1980). The Board argues that the Commissioner's decision in Bruner and the relevant facts therein are on all fours identical to the matter herein controverted. The Board specifically points out the following with respect to the employment contract in Bruner and compares them with the contract of Petitioner Caroselli in the instant matter:

"***	Bruner Contract	Caroselli Contract
Date of Contract:	April 20, 1978	April 20, 1978
School year defined in contract:	7/1/78 - 6/30/79	7/1/78 - 6/30/79
Note appearing on bottom of contract beneath signature of teaching staff member referring to asterisk following salary amount:	(*NOTE: Salary based on 5 days per week, 11 months per year-- 206 working days.'	(*NOTE: -- 11 month contract -- (206 working days)'
Renewal of contract for 1979-80 school year dated:	4/26/79	4/26/79
Terms:	Continued employment under existing contract dated 4/20/78	Continued employment under existing contract dated 4/20/78
Form of Renewal:	Exactly as executed by Caroselli	Exactly as executed by Bruner ***"

(Board's Exceptions, at p. 1-2)

The Board maintains therefore that given the above facts of this matter it is clear that petitioner herein was an eleven month employee and entitled to the same consideration with respect to compensation as the Commissioner determined in Bruner, supra. Thus, the Board maintains that it did, in fact, compensate petitioner in the amount of $3,444 in four semi-monthly payments during the month of July and August, 1979 (1979-80 school year). However, it subsequently became aware as the result of negotiations it concluded with the Association for the 1979-80 school year, that petitioner's salary for 20 days of employment which constituted one month of summer employment for that school year should have been $1,936.18, thereby resulting in an overpayment to petitioner in the amount of $1,507.82. The Board argues that petitioner was not entitled to be paid in

excess of $1,936.18 and, therefore, the amount of $1,507.82 constitutes payment for services petitioner did not render which petitioner is required to return.

Finally, the Board argues that Bruner, supra, and the Commissioner's determination In the Matter of the Request of the Board of Education of the Township of Brick, 1977 S.L.D. 704 as well as the provisions of Article VIII, section 3, paragraph 2 and 3 of the New Jersey Constitution preclude payment for services not rendered. The Board asserts that the precise language of the Commissioner in Brick Township, supra, stated:

> "***[I]t 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.***" (at 705)

The Board maintains that these were the precise conditions which prevailed herein where petitioner was paid for the months of July and August 1979, albeit he worked only 20 days and subsequently resigned from the Board's employ as of September 1, 1979.

Petitioner in his reply exceptions categorically rejects the position taken by the Board in its exceptions to Judge Law's initial decision. Petitioner argues that, contrary to the Board's claim herein that Bruner, supra, is dispositive of this matter, it is clear that Judge Law's determination is based upon the facts herein which conclude that petitioner was a contracted 12 month employee and thereby entitled to be compensated accordingly.

The Commissioner has reviewed the exceptions of the parties as they pertain to the findings and determination set forth by Judge Law in his initial decision. The Commissioner is constrained to find and determine that the facts of this matter must be viewed within the context of his determination in Bruner, supra. Petitioner's contention to the contrary, in effect, attempts to establish a distinction without a difference. The Commissioner so holds.

Accordingly, the initial decision in this matter is hereby set aside. The Commissioner finds and determines that petitioner's salary was contractually agreed upon by the parties by employment to be rendered for 11 months in accordance with the terms set forth therein.

In view of the above the Commissioner determines that the sum of $1,507.82 is owed to the Board by petitioner and the Commissioner therefore directs the payment of that sum.

COMMISSIONER OF EDUCATION

January 19, 1981

JON CAROSELLI,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE UPPER FREEHOLD REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT-APPELLEE.	:	

Decided by the Commissioner of Education, January 19, 1981

For the Petitioner-Appellant, Greenberg & Mellk
(John B. Prior, Esq., of Counsel)

For the Respondent-Appellee, Kalac, Newman & Griffin
(Peter P. Kalac, Esq., of Counsel)

The State Board of Education affirms the Commissioner's decision for the reasons expressed therein.

May 6, 1981

Pending New Jersey Superior Court

UNION TOWNSHIP TEACHERS ASSOCIATION AND ROBERT H. GREBE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

For the Respondent, Simone & Schwartz
(Howard Schwartz, Esq., of Counsel)

Petitioner, a tenured teaching staff member in the employ of the Board of Education of the Township of Union, hereinafter "Board," avers that he was denied a salary increment for the 1976-77 school year without just cause and in violation of the negotiated agreement between petitioner's Association and the Board. The Board avers that its action controverted herein was a legally proper exercise of its authority and discretion and that the Petition should be dismissed.

A hearing in this matter was conducted on November 16, 1977 by a hearing examiner appointed by the Commissioner of Education at the offices of the Union County Superintendent of Schools, Westfield. Subsequent thereto a Letter Memorandum in lieu of Brief was filed by petitioner and a Reply Brief was filed by the Board. The report of the hearing examiner is as follows:

The undisputed facts in the instant matter are these:

1. Petitioner had been employed by the Board for approximately ten years as a machine tool teacher. (Tr. 48, 99-100)

2. On June 10, 1976, between 6:00 and 6:30 a.m., petitioner telephoned the Board's attendance office and reported that he was ill and claimed a sick leave day in accordance with the Board's rules and practice. (Tr. 14)

3. On June 10, 1976, before 7:15 a.m., a Board employee observed petitioner's motor vehicle at a business location where it was known that petitioner was self-employed in a part-time business. (Tr. 84)

4. On the same day, between 9:00 and 9:30 a.m., petitioner was visited and observed at his part-time place of business by two school administrators in the Board's employ. (Tr. 22-23, 78)

5. Petitioner asserted that he was indeed ill and that he was afflicted with a rash on his body which caused him to itch and impelled him to scratch various parts of his body while teaching. (Tr. 12-14)

6. On June 10, 1976, the principal addressed a letter to petitioner wherein he summarized the events, as he perceived them, and informed petitioner that the matter was referred to the Superintendent of Schools. (P-2)

7. On June 11, 1976, the Board's director of personnel/administration held a conference with petitioner and subsequently advised him by letter to meet with the Assistant Superintendent in regard to the matter. (P-1)

8. On July 15, 1976, the Superintendent advised petitioner that the Board had reviewed a recommendation of the Assistant Superintendent to withhold petitioner's 1976-77 salary increment. (P-3)

9. On July 20, 1976, the Board took formal action to maintain petitioner's 1976-77 salary at the same level as his 1975-76 salary. (R-2)

10. On September 14, 1976, petitioner and his legal counsel met with the Board with regard to its action to withhold petitioner's salary increment.

11. On September 16, 1976, the Board's attorney advised petitioner's attorney that the Board had sustained its previous action to withhold petitioner's salary increment. (P-4)

The Board advanced a Motion to Dismiss the Petition of Appeal on the assertion that petitioner was untimely and that he failed to file his Petition within ninety days subsequent to the Board's action on July 20, 1976, pursuant to N.J.A.C. 6:24-1.2. (Tr. 4-5, 6-8)

Petitioner argued that he and his attorney appeared before the Board on September 14, 1976 to secure a reversal of the Board's action taken on July 20, 1976. Petitioner subsequently filed his Petition before the Commissioner on December 21, 1976. Petitioner argued further that the ninety day toll of time did not commence until September 14, 1976, such time that the Board determined to reconsider its actions of July 20, 1976. (Tr. 5-8)

The hearing examiner agrees with the arguments set forth by petitioner and recommends that the Board's Motion to Dismiss the Petition of Appeal grounded on untimeliness be dismissed.

Petitioner testified that approximately one month prior to June 10, 1976 he acquired a rash on his body from his waist to his neck which caused an extremely uncomfortable itching and he found it difficult to concentrate while he was at his teaching station. He testified that between 6:00 and 6:10 a.m. on the morning of June 10, 1976 he telephoned the Board's attendance office electronic recording machine to report that he was ill and requested a sick leave day. He testified that he subsequently left his home and went to a machine shop, where he was self-employed, to think and reflect upon some personal home problems. He testified that he had taken his lunch and a change of clothes to his place of business intending to remain until 4:00 p.m. at which time he had a scheduled doctor's appointment. (Tr. 11-17, 19-20, 22, 38-40, 52)

Petitioner testified that at approximately 11:20 a.m. while he was standing next to a machine observing some work that he had done, the principal and the Board's director of personnel appeared at his place of business and declared that petitioner belonged in school rather than at his machine shop. He testified that he stated to the two school administrators that he was not in school on that day because he did not feel physically or mentally capable to perform his school duties. He testified that he attempted to explain the reasons that he was not in school and offered to show them the rash on his body. He testified that the two administrators declined to observe his physical condition because they did not believe that they were qualified to render a judgment with regard to it. Petitioner also testified that he did not engage in any work in his machine shop nor did he earn any money on June 10, 1976. (Tr. 22-26, 40)

Petitioner testified that he had reported to school and taught his assigned classes prior to June 10 and that he had not advised the school's nurse, principal or any school official that he had a medical problem. He testified that on Friday, June 11 he returned to school, taught his assigned classes and was in receipt of a letter addressed to him from the principal with regard to his absence on June 10. (P-2) He testified that on June 11 he had a conference with the director of personnel and subsequently on June 14 he had a conference with the Assistant Superintendent who listened to his explanation with regard to his absence and advised him of the ramifications and the possible penalties that might be imposed as the result of his actions. (Tr. 41-49) He testified that he was subsequently in receipt of a letter from the Superintendent, dated July 15, which stated as follows:

> "Please be advised that the Board of Education, at a conference meeting held on July 13, 1976, reviewed the recommendation of the Assistant Superintendent to withhold your 1976-77 salary increase.
>
> "The Board sustained the recommendation with the provision that this matter be reviewed by the Superintendent of Schools on or before February 1, 1977."
>
> (P-3)

Petitioner testified that on September 14, 1976 he and his attorney had an appearance before the Board with regard to its action to withhold his salary increment. He testified that the Board deducted one day's salary for his absence on June 10, 1976 and that he was penalized from September 1, 1976 to February 1, 1977 for one half of the 1976-77 annual salary increment which represented a loss of $300 in salary. (Tr. 30, 34-38; P-4)

The Board's attendance coordinator testified that he maintained a telephone recording device in his home and that petitioner had reported that he was ill and would be absent from school on June 10, 1976. He testified that subsequent to leaving his home to drive to the high school he passed petitioner's place of business at approximately 7:10 A.M. and observed petitioner's automobile parked in the vicinity of the machine shop. He testified that he arrived at approximately 7:25 A.M. and advised the principal of what he knew and had observed with regard to petitioner. (Tr. 81-84)

The director of personnel and the principal testified that together they went to petitioner's place of business on June 10, 1976 and arrived at approximately 9:30 a.m. They both testified that when they entered petitioner's work area they observed him dressed in work clothes which included trousers, shoes, white T-shirt, safety goggles and an apron, working with a vertical milling machine which was in operation and running. The principal testified that he inquired of petitioner as to why he was not in school and that petitioner told him that he was ill and had a rash on his body. The principal testified that he stated that he did not dispute that petitioner had a rash, however, he continued to inform petitioner that if he could work in his machine shop, he could also work at school. The two school administrators testified that the visit to petitioner's machine shop lasted but a few minutes and they left together. (Tr. 65-70, 73-76)

The Assistant Superintendent testified that he had a conference with petitioner on Monday, June 14, 1976 at which time he stated that he would recommend to the Superintendent that

petitioner forfeit one day's salary and also that his salary increment be withheld for the subsequent academic year. (Tr. 85-87)

The Superintendent testified that he did not have direct contact with petitioner, however he had been advised of his absence from school and presence at his place of business on June 10, 1976 by the principal, the director of personnel and the Assistant Superintendent. The Superintendent testified that the Board considered the Assistant Superintendent's recommendation to withhold petitioner's salary increment and that it took formal action to do so on July 20, 1976. He testified that prior to the Board's action, he had informed petitioner that it was the recommendation of the Assistant Superintendent to withhold his 1976-77 salary increment. (Tr. 89-94; R-2; P-3)

The Superintendent testified that he subsequently recommended to the Board that commencing on February 1, 1977 that petitioner be restored one half of the 1976-77 annual salary increment which the Board approved. The Superintendent testified that it was the Board's policy, when it took disciplinary action against a teaching staff member, to require that he make a report to the Board within a six month period to ascertain whether or not there was improvement with regard to the disciplined teaching staff member. (Tr. 97-99)

The hearing examiner has carefully reviewed such testimony and documentary evidence in the context of petitioner's allegations and applicable law with respect to the withholding of his salary increment. The primary question for decision is whether or not such testimony and evidence refutes a judgment that the Board acted reasonably and with justification when it acted in 1976 to withhold petitioner's salary increment for the 1976-77 school year. In the matter of William Myers v. Board of Education of the Borough of Glassboro, 1966 S.L.D. 66, the Commissioner was concerned with the withholding of a salary increment and stated:

> "***[J]ustification for withholding a salary increment for unsatisfactory performance may be found in a single, serious infraction of the rules of the school, or in many incidents.***"
>
> (Emphasis supplied.) (at 68)

The hearing examiner finds that the undisputed facts in the instant matter as cited are true in fact. He further finds that the testimony of the principal and the director of personnel was credible wherein they observed petitioner operating a machine at his place of business. The hearing examiner recommends, therefore, that the Board's action be affirmed to deduct one day's salary for petitioner's absence on June 10, 1976.

The hearing examiner finds no evidence that the Board violated its policies embodied in the negotiated agreement between it and the Association. The hearing examiner finds that petitioner was made aware that the Board intended to withhold his salary increment prior to its formal action. Additionally, the hearing examiner finds that the Board provided petitioner the opportunity to appear before it, with his legal counsel, to argue against its action. The hearing examiner finds that the Board was in no way obligated to grant petitioner such an appearance but rather provided him the opportunity at its own discretion. In all respects, the hearing examiner finds the actions of the Board to have been appropriate and within its statutory authority. Ralph Marshall v. Board of Education of the Southern Ocean County Regional High School District, Ocean County, 1978 S.L.D. ___ (decided July 10, 1978)

The hearing examiner finds that the Board's action to restore one half of the 1976-77 salary increment to petitioner commencing February 1, 1977 was appropriate and within its statutory authority. Having made such a finding, the hearing examiner is mindful of the Commissioner's determination in the matter of Charles Coniglio v. Board of Education of the Township of Teaneck, 1973 S.L.D. 449, wherein he held:

> "***When a local board of education does adopt a policy for the withholding of salary increments, either by adopting the provisions of N.J.S.A. 18A:29-14 or a variation thereof, it cannot adopt a policy which is not within the bounds of N.J.S.A. 18A:29-14. This statute makes no provisions for the withholding of a portion or a fraction of an increment. Accordingly, any policy adopted by virtue of the authority of this statute may not provide for the withholding of a portion or fraction of an increment.***"
>
> (at 459)

The facts in the matter, sub judice, are in direct contrast to those set forth in Coniglio, supra. The facts in the instant matter show that the Board acted to withhold a full salary increment from petitioner for the 1976-77 school year. Thereafter, pursuant to its policy, the Board reviewed its disciplinary action against petitioner and determined that he had made sufficient improvement at midyear to be restored to his increment entitlement. Such entitlement commenced on February 1, 1977 for one half of the 1976-77 school year. As the Commissioner stated in the matter of Robert H. Beam v. Board of Education of the Borough of Sayreville, 1975 S.L.D. 993, 995 such discipline with regard to an increment withholding was not intended to carry on ad infinitum.

The authority for the Board to withhold petitioner's salary increment is found in N.J.S.A. 18A:29-14. Pursuant to statutory prescription, the findings, ante, and the Court decision in Kopera v. West Orange Board of Education, 60 N.J. Super. 288 (App. Div. 1960), the hearing examiner finds that the Board had a reasonable basis in reaching its conclusion that it would withhold petitioner's salary increment for the 1976-77 school year.

Accordingly, the hearing examiner recommends that the Commissioner find that the Board acted properly, pursuant to its statutory authority, and he further recommends that the Petition of Appeal be dismissed.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the entire record of the matter controverted herein, including the report of the hearing examiner.

The Commissioner observes that exceptions were filed by both petitioner and respondent pursuant to the provisions of N.J.A.C. 6:24-1.17(b).

Petitioner's initial exception alleges that the facts of the instant matter do not come within the doctrine cited as controlling by the hearing examiner. In the matter of William Myers v. Board of Education of the Borough of Glassboro, 1966 S.L.D. 66, the hearing examiner noted that the Commissioner was concerned with the withholding of a salary increment and stated:

> "***[J]ustification for withholding a salary increment for unsatisfactory performance may be found in a single, serious infraction of the rules of the school, or in many incidents.***" (at 68)

The Commissioner finds that the facts in the instant matter do indeed come within the doctrine as cited. The Commissioner rejects petitioner's exception concerning the lack of an indication of "seriousness" by the hearing examiner as it relates to an infraction of the rules of the school and the resultant incident of unsatisfactory performance. The Commissioner notes that it is not his responsibility or function to interfere with local boards in the management of their schools unless they violate the law, act in bad faith or abuse their discretionary authority. Boult and Harris v. Board of Education of the City of Passaic, 1939-49 S.L.D. 7 (1946), aff'd State Board of Education 15, 135 N.J.L. 329 (Sup. Ct. 1947), aff'd 136 N.J.L. 521 (E. & A. 1948)

Petitioner takes further exception to the refusal by the principal and director of personnel to inspect his physical condition and render a determination as to his capabilities for performing his teaching duties.

The Commissioner finds that there was a valid reason for such refusal. Neither administrator possessed even limited medical training or other qualifications needed to make a judgment regarding the physical well-being of petitioner. Howard K. Worrell v. Board of Education of the Township of Cherry Hill, Camden County, 1979 S.L.D. _____ (decided August 13, 1979)

Petitioner took additional exception to the hearing examiner's conclusion regarding the legality of the Board's action in withholding less than a full year's increment subsequent to its final determination of September 14, 1976.

The Commissioner in reviewing the record finds that the facts in the instant matter show that the Board acted to withhold a full salary increment from petitioner for the 1976-77 school year pursuant to its authority as found in N.J.S.A. 18A:29-14. Further, he sees nothing in statute which prohibits a board of education from reviewing its disciplinary action. Such action is a local policy matter within its discretionary powers and entitled to a presumption of correctness. Thomas v. Morris Township Board of Education, 89 N.J. Super. 329 (App. Div. 1965), aff'd 46 N.J. 581 (1966) The Commissioner has previously found that such discipline should not be perpetuated ad infinitum. Robert H. Beam v. Board of Education of the Borough of Sayreville, 1975 S.L.D. 993, 995

The Commissioner has noted the exception as filed by the Board with regard to the question of timely filing of the Petition of Appeal in the instant matter. The Board contends that, since petitioner did not file within the ninety day period, such action on his part was untimely.

The Commissioner does not agree. He has reviewed the record and finds that the Board did grant petitioner a hearing on September 14, 1976 subsequent to its July 20, 1976 formal action. At this point petitioner had reasonable expectation of convincing the Board to amend or stay its action. The Board did review the matter and notified petitioner as to its findings which, in effect, sustained its former action. The notification of this finding was transmitted formally to petitioner's attorney by the Board's attorney on September 16, 1976. (P-4) It is, therefore, reasonable to expect that the ninety day toll of time did commence as of the date of final notification. Subsequent to this notification, petitioner did file a Petition of Appeal with the Commissioner pursuant to N.J.A.C. 6:24-1.2 et seq.

For reasons cited, the Commissioner determines that the Board acted within its discretionary authority and legal exercise of its managerial prerogative. N.J.S.A. 18A:11-1 and within the meaning of N.J.S.A. 18A:29-14

Commissioner affirms the findings and recommendations of the hearing examiner and adopts them as his own.

The Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

January 23, 1981

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3064-80
AGENCY DKT. NO. 197-4/80A

IN THE MATTER OF:

BOROUGH OF FARMINGDALE,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF FARMINGDALE,
Respondent.

Record Closed: October 24, 1980
Received by Agency: 12/8/80

Decided: December 8, 1980
Mailed to Parties: 12/10/80

APPEARANCES:

John W. O'Mara, Esq., for petitioner

Kenneth B. Fitzsimmons, Esq., for respondent (Sim, Sinn, Gunning & Fitzsimmons, attorneys)

BEFORE **DANIEL B. MC KEOWN**, ALJ

The Mayor and Council of the Borough of Farmingdale (Council) demand that the Board of Education of the Borough of Farmingdale (Board) be enjoined from the

construction of a proposed school building addition, as revised from an original plan as approved by the electorate at a referendum, on the grounds the Board after the referendum was approved substantially changed the plans as explained to the voters prior to the referendum.

The Commissioner of Education transferred the matter to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1, et seq. A hearing was conducted September 30, 1980 after which letter memoranda of the parties was filed. The record was closed and readied for disposition October 24, 1980, the day after receipt of Council's memorandum.

The Board presented the following proposal to its voters at a special referendum, N.J.S.A. 18A:14-3, held October 13, 1979: (J-8)

> The Board of Education of the Borough of Farmingdale, in the County of Monmouth, New Jersey, is authorized (a) to undertake, as a capital project for lawful school purposes, the construction of an addition to the existing elementary school building located at Academy Avenue and Southard Avenue in the Borough to provide for a library, kindergarten and a multipurpose room, and the related remodeling of the existing building and to expend therefor, including incidental expenses, not exceeding $798,000; and to issue bonds of the School District for said purpose in the principal amount of $798,000, thus using up all of the $168,012.22 borrowing margin for the said Borough of Farmingdale previously available for other improvements and raising its net debt to $136,632.60 beyond such borrowing margin.

Prior to the election the Board's architect, Uniplan, prepared a preliminary budget on May 4, 1979 and schematic plan for alterations, renovations, and new construction to be supported by the proposed bond issue of $798,000. The preliminary budget for the three categories and specifications thereof provided the following: (J-2)

Alterations (old building)			
1.	general construction		
	floors (classrooms)	$ 7,000.	
	toilets	6,000.	
	doors	4,000.	
	exits	14,000.	
	handicapped access (elevator)	40,000.	
	total general construction	$71,000.	
2.	plumbing	$12,000.	
3.	heating and ventilating	$54,000.	
4.	electrical update and tie-in	$20,000.	
Total Alterations			$157,000.
Renovations			
1.	plan renovations		
	administration, nurse, storage faculty		$ 25.000.
Addition - new construction			
1.	9,600 sq. ft. ¶ $45.		
	multipurpose, library, kindergarten		$432,000.
TOTAL CONSTRUCTION			$614,000.
TOTAL BOND ISSUE (x 1.3)			
	includes costs for site work, utilities, architectural and engineering fees, furniture, equipment and contingencies		$798,000.

The proposed schematic plan (J-1) was in fact compatible to the preliminary budget in that alterations and renovations were planned as stated in the preliminary budget, as was new construction in the form of a multipurpose room, library, and kindergarten classroom. The proposal thereafter was the subject of at least two Board meetings wherein the plans were presented to the public.

As the date of the referendum approached, the Board caused to be circulated in the community a brochure (J-5) which sets forth its proposal for which it sought voter approval; a five page leaflet (J-6) by which the Board attempts to correct rumors by setting forth assertedly factual statements in regard to the pending referendum; and finally on October 12, 1979, the day before the referendum, the Board placed an advertisement in the Booster News, a weekly newspaper circulated in Farmingdale, by which it solicited "Yes" votes on the referendum. (J-7) Nothing was contained within any of these publications which suggested the Board was considering alternatives to the plan already presented.

It is presumed here that the Board received prior approval of its plan (J-1) from the Department of Education's Bureau of Facility Planning, N.J.A.C. 6:22-1.11(f)1., in order to put the proposal to the voters which the electorate approved on October 13, 1979.

Prior to soliciting bids on the alterations, renovations, and new construction as originally planned, the Board modified the plans (J-3; J-4) so that the originally proposed size of the new multipurpose room was reduced by 20 square feet, the direction of the room was changed and the size of the new kindergarten room was reduced from a proposed 1,050 square feet to 900 square feet. The proposed new library of 2,548 square feet, also to have been used as an auxiliary classroom, was eliminated and shifted to the lower level of the existing building at the site of a storage room, lavatories, and a teachers' room. These latter rooms are to be now renovated to accomodate the library. In the space where the new library was originally to be located are administrative offices, nurse's room, teachers' room, mechanical room, maintenance room and a machine room. It is noted that the administrative offices, as originally presented to the public prior to the referendum, were to be renovated and remain on the lower level of the existing building. Now, the Board proposes that lower level space, originally for administrative offices is now to be the auxiliary classroom. Finally, a new heating plant originally planned for and explained to the voters has now been eliminated because the Board

determined that the present heating plan is sufficient. It is noted that the changes made by the Board in its original alteration, renovation, and new construction were approved by the Bureau of Facility Planning on September 15, 1980.

The issue before me is whether the Board's revised plan, approved by the Bureau of Facility Planning and upon which bids were solicited, constitutes a significant change from the original plan as explained to the public prior to the referendum on October 13, 1979 and if so should the Board be restrained from proceeding with the revised plan. The question of "significant change" goes to the issue of whether the Board, in fact, is embarking upon a capital project as approved by the public at the referendum or is it attempting to construct facilities in a manner not within the intendment of the approved proposal (J-8, ante) nor as explained to the public at its pre-referendum meetins or literature distributed in support thereof.

The term "significant" here is meant to mean as defined in Webster's New Collegiate Dictionary, 1979, G & C. Merriam Company, having meaning; containing a disguised or special meaning; having or likely to have influence or effect.

Of the several changes made as described above, the abolition of a proposed newly constructed library as explained to the voters prior to the referendum and in its stead to now plan administrative and other offices is surely a significant change in the plans, the proposal for which was approved by the electorate. Such a change has meaning; it has a special meaning which is facilities for the pupils or for staff; and such a change is likely to have had an influence or effect upon the voters at the time of the referendum had the voters known of the Board's intention. That a library facility is still part of the total plan, albeit now located in the basement, does not alter the fact that the facility will not be newly constructed.

The New Jersey Supreme Court in Durgin v. Brown, 31 N.J. 189 (1962) addressed the question of whether once a referendum was passed by the electorate a board had the option of proceeding through completion of the referendum's purpose. The Court at page 198, held

> Nor does the referendum serve to vest in local government the power to deal with a problem. That power was already granted to the Board by R.S. 18:11-1 [N.J.S.A. 18A:33-1] mentioned above. Rather N.J.S.A. 18:5-86 [N.J.S.A. 18A:24-23, et seq.] contemplates that the Board first exercise that power by adopting

> a specific plan; that consents be then obtained from the State Commissioner of Education and the Local Government Board; and finally, that the specific plan receive the Voters' stamp of approval. This sequence of events negates an intention that the referendum is merely advisory. Moreover, an advisory referendum is a tool which local government may but need not use, whereas here the referendum is required.
>
> In these circumstances, the Legislature could hardly have meant that, notwithstanding the election, the Board may change its mind with the freedom it would have if its discretion alone were involved. Rather we think the Legislature committed the final judgment to the voters.
>
> This is not to say that the vote upon the referendum must be obeyed no matter what may later ensue. We may assume the Legislature intended some residual power to meet the extraordinary or unexpected. One can conceive of supervening events which so nullify the premise upon which the vote was had, that discretion remains in the Board to seek relief from the mandate in the public interest. But to rehash the merits of the policy decision which was submitted to the electorate and to decline to fulfull its will because the same or new members of the Board now prefer another program is something else. The time for the Board's decision upon such matters was before the vote. When the voters approved the proposals, the debate upon policy was ended.
>
> Here it is not claimed that something occurred which reasonably suggested that the electorate would wish to be relieved of its decision. ***

No reason is given here why the Board after the approval of the referendum elected to substantially change the proposed plan.

The Commissioner in 1963 considered a similar issue in Kenneth Kearley v. Bd. of Ed. of Borough of Watschung, 1963 S.L.D. 73 and noted at p. 75

> This obligation to acquaint the voters with the proposal does not contemplate commitment to a firm final plan. Such an expectation is unrealistic. A Board of Education is authorized to employ an architect for the preparation of preliminary plans and cost estimates *** The preparation of final working drawings and specifications, however, *** must first be approved by the electorate. It should be obvious that preliminary plans, no matter how carefully prepared, must be amenable to revision in terms of site problems encountered once possession and legal entry upon the land is accomplished following voter approval. If a board were committed to construction of the exact school building illustrated in its pre-referendum brochure, it would have to obligate itself to expensive final plans which would be worthless if the voters

> rejected the proposal. The Commissioner believe that the information supplied in a variety of ways by boards of education to inform their constituents about contemplated school expansion programs is understood by all parties to represent the broad general aims, objectives, expectations, best estimates, or hopes in respect to the proposal, and not a detailed commitment to which the Board is unalterably bound. It is clear that the legislative scheme in New Jersey is to give first to the voters the right to pass upon the general outline of a school building prject and to set limints on the amount of money to be expended for it , and then, once approved by the electorate, to rely on the judgment of the board of education to decide and execute the specific details of the facilities, subject always to the standards for approval of the State Board of Education.
>
> While not committed in particular to its plans as expressed in a preliminary way prior to referendum, a board of education obviously cannot substitute an entirely new project or depart from its original concept to such a degree as to constitute an attempt to evade public approval or commit a breach of faith with the taxpayers. Whether the deviations from its preliminary sketches consitute such an illegal act is a matter of fact to be determined in each case. (emphasis added)

A fair reading of Durgin and Kearley lead in my view to the inescapable conclusion that once a board presents preliminary plans to its citizens and those plans form the basis upon which the citizens are asked to commit themselves to present and future indebtedness, the board has no authority to substantially change the preliminary plans.

Here, a specific substantial change was made. The citizens were informed the proposal would result in the construction of, inter alia, a new library facility for pupils. The electorate approved the referendum. Instead of a new library facility, pupils shall receive a library in the basement of the existing structure through the renovation of certain existing facilities. Instead of a new library for pupils, staff shall receive new offices. Such was not within the realm of knowledge of the voters at the time of the referendum.

It is accordingly **ORDERED** that because a substantial change was made in the original plans, to the exclusion of the voter's knowledge at the time of the election, the Board is hereby permanently restrained from proceeding with such a substantial modification of its original plan; and

It is **FURTHER ORDERED** that the Board proceed forthwith to construct its new addition, renovations, and alterations consistent with its original plan (J-1) and with this decision.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, FRED G. BURKE,** who by law is empowered to make a final decision in this matter. However, if Fred G. Burke does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

December 8, 1980
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

December 8, 1980
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

December 10, 1980
DATE

Ronald L. Parke/bf
OFFICE OF ADMINISTRATIVE LAW

plb

BOROUGH OF FARMINGDALE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FARMINGDALE, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law.

The Commissioner observes that exceptions were filed in a timely fashion by the Board pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Respondent Board excepts to the conclusion by the Honorable Daniel B. McKeown, ALJ that the proposed construction plan represents a substantial change from the original plan on which a successful referendum was authorized by the voters. The Board contends that it has not made any significant change in that plan only authorizing de minimus reduction in size of certain facilities or a relocation of facilities of little significance between the new addition and the renovated area of the present building. The Commissioner cannot agree.

An examination of the record reveals to the Commissioner certain facts which lead him to conclusions therein. The project proposal which was written for the referendum held on October 13, 1979 was very explicit in describing the addition to the existing building which included a new library, kindergarten and multipurpose room. Based upon the definitive description of the proposal, a favorable referendum was authorized by the electorate. The suggested change herein substituting new offices for a new library, evidently has had a strong negative impact upon the community. The Commissioner accordingly concludes that the Board is responsible to the electorate to live up to the letter of the proposal.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

The Board shall proceed forthwith to construct its new addition, renovations and alterations consistent with the original plan with such minor modification as may be architecturally required and approved by the Bureau of Facility Planning Services.

It is so directed.

COMMISSIONER OF EDUCATION

January 22, 1981

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. ---
AGENCY DKT. NO. 379-10/76

IN THE MATTER OF:

FRED RHODES,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF CALDWELL, WEST CALDWELL, ESSEX COUNTY,
Respondent.

APPEARANCES:

W. William Rhodes, Esq., for petitioner

Harold M. Kain, Esq., for respondent

BEFORE **DANIEL B. McKEOWN,** ALJ:

Fred Rhodes, (petitioner) a resident of West Caldwell and a parent of two children enrolled in the public schools operated by the Board of Education of the Borough of Caldwell-West Caldwell, (Board) challenges the constitutionality and statutory authority of the Board to adopt and implement a policy by which parents of its enrolled pupils are charged fees for the pupils to participate in selected away-from-school building activities it sponsors. Disposition of the matter was held in abeyance pending resolution of two similar matters then before the Commissioner of Education: Debra Matrick v. Board of Education of Union County Regional High School District, No. 1, S.L.D. ____

(August 19, 1979) and Board of Education of the Borough of Fair Law v. Harold F. Schmidt, 1978 S.L.D. 735, aff'd State Board of Education, June 6, 1979.

The then assigned hearing examiner, the undersigned, upon joining the Office of Administrative Law brought the matter forward for disposition.

The issue presented for resolution is:

> Whether a board of education is prohibited from assessing fees for certain away-from school building pupil activities it sponsors and imposing that fee upon a pupil or the parents thereof prior to the pupil's participation in that activity.

The Board has a policy, a copy of which is attached and made part hereof, entitled "Field Trips and Excursions Policy" by which the Board declares its intention to provide its pupils three kinds of field trips: fundamental field trips, or those considered an integral part of the regular curriculum in which all pupils are expected to participate; supplemental field trips, or those not considered to be an integral part of the regular curriculum but which may be of interest to a small number of pupils on a voluntary basis within a curriculum; and recreational field trips which are those offered solely for social or recreational purposes on a voluntary basis. There is nothing in the record to establish that the fundamental field trips are taken other than during school hours, while the voluntary trips are taken, it is presumed, after school hours.

The Board with respect to the fundamental, mandatory field trips shall absorb costs for admissions and transportation. Pupils are to absorb the costs for their lunch and dinner. With respect to the voluntary field trips, pupils bear all costs; transportation, admission, and meals.

Petitioner argues the assignment of any fees to pupils or to their parents for participation in any field trip, mandatory or voluntary, the Board sponsors is contrary to the "free public school" clause of the New Jersey Constitution, Article VIII, Section 4, Paragraph 1 and that such fees are contrary to the Commissioner's own ruling in Melvin C. Willett v. Board of Education of the Township of Colts Neck, 1966 S.L.D. 202, aff'd State Board of Education 1968 S.L.D. 276. The Board to the contrary argues that N.J.S.A. 18A:11-1 provides it with the authority to make rules and regulations for the operation of

its schools and that to apply the Willett rule strictly as urged by petitioner would do violence to those kinds of voluntary activities the Board sponsors for the benefit of its pupils but is under no legal obligation to do such as attending a Spanish language play, visits to local colleges for those interested in applying, baseball games for the safety patrol, or those activities in which small groups of pupils may be interested and upon which trip no classroom discussion or tests occur.

The Commissioner held in Fair Lawn, supra, at p. 738,

> Such supplemental [voluntary] opportunities abound both within and outside the boundaries of New Jersey and are increasingly accessible through safe and economical modes of travel. There has been expansion of facilities at state and national parks as well as purchase by boards of education of nature study and ecological study sites. The need for members of our highly technological society to avail themselves of such quiet retreats continues unabated. In this repect the public schools may properly assume a function in preparing pupils both for such participation and the preservation of the environment for generations to follow;

and, at p. 739-740

> When a board approves such trips on an optional basis during the school day it must not only arrange suitable transporation and supervision for pupils but must continue to provide a viable program of education for those who do not wish to participate. It is not required to provide food for those pupils who would have furnished their own meals had they choosen to remain in school. While they may do so, boards of education are not required to pay for food, lodging and transportation for those who voluntarily choose as delegates or officers to attend state and national conventions of vocationally oriented pupils organizations such as Future Farmers of America or Health Occupations Students of America. To invoke such a stringent requirement could result in undue expenditures of public funds in a period in which budget caps limit the expansion into such areas. It would not only preclude schools from encouraging such activity but also cause the unfortunate demise of well formulated effective programs of leadership training. Such a result is not in the public interest.***

> While the laws of this State require that a thorough and efficient system of free public education be made available to each resident pupil in a school district, it is not mandatory that each pupil participate in every curricular and cocurricular opportunity authorized by a board of education. Such a requirement would be both untenable and contrary to the reality that individual differences, abilities, interests and potentialities exist. See Montclair Concerned Citizens Association et al. v. Board of Education of the Town of Montclair, Essex County, 1977 S.L.D. 1014.

The matter controverted herein is strikingly similar to that in Fair Lawn. I see no reason why the result here should differ. Thus, costs for fundamental field trips, except food, are to be absorbed by the Board. Voluntarily field trips, taken at the option of pupils, may be supported by fees assigned to pupils.

Accordingly, I CONCLUDE petitioner has failed to establish by a preponderance of credible evidence that the controverted policy of the Board is contrary to the New Jersey Constitution, the Commissioner's earlier ruling in Willett, supra, or contrary to statute.

The Petition of Appeal IS DISMISSED.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, FRED G. BURKE,** who by law is empowered to make a final decision in this matter. However, if Fred G. Burke does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

AGENCY DKT. NO. 379-10/76

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

December 4, 1980
DATE

Daniel B. McKeown
DANIEL B. McKEOWN, ALJ

Receipt Acknowledged:

December 5, 1980
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

December 9, 1980
DATE

Ronald L. Parker
OFFICE OF ADMINISTRATIVE LAW

ms

FRED RHODES,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF OF CALDWELL-WEST-CALDWELL, ESSEX COUNTY,	:	
RESPONDENT.	:	
	:	

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law.

The Commissioner observes that exceptions were filed by petitioner pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Petitioner argues that the Board's policy does not conform with the law and asks that the initial decision by the Honorable Daniel B. McKeown, ALJ be modified. The Commissioner does not agree. Subsequent to the Fair Lawn v. Schmidt decision, the Legislature passed Chapter 49, Laws of 1980 on June 26, 1980 which states in its entirety:

> "1. Any board of education may authorize field trips for which all or part of the costs are borne by the pupils' parents 'or legal guardians', with the exception of pupils in special education classes and pupils with financial hardship. 'In determining financial hardship the criteria shall be the same as the Statewide eligibility standards for free and reduced price meals under the State school lunch program (N.J.A.C. 6:79-1.1 et seq.).'
>
> "2. As used in this act 'field trip' means a journey by a group of pupils, away from the school premises, under the supervision of a teacher.
>
> "3. No student shall be prohibited from attending a field trip due to inability to pay the fee regardless of whether or not they have met the financial hardship requirements set forth in section 1 of this act.
>
> "4. This act shall take effect immediately."

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

January 26, 1981

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NOS. EDU 0197-80
and EDU 1588-80
AGENCY DKT. NOS. 422-11/79A
and 64-3/80A CONSOLIDATED

IN THE MATTER OF:

MARY O'HARA,
Petitioner,
v.
BOARD OF EDUCATION OF
CAMDEN COUNTY VOCATIONAL
SCHOOL,
Respondent.

Record Closed: October 30, 1980
Received by Agency: 12/10/80

Decided: December 9, 1980
Mailed to Parties: 12/12/80

APPEARANCES:

Stephen J. Mushinski, Esq., for petitioner (Parker, McCay and Criscuolo, attorneys)

Robert F. Blomquist, Esq., for respondent and Intervenor J. Evans Jennings, Jr. (Davis & Reberkenny, attorneys)

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

This is an action for reinstatement as a school librarian with back pay. Petitioner also claims entitlement to the position of media specialist.

The matters were opened before the Commissioner of Education and transmitted as contested cases to the Office of Administrative Law pursuant to N.J.S.A. 52:14F-1, et seq. Prehearing conferences were held on March 17 and April 29, 1980. By order dated April 29, the matters were consolidated. Hearing was held at the Camden County Court House, Camden, on June 12 and 13. Posthearing submissions were filed by both parties. A motion to supplement the record was granted and considerable correspondence was accepted thereafter. By letter order the record was closed on October 30, 1980.

Mary O'Hara, a tenured teaching staff member in the employ of the Camden County Vocational Board of Education (Board) avers she has been transferred improperly to the position of teacher of mathematics in the district's compensatory education program and demands reinstatement as a librarian. O'Hara avers also that she is entitled to the position of media specialist in preference to the person now so employed.

I

O'Hara was hired in September 1973 as a librarian and so served through the 1977-78 school year. She was on approved sick leave for the entire 1978-79 school year. The Board required O'Hara to present a Board-appointed or approved physician's certificate of satisfactory recovery pursuant to N.J.S.A. 18A:16-1 et seq. Such certificate was not timely presented and she did not resume employment until on or about December 17, 1979. O'Hara complained to the Commissioner of Education, challenging the legality of the Board's requirement. The petition of appeal was dismissed. O'Hara v. Camden Cty. Voc. Bd. of Ed., (EDU 4243-79, N.J.O.A.L. Feb. 5, 1980).

On or about December 17, 1979, O'Hara was assigned to the position of mathematics teacher in the compensatory education program at the Pennsauken Campus. She states that three librarian positions existed in the district from September 1975 forward and that she filled one of the two positions on the Gloucester Township Campus. By virtue of tenure status and length of service, she is senior to the other librarian assigned to the Gloucester Township Campus. Effective as of the beginning of the 1979-80 school year, the Board abolished one of the librarian positions at the Gloucester school.

O'Hara claims entitlement to the remaining librarian position and asserts the Board has failed and refused to honor her claim. She requests reinstatement with all accrued rights, benefits and emoluments.

The Board admits O'Hara's employment, tenure and certification and that she was on sick leave for the entire 1978-79 school year and, upon submission of a medical certificate to its satisfaction, she returned to active service. It admits also that O'Hara was assigned to teach mathematics in the compensatory education program upon her return but denies any reduction in salary.

The Board denies it has violated the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq. as to O'Hara. It admits the abolishment of one librarian position on the Gloucester Township Campus effective July 1, 1979 and that a person other than O'Hara was assigned to the remaining librarian position in October 1979. The Board denies O'Hara's claim that she alone is entitled to hold the librarian position while acknowledging that she pressed the claim on December 17, 1979.

The Board states it was entitled to transfer O'Hara from one position to another, within the scope of her certifications, based on the educational program needs of the district. It states further that the compensatory education position to which it assigned O'Hara is one of vital importance in fulfilling its education responsibilities to the pupils of the district.

The Board avers it abolished the library technician training program at the end of the 1978-79 school year. While a librarian prior to that action would be considered a shop teacher for salary determination purposes, no person in the librarian position since the cessation of the program would be considered a shop teacher and the position on the salary guide has been adjusted accordingly. Therefore, the Board argues O'Hara would be at precisely the salary position as a librarian that she is now as a compensatory education teacher.

The pertinent sequence of events is as follows. O'Hara was on sick leave for virtually the entire 1978-79 school year. Effective July 1, 1979, one librarian position at the Gloucester school and the library technician training program were abolished. O'Hara

was assigned to the remaining librarian position. The person who had held the other librarian position was reassigned to teach social studies. O'Hara did not return to active service at the beginning of the 1979-80 academic year. The library functioned under the direction of substitutes for approximately one month. Effective October 10, 1979, the person previously reassigned from librarian duties to social studies teaching duties was again reassigned, this time to the position of librarian at the Gloucester school. At some time in November or December, but prior to December 17, O'Hara satisfied the requirement of the Board that she submit a medical certificate, acceptable to the Board, attesting that she was able to resume service as a teaching staff member. Effective December 17, O'Hara was reassigned to teach mathematics in the district's compensatory education program. She commenced such service and filed the action antecedent to the present consolidated cases.

It is noted here that upon abolishment of the library technician training program, the librarian position, which formerly encompassed teaching in the program, ceased being a "shop teaching" position for salary guide placement purposes. The position, therefore, is now properly a group II position rather than a group III position for salary purposes under the agreement between the Board and the Teachers' Association.

When one of the two librarian positions on the Gloucester Township Campus was abolished, the Board properly reassigned the less senior librarian within the scope of her certifications. Upon the opening of the next academic year, the Board found itself without a permanent librarian. O'Hara did not comply with its lawful direction to submit a medical certificate in a timely manner and the person who had filled the other librarian position had been properly reassigned. The Board then made a decision to re-reassign the former librarian to the librarian position then uncovered by a regular teaching staff member.

Nevertheless, O'Hara was and is the senior librarian as to the Gloucester school. N.J.S.A. 18A:28-5, 28-9 et seq., N.J.A.C. 6:3-1.10(k)30. Her employment history, tenure, and certifications are not disputed. The other librarian enjoyed less seniority than did O'Hara. The Board recognized this when, upon its decision to abolish one librarian position, it reassigned the other librarian to social studies teaching duties. Notwithstanding the failure of O'Hara to timely present medical evidence of her ability to resume

active duty, the reassignment of her to the compensatory education program violated the seniority rules and procedures adopted by the State Board of Education. N.J.A.C. 6:3-1.10.

Accordingly, **I FIND** Mary O'Hara was improperly reassigned from the librarian position to a teaching position in the compensatory education program. **I FIND FURTHER** that her demand for back pay must fail by reason of the lawful redifinition of librarian duties and reclassification of the position for salary purposes upon abolishment of the library technician program.

II

O'Hara alleges the position title of multimedia specialist was changed to audiovisual coordinator in the 1979-80 school year and that the change from a title recognized in the New Jersey Administrative Code and requiring certification in a particular subject area to one for which no State Board of Examiners certificate exists is in violation of N.J.S.A. 6:11-3.4 and 3.6. She claims that J. Evans Jennings, Jr., is employed by the Board in a particular subject matter field, media specialist, but does not hold appropriate certification therefor, in violation of N.J.S.A. 18A:27-2 and 2.1 and N.J.A.C 6:11-3.1 and 3.2. Jennings was admitted as an intervenor by leave of the undersigned pursuant to N.J.A.C. 1:2-23.1(a) for the purposes of this issue. O'Hara alleges further that the position title of librarian on the Gloucester Township Campus has not changed despite changes in and addition to the responsibilities of the position since the 1973-74 school year, her first year of employment. She requests change of the job title from librarian to media specialist, that the title audiovisual coordinator not be permitted as a change from multimedia specialist and that the salaries for these two positions — media specialist and multimedia specialist — be placed in the same salary range retroactive to September 1, 1973.

Other allegations were raised but are not considered because the petitioner has asked no relief in connection with them.

The Board denies the title multimedia specialist was changed to audiovisual coordinator in school year 1979-80 and denies that such change, even if true, violates

N.J.A.C. 6:11-3.4 and 3.6. The Board denies that Jennings is employed in a subject matter field for which he lacks appropriate certification. The Board also denies that the duties and responsibilities of the Gloucester Township Campus librarian have changed so as to require a change of job title to media specialist retroactive to September 1, 1973.

The first two charges are DISMISSED for failure to prosecute. N.J.A.C. 6:1:1-3.9.

Concerning the third allegation, that Jennings is employed as a media specialist but does not hold an appropriate certificate, I FIND:

1. Jennings holds a valid secondary school teacher of science certificate;

2. He has considerable experiential background in science and engineering;

3. He was hired in the 1972-73 academic year as an audiovisual coordinator, a position for which no certification did or does exist;

4. He was rehired for the 1973-74 and 1974-75 school years as a multimedia specialist, a position for which there is not a precisely titled certification;

5. On May 16, 1975, State Board of Education adopted rules authorizing and requiring certification of educational media specialists and associate educational media specialists;

6. Jennings was hired for the 1975-76 school year as a media specialist;

7. Jennings applied for but did not receive notification of having been granted an educational media specialist certificate pursuant to N.J.A.C. 6:11-12.21;

8. He made no follow up of the original application until the initiation of the present litigation.

At the same time it adopted the rules authorizing and requiring the media specialist and associate media specialist certificates, the State Board of Education adopted N.J.A.C. 6:11-12.23, "Policies governing issuance of certificates in educational media." The policies set forth plainly the minimum requirements for the certificates and the extent to which persons holding standard New Jersey teacher certificates but not having all of the other requisites, as Jennings, would be accommodated and for what period of time such accommodation would be available. This portion of the policies was, in effect, a partial grandfather clause. Persons requesting new certificates under the clause were allowed three years from the effective date to qualify and apply.

It is clear from the record that Jennings did make application under the clause on December 18, 1975. It is asserted and not controverted that Jennings simply heard nothing from the State Board of Examiners or the Office of the County Superintendent of Schools for a period of approximately three years. On cross-examination Jennings admitted the State Board of Examiners refunded the fee he submitted with his application. He states he received the refund about two years ago, was not positive of what the refund was for and he has never received media specialist or associate media specialist certification. Jennings has recently made reapplication under the provisions of N.J.A.C. 6:11-3.31, allowing in certain circumstances substitution of alternative educational background or experience.

Jennings contends he should not be penalized for administrative delay. I agree as to the period of time between his application and the return to him of the fee. Upon refund of the fee, Jennings knew or should have known that he did not possess the certification requisite to his position. It was at that point that Jennings had an obligation to pursue an appropriate certificate by an appropriate course of action both as a protection of himself and his district.

In North Bergen Federation of Teachers, et al v. North Bergen Bd. of Ed., 1977 S.L.D. 1125, it was held that administrative delay in passing upon certification cannot be used to deny rights to a teaching staff member that would otherwise have accrued. During the pendency of his application, Jennings was entitled to such consideration. Constructive notice that the requested certificate will not issue is sufficient to remove the case from this context, however.

I FIND FURTHER, therefore, that J. Evans Jennings does not hold certification appropriate to the position he holds. I decline comment on his present qualifications for a media specialist certificate because of the pendency of his reapplication.

The fourth claim, concerning the duties of librarian and the demand that the librarian title be changed to media specialist retroactive to September 1, 1973 and the related claim that O'Hara is entitled to the media specialist position are **DISMISSED.**

Under the provisions of N.J.S.A. 18A:11-1, a board of education shall

...

C. 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...; 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.

Pursuant to N.J.S.A. 18A:16-1,

> Each board of education, subject to the provisions of this title and of any other law, shall employ and may dismiss...such principals, teachers, janitors and other officers and employees, as it shall determine, and fix and alter their compensation and the length of their terms of employment.

The record made by petitioner does not convince me that the duties she performed as a librarian were those or even were substantially those of a media specialist. As it is clear from the above cited statutes, a board of education has wide discretion in the creation of positions and in the assignment of personnel to those positions. Absent convincing proof that something more than a similarity of duties or overlapping of duties existed, or that O'Hara has the mere ability to do the things a media specialist does, the issues should not be given cognizance.

> [I]t is not a proper exercise of a judicial function for the Commissioner to interfere with local boards in the management of

> their schools unless they violate the law, act in bad faith (meaning acting dishonestly), or abuse their discretion in a shocking manner. Furthermore, it is not the function of the Commissioner in a judicial decision to substitute his judgment for that of the board members on matters which are by statute delegated to the local boards. Finally, boards of education are responsible not to the Commissioner but to their constituents for the wisdom of their actions.... Boult and Harris v. Board of Education of Passaic 1939-49 S.L.D. 7,13, affirmed State Board of Education, 15, affirmed 135 N.J.L. 329 (Sup. Ct. 1947), 136 N.J.L. 521 (E. & A. 1947).

III

In summary, **I FIND**:

1. Petitioner O'Hara was improperly reassigned from the librarian position she had held since September 1973;

2. Her salary has not been decreased by the reassignment due to the lawful reclassification of the librarian position placing it in group II for salary purposes;

3. Intervenor Jennings is now employed by the Board in a position for which he does not hold appropriate certification;

4. Jennings has made reapplication for a media specialist or associate media specialist certificate and that application is now pending.

In consideration of these findings and the foregoing analysis, **I CONCLUDE** Mary O'Hara is entitled to reinstatement in the position of librarian in the Camden County Vocational School District with seniority rights intact and with placement on the proper step of salary guide group II. **I FURTHER CONCLUDE** that J. Evans Jennings presently is employed by the Board in contravention of N.J.S.A. 18A:27-2 and N.J.A.C. 6:11-3.1 and 3.2. **I CONCLUDE ALSO** that Jennings had made reapplication for a media specialist or associate media specialist certificate, the reapplication is now pending and he and the Board will be bound by the determination of the State Board of Examiners in the matter. Since the Board must act in accord with the imminent decision of the State Board of Examiners, it would be inappropriate here to to direct any action as to his employment.

Accordingly, the Camden County Vocational School Board of Education shall reinstate Mary O'Hara as a librarian with all seniority rights uninjured and with placement on the proper step of salary guide group II. **IT IS SO ORDERED.**

In all other respects the petition **IS DISMISSED.**

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, FRED G. BURKE,** who by law is empowered to make a final decision in this matter. However, if Fred G. Burke does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

9 DECEMBER 1980
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

10 December 1980
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

December 12, 1980
DATE

Ronald L. Parker /gg
OFFICE OF ADMINISTRATIVE LAW

bm

DOCUMENTS IN EVIDENCE

P-1	Library Services to Teachers, August 1975, 20 pp.
R-1	Job description, multimedia specialist, stamped received, D & R, 12-23-79
R-2	Excerpt of Board minutes, 8-24-78, p. 54
R-3	Excerpt of Board minutes, 4-11-79, p. 55
R-4	Excerpt of Board minutes, 4-11-79, p. 70
R-5	Excerpt of Board minutes, 8-16-79, p. 157
R-6	Memorandum, Morton to Springle, 11-17-78, revised budget requests, with attachments, 24 pp.
R-7	Memorandum, Amato to Division Heads, 2-23-79, with attachment, 2 pp.
R-8	Excerpt of Board minutes, 10-18-79, p. 216
R-9	Excerpt of Board minutes, 10-18-79, p. 212
R-10	Excerpt of Board minutes, 12-10-79, p. 53
R-11	Job description, audio visual coordinator, undated
R-12a	Personnel record card, Nina R. Arrowood
R-12b	Personnel record card, Mary Alice O'Hara
R-13a	Employment contract, J. Evans Jennings, Jr., 1972-73

R-13b	Employment contract, J. Evans Jennings, Jr., 1973-74
R-13c	Employment contract, J. Evans Jennings, Jr., 1974-75
R-13d	Employment contract, J. Evans Jennings, Jr., 1975-76
R-13e	Employment contract, J. Evans Jennings, Jr., 1976-77
R-13f	Employment contract, J. Evans Jennings, Jr., 1977-78
R-13g	Employment contract, J. Evans Jennings, Jr., 1978-79
R-14	Proposed policies, educational media certificates
R-16	Letter, Jenning to Teacher certification clerk, 11-17-75
R-17	Cancelled check2598, 12-18-75 Jennings to Commissioner of Education, 110 (photocopy)
R-18	Qualifications of J. Evans Jennings, Jr., 6-11-80, 18 pp.
J-1a	Supervisor certificate, Mary Alic O'Hara, issued 2-80
J-1b	Educational media specialist certificate, Mary Alice O'Hara, issued 5-76
J-1c	Teacher-Librarian certificate, Mary Alice O'Hara, issued 7-70
J-1d	Elementary school teacher certificate, Mary Alice O'Hara, issued 7-70
J-1a	Secondary school teacher-social studies certificate, Nina R. Arrowood, issued 8-69
J-2b	Secondary school teacher-English, Nina R. Arrowood, missued 8-69

J-2c Professional librarian certificate, Nine R. Arrowood, issued 10-6-75

J-2d School librarian certificate, Nina R. Arrowood, issued 10-75

J-2E Associate educational media specialist certificate, Nina R. Arrowood, issued 7-76

J-2f Educational media specialist certificate, Nine R. Arrowood, issued 7-76

J-2g Supervisor certificate, Nina R. Arrowood, issued 10-78

J-2h Principal/supervisor certificate, Nina R. Arrowood, issued 3-80

J-3 Secondary school teacher-science certificate, J. Evans Jennings, Jr., issued 10-15-65

J-4 Personnel record, Mary Alice O'Hara

J-5 Personnel record, Nina R. Arrowood

J-6 Personnel record, J. Evans Jennings, Jr.

J-7 Packet, job descriptions and related matter, multimedia specialist and multimedia technician, 10 pp.

J-9 Job descriptions, public services librarian, 2 pp. and technical services librarian, 3 pp., undated

J-11 Job description, librarian, 2 pp., undated

J-12 Letter, 8-8-79, Morton to faculty, with schedule attached

J-13 Negotiated labor contract, 1979-81, between Board and Teachers' Association, 33 pp.

MARY O'HARA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CAMDEN COUNTY VOCATIONAL SCHOOL, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law.

The Commissioner observes that exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Commissioner is constrained to initially address the issues raised by the multitudinous exceptions and communications concerning them in the instant matter. Because of the time factors involved the Commissioner deems it proper to list and annotate the communications received by him as follows:

1. Primary exceptions to the initial decision filed by respondent were received December 23, 1980 and adjudged timely.

2. Reply exceptions filed by petitioner and received on January 5, 1981 were adjudged timely.

3. The Board's Answer to the reply exceptions for which there is no provision in law was received on January 8, 1981.

4. Petitioner's Notice of Motion to Reopen this matter with supporting arguments was received January 16, 1981.

5. The Board's Cross-Motion in Opposition to Petitioner's Motion to Reopen and the Board's own Motion to Dismiss Petitioner's Motion with supporting arguments were received on January 16, 1981.

6. Petitioner's opposition to the Board's Answer to the reply exceptions for which there is no provision in law was received on January 16, 1981.

Firstly, the Commissioner deems it proper to address petitioner's Notice of Motion to Reopen. Petitioner argues that

the Honorable Bruce R. Campbell, ALJ failed to properly consider certain materials introduced at the time of trial which she contends to be supportive of her pleadings.

Respondent opposes petitioner's Motion and argues that, rather than a forthright move to reopen the matter, petitioner seeks to enter exceptions to the initial decision not filed in a timely fashion. The Board contends that petitioner does not have adequate grounds to reopen the present matter. The Commissioner agrees.

Petitioner's objection to the reasoning of Judge Campbell by that omission and her argument that evidence necessary to reach a decision was not properly considered by the Court must fail. An examination of the record herein convinces the Commissioner that a sufficiency of evidence has been considered by the Court to properly adjudicate the matter at hand. Nor does the Commissioner deem it necessary that every piece of evidence produced at the hearing be given the same probatory weight in reaching a decision.

Petitioner's Motion to Reopen this matter is denied; the Board's Cross-Motion to Dismiss Petitioner's Motion to Reopen is granted.

The Board in its primary exceptions excepts to the failure of Judge Campbell to determine that petitioner waived her rights to the position of librarian by her initial noncompliance with the Board's request for a medical certificate. The Board contends that its transfer of petitioner to a position in compensatory education was within its managerial prerogative.

Lastly, the Board argues that Intervenor Jennings should not be penalized for the administrative delay surrounding his application for media specialist certification. The Board avers that the Commissioner should not interfere with the internal management of its school system by seizing on a technical lack of certification at the present time to oust a highly qualified individual who has served in a district-wide technical position for a period of nearly eight years.

Petitioner's reply exceptions refute those of the Board and additionally argue that she is entitled to a higher salary determined by a Group III placement on the salary guide.

The Commissioner finds no merit in the Board's argument that petitioner has waived her rights to a position as librarian. Petitioner's pursuit of her due process rights does not constitute a waiver of her seniority or tenure rights. The Commissioner does not find the Board's arguments relevant. Nor can the Commissioner agree that petitioner's transfer by the Board to a position in compensatory education lies solely within the managerial prerogative of the Board. The argument of peti-

tioner expressed in her reply exceptions has merit and is herewith set down in full:

> "It was reiterated in Stolte v. Board of Education of the Township of Willingboro, OAL DKT #EDU-2261-79, Agency DKT #84-79A, reversed by the Commissioner of Education for other reasons, March 17, 1980 that tenure and seniority rights accrue and must be applied in instances where certain reductions occur. Judge McKeown stated:
>
> > 'It is well established in this State that a teaching staff member with a tenure status and seniority rights cannot be transferred or dismissed upon the abolition of his position for statutorily permitted reasons, while another teaching staff member with lesser experience is assigned to that very position.***' [Downs et al. v. Board of Education of District of Hoboken, 126 N.J.L. 11 (1940), aff'd 127 N.J.L. 602 (1941)]" (Petitioner's Reply Exceptions, at p. 5)

An examination of the record convinces the Commissioner that petitioner is the senior librarian in this school district. Her reassignment to the compensatory education program is in violation of her seniority rights therein. N.J.A.C. 6:3-1.10 Accordingly, the Board shall reinstate her as a librarian with all rights maintained intact. The Commissioner, however, finds no merit in petitioner's argument that she is entitled to a Group III salary in light of the Board's proper reclassification of the position of librarian in a Group II level for salary purposes.

Finally, the Commissioner cannot agree with the Board that Intervenor Jennings' status be left undisturbed. Nor can the Commissioner agree with the Court herein that it would be inappropriate to direct any action as to his employment. The Commissioner is constrained to repeat the statutory obligation of teaching staff members and boards of education expressed in N.J.S.A. 18A:26-2 herewith set down in full:

> "No teaching staff member shall be employed in the public schools by any board of education unless he is the holder of a valid certificate to teach, administer, direct or supervise the teaching, instruction, or educational guidance of, or to render or

> administer, direct or supervise the rendering of nursing service to pupils in such public schools and of such other certificate, if any, as may be required by law."

The Commissioner finds the record clear herein. Jennings does not hold proper certification for the position for which he is now employed by the Board. Previously, in December 1975 Jennings made application for media or associate media specialist certification and heard nothing for three years. The Commissioner cannot tolerate another three-year delay. Nor does the Board have a right to continue the employment of such a teaching staff member. N.J.S.A. 18A:27-2 states:

> "Any contract or engagement of any teaching staff member, shall cease and determine whenever the employing board of education shall ascertain by written notice received from the county or city superintendent of schools, or in any other manner, that such person is not, or has ceased to be, the holder of an appropriate certificate required by this title for such employment, notwithstanding that the term of such employment shall not then have expired."

The Commissioner directs that Jennings and the Board shall be bound by the decision of the State Board of Examiners and that Jennings' continued employment (or not) in the position in question shall be determined within the thirty-day period following the date of decision by the State Board of Examiners. The Camden County Superintendent of Schools is so notified. The Commissioner retains jurisdiction therein.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own with the noted modification.

The Board is directed to reinstate petitioner forthwith.

COMMISSIONER OF EDUCATION

January 26, 1981

MARY O'HARA,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CAMDEN COUNTY VOCATIONAL SCHOOL, CAMDEN COUNTY,	:	DECISION
RESPONDENT-CROSS-APPELLANT.	:	

Decided by the Commissioner of Education, January 26, 1981

Decided by the State Board of Education, September 2, 1981 and November 10, 1981

For the Petitioner-Appellant, Mary O'Hara, Pro Se

For the Respondent-Cross-Appellant, Davis & Reberkenny (Robert F. Blomquist, Esq., of Counsel)

The State Board of Education affirms the Commissioner's decision for the reasons expressed therein.

P. Paul Ricci opposed in the matter.

S. David Brandt and Mateo DeCardenas abstained in the matter.

December 2, 1981

Pending New Jersey Superior Court

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. ——
AGENCY DKT. NO. EDU 427-12/78

IN THE MATTER OF:

DONALD J. HUMCKE,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF TINTON FALLS AND JOHN FANNING, SUPERINTENDENT, MONMOUTH COUNTY,
Respondents.

Record Closed: May 27, 1980
Received by Agency: 12/12/80

Decided: December 10, 1980
Mailed to Parties: 12/16/80

APPEARANCES:

Peter Bass, Esq., for the Petitioner

Martin M. Barger, Esq., for the Respondents

BEFORE **LILLARD E. LAW**, ALJ:

Petitioner alleges that the Board of Education of the Borough of Tinton Falls (Board) has failed to provide an educational program for its gifted and talented pupils pursuant to N.J.A.C. 6:8-3.5(a)11 and requests that the Commissioner of Education order the Board to immediately provide such appropriate educational programs to its identified

gifted and talented pupils. The Board denies the allegations and asserts that it has complied with all of the requirements of the New Jersey Administrative Code.

This matter was opened before the Commissioner of Education upon the filing of a Verified Petition of Appeal dated March 29, 1979. On June 7, 1979 a conference of counsel was held between the parties and the issues to be determined were set forth as follows:

"1. Is the Board in compliance with /N.J.A.C. 6:8-3.5(a)11 which provides as follows:

"(a) The educational program (curriculum) for each district and school shall be developed in consultation with the teaching staff members, under the direction of the chief school administrator, shall be adopted annually by each district board of education and shall:

"***11. Provide educational opportunities for exceptionally gifted and talented pupils."

2. What action, if any, has the Board taken with regard to its Child Study Team report which identified a pupil as gifted and talented?

3. What action, if any, has the Board taken to implement a program for its gifted and talented pupils with regard to recommendations for such by the New Jersey Department of Education Coordinator of Gifted and Talented Programs?

4. What assistance, if any, has the Board sought to establish and implement a program for its gifted and talented pupils?"

On July 2, 1979 this matter was transferred to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. Hearings were conducted on November 15, 1979 and February 6, 1980. Thereafter, the parties filed their written summations and the matter was closed on May 27, 1980.

STATEMENT OF FACTS

1. It is stipulated that petitioner's son, hereinafter "G.H.," is a gifted and talented pupil.

2. During the 1978-79 school year the Board provided fifteen (15) different projects for its gifted and talented pupils in grades one (1) through eight (8) except for the seventh (7th) grade. (P-2)

3. In the second grade G.H. was exposed to a library program and was also permitted to use the library in another school to advance his individual activities.

4. In the third grade G.H. was offered the opportunity to participate in a talent show, worked on division with two figures, was given additional reading material, did a project on airports, had individual spelling projects, and participated in a play. He was also in the top reading group and in a special library program.

5. In the fourth grade a special, individual program was developed for G.H. dealing with Presidents of the United States. In addition, he was in the top reading group and participated in the special library program.

6. In the fifth grade G.H. was in the gifted and talented math program, the top reading group and the special library project.

7. In the sixth grade G.H. is in the top reading group, special library project, top math group, great books program, and student newspaper.

Petitioner avers that the Public School Education Act of 1975, N.J.S.A. 18A:7A-1 et seq., includes as major elements of a thorough and efficient educational system, "a breadth of offerings designed to develop the individual needs and abilities of pupils" and "programs and supportive services for all pupils, especially those who are educationally disadvantaged or have special education needs." N.J.S.A. 18A:7A-5(d), (e). Also, the State Board of Education regulation, N.J.A.C. 6:8-1.1 et seq., which implements the law specifically requires that each school and school district "provide educational

opportunities for exceptionally gifted and talented pupils." N.J.A.C. 6:8-3.5(a)(11). The regulation also states that the public school shall provide: "Specialized and individualized kinds of educational experiences to meet the needs of each pupil." N.J.A.C. 6:8-2.1(c)(3). Additionally, school districts' educational program shall be designed to stimulate each pupil to achieve the highest level of attainment of which he is capable." N.J.A.C. 6:27-1.3(d).

Petitioner asserts that pupils identified as gifted and talented are entitled to "educational opportunities" under New Jersey law. Educational opportunities may include many alternatives such as: self-contained classrooms, mentorships, independent study, advanced placement, resource rooms and adapted in-classroom activities. He contends that the chosen alternative must reflect the learning characteristics and abilities of the gifted child which have been identified. He argues that a program appropriate for a child of average abilities would not meet the needs of a gifted and talented child and that the proper educational programs for gifted and talented pupils would, like those for handicapped pupils have to meet the special needs of the child in order to meet the requirments of the regulation.

It is the petitioner's contention that the Board was not in compliance with N.J.A.C. 6:8-3.5(a)(11). Petitioner observes that it is the Board's contention that placing a gifted and talented child in the top reading group, the top math group, is equivalent to supplying a gifted and talented child with educational opportunities. He contends that the Board claims this is true even though pupils who are in these classes may not be gifted and talented and the focus of the class may be nothing more than an acceleration in the regular educational curriculum.

Petitioner asserts that a summary of the testimony at the hearing demonstrates that the Board provided inappropriate and alleged programs for exceptionally gifted and talented pupils, which programs are uncoordinated, ineffective, and unmonitored. He contends that the alleged educational opportunities for the exceptionally gifted and talented pupils include pupils who have in no way been identified as such and that there was a lack of continuity shown in the programs arranged by the Board. It is the petitioner's contention that the Board was not in compliance with N.J.A.C. 6:8-3.5(a)(11).

Specifically, it is the position of petitioner that the Board has failed in all respects to establish a program or educational opportunities for G.H. who has been

identified as a gifted and talented child. The program or opportunities are inappropriate for this pupil and the Board should be directed to establish a proper and appropriate program to stimulate G.H. to achieve the highest level of attainment of which he is capable.

The Board contends that it has met all of the requirements of the law and Administrative Code with respect to its gifted and talented programs. It asserts that numerous educational opportunities, of all types, have been provided over the years, with expansion each year. Its pupils have been identified as gifted and talented on an annual basis, by various tests mentioned by several witnesses, and have then been given the opportunity to participate in those projects applicable to them. In addition, although this action is certainly not required by law, individual activities have been provided for particular students that may benefit from such activities. G.H., it asserts, has been afforded such activities.

The Board asserts that the most important witness to appear at these hearings was Arlene E. Sielinski (Tr. I, 109-127). Ms. Sielinski is employed by the New Jersey Department of Education and works out of the Monmouth County office as a School Program Coordinator II. It is her responsibility to monitor school districts for compliance with the Public Education Act of 1975. Among her responsibilities, Ms. Sielinski is to monitor educational opportunities for exceptionally gifted and talented pupils. Her area of responsibility includes the Tinton Falls Schools.

In her testimony, Ms. Sielinski read a memorandum from Ralph Lataille, former Deputy Commissioner, State Department of Education. This memorandum, dated January 18, 1979, was directed to County Superintendents of Schools and reads as follows:

> "The monitoring of districts and school program requirements for the gifted and talented shall be limited to the N.J.A.C. 6:8-3.5(a)11 statement which reads: Provide educational opportunities for exceptionally gifted and talented pupils.
>
> The key words are educational opportunities. Educational opportunities infer that the activities offered to the exceptionally gifted and talented be extensions of the ongoing programs. As schools prepare to make provisions within the current program for gifted and talented students, they might review the use of released time and course substitution which would permit the students to participate in a program/course in another grade or school within

the district or program in the community, conduct independent studies, work with individuals or groups in the school or community.

You will note that the word programs for pupils is used in N.J.A.C. 6:8-3.5A6, 7 and 8 when the code calls for programs for pupils who are handicapped, in need of bilingual education and/or in need of compensatory education.

The use of the word opportunities in lieu of programs is not without reason. Programs, as used in the code, refers to hiring special teachers, providing special teachers, providing specific instructional area and instructional materials, developing a specific curriculum.

Obviously, the language of the code releases the scope or range of the abilities incorporated in the term exceptionally gifted and talented. While some schools may wish to provide the gifted and talented with a program, it would be unrealistic to expect schools to offer separate programs for each and every exceptionally gifted and talented pupil. However, it is realistic to expect schools to provide opportunities for these pupils.

The purpose of this memo is to limit the monitoring of opportunities for the gifted and talented to the code's statements. It is to make clear that the guidelines for gifted and talented programs are guidelines and not, underscored, a monitoring checklist.

Specifically, as you monitor opportunity for gifted and talented, there are two questions to which you have a right to expect district/schools to respond. They are, one, what are your procedures for determining which pupils are provided with opportunities for the gifted and talented; two, what opportunities are the district/schools providing for pupils determined to be gifted and talented.

Please review this memo with your school program coordinators. Thank you." (Tr. I, 123-125)

The Board asserts that Ms. Sielinski testified that the Tinton Falls Schools Board of Education was in progress toward reaching compliance with that memorandum, a finding that is satisfactory under the rules and regulations of the New Jersey Department of Education. The monitor assigned by the New Jersey Department of Education approved the gifted and talented program of the Board, a finding that must lead to dismissal of the Petition.

Mr. Theodore J. Gourley, who is employed by the New Jersey Department of Education to direct gifted and talented education programs, testified that individualized

programs for each person or each pupil was not necessary. He stated that the key is that a variety of opportunities be made available to the gifted and talented pupils (Tr. II, p. 48).

Mr. Gourley was presented with a copy of Exhibit P-2 and was asked for his opinion of same. His response was that the program looked "very good" (Tr. II, p. 64). Mr. Gourley went on to state that "there was excellent progress towards compliance" (Tr. II, p. 65) and his only concern was expansion of the program. The Board asserts that other testimony, presented by Dr. Fanning, the former Superintendent, and others, established this expansion, resolving Mr. Gourley's only concern.

The Board contends that the witnesses testified as to the details of the particular projects in the various grades, ranging from the special library projects, to the top reading and math groups, to the great books program, and to the individual projects as in the case of G.H. and pursuant to P-2.

The Board observes that N.J.A.C. 6:8-3.5(a)11 requires the individual school districts to provide educational opportunities for exceptionally gifted and talented pupils. It argues that the memo of Mr. Lataille interprets that regulation and establishes the responsibilities of the county monitors. Arlene Sielinski, the County Monitor assigned to Tinton Falls, testified that the Board was working toward compliance and satisfied the requirements of the New Jersey Department of Education.

The Board asserts that petitioner is not entitled to anything more and requests that the Petition be dismissed.

Having carefully reviewed the entire record in this matter, I **FIND** the Statement of Facts as set forth hereinbefore are hereby adopted by references as **FINDINGS OF FACT**.

I **FURTHER FIND** that the testimony of Ms. Sielinski was persuasive and controlling in this matter. Ms. Sielinski found no violations of statute or administrative rules and regulations. To the contrary, she found the Board to be in progress toward compliance through its offerings of opportunities for its gifted and talented pupils.

Having arrived at such Findings of Fact, I **CONCLUDE** that the Board was not in violation of N.J.A.C. 6:8-3.5(a)11. Nor was there a showing of bad faith, arbitrariness, capriciousness or statutory violation. In this regard the Court has said:

> "***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))

I **CONCLUDE** that educational and instructional opportunities were, indeed, offered to G.H. pursuant to statute and administrative rules and regulations and that petitioner has failed in his burden of proving otherwise.

Having reached the findings and conclusions set forth above, **IT IS ORDERED** that the herein Petition of Appeal be and is hereby **DISMISSED**.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, FRED G. BURKE,** who by law is empowered to make a final decision in this matter. However, if Fred G. Burke does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

DKT. NO. EDU 427-12/78

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

10 December 1980
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

12/12/80
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

December 16, 1980
DATE

OFFICE OF ADMINISTRATIVE LAW

plb

DOCUMENTS IN EVIDENCE

P-1	Independent Study, (Language Arts, Science, Art, Culminating Activities.)
P-2	The Tinton Falls Schools Gifted Programs, dated October 30, 1978
P-3	California Achievement Test, G.H., dated June 30, 1979
P-4	N.J. Department of Education Guidelines for Gifted and Talented Educational Programs, Division of School Programs, Branch of Curriculum Office of Gifted and Talented, dated September 1978
P-5	The Team Meeting, Re: Tinton Falls School, Special Services, G.H., dated March 16, 1977
P-6	Report entitled "Psychological Education of G.H." dated February 3, 1976, two pages
P-7	Document entitled "Placement; Swimming River School Third Grade, Miss J. Bornemann," G.H., March 16, 1977
P-8	Two page document, "Social Worker's Report" dated January 26, 1976
P-9	Two page document dated March 3, 1977, signed by JoAnn Moller, Learning Consultant
P-10	Letter dated April 18, 1977 to Mr. and Mrs. D. Humcke by Rose Stega, Director of Special Services
P-11(A)	Letter dated January 27, 1978, two pages
P-11(B)	One page letter, January 31, 1978
P-11(C)	Three page letter, February 8, 1978
P-11(D)	Three page document, March 3, 1978
P-11(E)	Three page letter, August 4, 1978
P-11(F)	One page letter, September 5, 1978
P-11(G)	One page letter, September 7, 1978
P-12	Manalapan-Englishtown Regional Schools Academically Talented Program 1977-78
P-13	Progress report of G.H.

DONALD J. HUMCKE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF TINTON FALLS AND JOHN FANNING, SUPERINTENDENT, MONMOUTH COUNTY,	:	DECISION
RESPONDENTS.	:	

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law.

The Commissioner observes that no exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 1:16.4a, b and c.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

January 26, 1981

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. ——
AGENCY REF. NO. 201-6/77

IN THE MATTER OF:

FREDERICK E. CASSIDY,
Petitioner,
v.
BOARD OF EDUCATION OF NORTH WARREN REGIONAL HIGH SCHOOL,
Respondent.

APPEARANCES:

Sanford R. Oxfeld, Esq., for petitioner (Rothbard, Harris & Oxfeld, attorneys)

Thomas J. Savage, Esq., for respondent (Grotta, Glassman & Hoffman, attorneys)

BEFORE **DANIEL B. MC KEOWN**, ALJ:

Petitioner, formerly employed as a teaching staff member by the Board of Education of the North Warren Regional High School District, (Board) alleges the reason given by the Board for its nonreemployment of him for 1977-78 is improper and, further, that that reason is not the real reason why his employment was not continued.

The matter was filed and heard before the Commissioner of Education. The record was brought forward for disposition to the Office of Administrative Law when the then assigned hearing officer became an administrative law judge.

The essential facts of the matter are these:

Petitioner was first employed by the Board as a teacher for the 1974-75 academic year and was assigned to teach physical education and health. The Board continued petitioner's employment for the next two successive years, 1975-76 and 1976-77. During these three years of employment, petitioner also served as athletic director, head football coach, and assistant boys junior varsity basketball coach.

It is agreed that before April 30, 1977 petitioner was notified by the Board his employment was not to be continued into 1977-78; (J-1) N.J.S.A. 18:A27-10, that subsequent to receiving such notice petitioner requested and received a written statement of reasons why the Board determined not to offer him reemployment; and, that petitioner was afforded an informal opportunity to be heard to convince the Board it erred in its determination of such nonrenewal of his employment. (See Donaldson v. Board of Ed. of City of North Wildwood, 65 N.J. 236, (1974)) Also, it is not disputed that the Board notified petitioner of its affirmance of its earlier determination not to reemploy him after the informal opportunity to be heard. N.J.A.C. 6:3-1.20(i)

The dispute is of the nature and substance of the reasons afforded petitioner in writing by the Board why his employment was continued. The reasons are here reproduced: (J-18)

> You have requested the Board to provide you with written reasons for the non-renewal of your teaching contract.
>
> Please be advised that the Board, in its considered judgment, has concluded, that relatively speaking, it is in the best interest of the community and the district to seek a more highly qualified replacement for your position. The Board was not satisfied with the nature of your community involvement and it is desirous of filling its tenured staff with the best personnel available.
>
> In light of these factors and your total performance, you did not meet our expectations.
>
> These deficiencies are of course relative, and were viewed by the Board in light of its determination as to the best interest of the community and the district.

Petitioner complains he has no knowledge, nor was information ever given him by the Board or the Superintendent or by the principal upon which it could even be reasonably inferred he had knowledge of the Board's dissatisfaction "*** with the nature of his community involvement ***". Petitioner also complains he had no knowledge with respect to the standards against which he was measured for the Board to conclude he

failed to "*** meet our expectations ***". Furthermore, petitioner complains, the action of the Board not to reemploy him for 1977-78, in light of the favorable recommendation on on his reemployment by the Superintendent and the principal, renders the Board's decision wholly arbitrary.

The Board determined by a five-to-four vote on April 26, 1977 not to offer petitioner reemployment. In arriving at that determination, the Board considered its administrator's evaluation of petitioner's teaching performance and it considered petitioner's performance as athletic director and head football coach.

Petitioner's total record establishes that during his first year of employment, 1974-75, he was reprimanded by the Board for being one of three chaperones on an out-of-state senior class trip who took no affirmative action to prohibit some pupils from consuming alcoholic beverages; (R-1) that his evaluations during his three years of employment are not without areas in need of improvement; (J-9) (J-10) (J-11) (J-12) (J-13) (J-14) (J-15) (J-16) (J-17) that according to the Superintendent's testimony on behalf of petitioner community criticism was leveled at petitioner for the determination he made, petitioner, as athletic director to play a particular football game during a driving rainstorm; (Tr. II-27) and that he spoke to petitioner on two occasions to caution petitioner against the use of dodge ball during regularly assigned physical education classes.

Each of the Board members who voted against continuing petitioner's employment testified as to the reasons which led them to vote in the negative. Board member Gilmore testified that in addition to petitioner's teaching performance he voted in the negative because (1) of telephone complaints he received from his constituents in regard to the manner of presentation of material in sex education petitioner was assigned to teach; (2) because of scheduling problems of interscholastic athletic competition events for which petitioner, as athletic director, was responsible; (3) for criticism in local newspapers for the scheduling conflicts; (4) for petitioner's display of temper as head football coach in front of players and fans by kicking yard markers and water buckets; and (5) he, as a Board member, concluded that petitioner's qualities were not compatible with his duty to select those who shall teach in the Board's schools.

Board member Donovan was new to his Board seat during April, 1977 and had been informed of petitioner's questionable status in regard to continued employment. Donovan testified he talked with persons in other school districts with whom petitioner

worked as athletic director or football coach and received negative comments; that he received complaints from his constituents in regard to petitioner's perceived unsportsman-like conduct during football games; he listened to the various arguments of the other Board members during an executive session prior to the public vote on April 27, 1977; and he concluded that petitioner's employment should not be continued.

Board member Petretti testified she voted against petitioner's employment being continued because of his behavior on the football field, and the complaints received in regard to petitioner's presentation of sex education material. It is noticed here that Board member Petretti testified the complaint with respect to petitioner's sex education material was that he was to have said to his pupils, "'You're better off waking up dead than raped.'" (Tr. III-71)

Board member Anconetani testified he determined to vote against continuing petitioner's employment based on the evaluations of his teaching performance; on the basis of earlier reprimand given petitioner in regard to the consumption of alcoholic beverages by some pupils during the out-ofstate senior class trip; and, as the result of what he considers to be a reasoned judgment.

Board member Simonetti determined to vote against continuing petitioner's employment based on the prior reprimand given petitioner by the Board in addition to complaints received by his constituents and from officials of other school districts.

Petitioner testified his evaluations of his teaching performance demand his continued employment absent valid reasons for not to be continued. He denies uttering the remark "'You're better off waking up dead than raped.'" Petitioner admits the existence of transportation and scheduling problems on one or two occasions while he was athletic director; that the football game played during a driving rainstorm was a subject of community controversy though the playing of the game could not have been prevented by him once begun; and that from time to time in the heat of a football game he may have displayed somewhat of a temper and may have used the terms "damn" and "hell."

Finally, it is recognized both the Superintendent and the principal recommended to the Board that petitioner's employment be continued into 1977-78.

Thus, within this context the sole issue to be addressed is whether the statement of reasons (J-18) given him by the Board for its determination not to reemploy him is improper, or as a camouflage for the 'real' reason, in light of the Superintendent's and principal's recommendation his employment be continued.

Firstly, it is the Board alone which appoints persons as teaching staff members to be in its employ. N.J.S.A. 18A:25-1 A recommendation made to it by one or more of its administrative employees in regard to the employment of such a person is not binding on the Board. Abramson v. Board of Education of the Township of Colts Neck, 1975 S.L.D. 418, 422 Where, as here, the Board's administrators do in fact recommend a nontenure teacher for continued employment ostensibly based on their objective and subjective judgments of the person's performance, that is no bar for the Board to consider such recommendations in light of its own objective and subjective judgment.

In matters of the nonreemployment of nontenure teachers, the Board is required, if requested by the affected person, to present a written statement of reasons why such determination was made. N.J.S.A. 18A:27-3.2 The reasons need not be proved, as tenure charges must, against the person. Rather, the stated written reasons are to aid the person to correct deficiencies of performance as perceived by the employing Board. Donaldson v. Board of Education of North Wildwood, 65 N.J. 236 (1974); Long Branch Education Association v. Board of Education of the City of Long Branch, 1975 S.L.D. 1029, 1038 Deficiencies perceived by one board of education may not in fact be discerned by another board. But, the fact and the law remains that it is the Board which makes the determination whether to continue, or in the first instance, offer employment.

Here, the Board considered petitioner's classroom performance and his performance of the duties he accepted as athletic director and head football coach and, in a reasoned fashion absent proof to the contrary, determined not to reemploy him for 1977-78. As noted earlier, the reasons do not have to be proved. The reasons are solely intended to notify petitioner that the Board perceived weaknesses in his classroom performance as well as his performance as athletic director and head football coach.

Now the statement of reasons (J-18) given petitioner for nonreemployment may not be as clear as possible with respect to community involvement and standards. One must recall, however, that petitioner did have an informal opportunity to be heard before the Board and if the statement of reasons was unclear to him he had the

opportunity to receive clarification. Considering the record as a whole, I FIND a nexus between petitioner's community involvement and his classroom performance which precipitated parental complaints to school authorities as well as his behavior and performance as head football coach and athletic director. I further FIND that the standard against which he was measured was that of a reasonable person in the place of the individual Board members. Would a reasonable person, based on the information the Board had, be able to cast a vote against the continued employment of petitioner.

I CONCLUDE, based on the record as a whole and in light of the existing duty and responsibilities of boards of education in regard to who shall teach in its schools, that the action of the Board not to reemploy petitioner for 1977-78 is not, as alleged, arbitrary, capricious or unreasonable. Petitioner has failed in his proofs.

The Petition of Appeal IS DISMISSED.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, FRED G. BURKE,** who by law is empowered to make a final decision in this matter. However, if Fred G. Burke does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

DKT. NO. 201-6/77

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

December 17, 1980
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

December 17, 1980
DATE

Seymour Weis
DEPARTMENT OF EDUCATION

Mailed To Parties:

December 22, 1980
DATE

Ronald L. Parker /sl
OFFICE OF ADMINISTRATIVE LAW

plb

DOCUMENTS IN EVIDENCE

FOR THE PETITIONER:

P-1 Certificate to teach

P-2 Letter offer of employment to petitioner for 1974-75 and his acceptance thereof dated May 25, 1974

P-3 Letter of intent dated June 12, 1974

P-4 Petitioner's appointment to and acceptance of extracurricular assignments for 1974-75dated July 16, 1974

P-5 Executed Employment Contract for 1974-75

P-6 Petitioner's appointment to and acceptance of extracurricular assignment for 1975-76dated September 2, 1975

P-7 Memorandum dated September 12, 1975 from Superintendent to petitioner

P-8 Petitioner's assignment to and acceptance of another extracurricular assignment for 1975-76-dated November 7, 1975

P-9 Executed employment contract for 1976-77

FOR THE RESPONDENT:

R-1 Letter dated June 18, 1975 to petitioner from the Board Secretary

R-2 Memorandum dated December 8, 1975 to petitioner from the principal

JOINT EXHIBITS OF THE PARTIES:

J-1 Minutes of a regular board meeting held April 26, 1977

J-2 Minutes of executive session of Board held April 26, 1977

J-3 Minutes of special meeting of the Board held April 29, 1977

J-4 Minutes of Board executive session held April 29, 1977

J-5 Minutes of regular meeting of Board held May 10, 1977

J-6 Minutes of Board executive session held May 10, 1977

J-7 Minutes of executive session held May 24, 1977

J-8 Minutes of petitioner's informal opportunity to be heard by the Board - June 6, 1977

J-9 Observation Report of petitioner, October 3, 1974

J-10 Observation Report of petitioner, January 27, 1975

J-11 Observation Report of petitioner, January 23, 1976

J-13 Observation Report of petitioner, April 8, 1976

J-14 Observation Report of petitioner, May 26, 1976

J-15 Observation Report of petitioner, January 12, 1977

J-16 Observation Report of petitioner, April 26, 1977

J-17 Observation Report of petitioner, April 29, 1977

OAL DKT. NO. EDU 201-6/77

FREDERICK E. CASSIDY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF NORTH WARREN REGIONAL HIGH SCHOOL, WARREN COUNTY,	:	
RESPONDENT.	:	

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law.

The Commissioner observes that no exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 1:16-4a, b and c.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

February 2, 1981

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 3313-80

AGENCY DKT. NO. 230-5/80A

IN THE MATTER OF:

LYNDA BUNDY

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF JEFFERSON

Record Closed: December 5, 1980

Received by Agency: 12/18/80

Decided: 12/19/80

Mailed to Parties: 12/22/80

APPEARANCES:

Saul R. Alexander, Esq., for Petitioner

James P. Granello, Esq., for the Board

BEFORE **WARD R. YOUNG**, ALJ:

This matter was opened on May 2, 1980 by the filing of a Petition of Appeal with the Commissioner of Education, wherein it is alleged that the reasons of excessive absenteeism cited by the Board for petitioner's non-renewal were not valid.

An Answer was filed with the Commissioner on May 19, 1980 and the matter was transmitted to the Office of Administrative Law on May 28 as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

A prehearing conference was held on September 3, 1980 at which the parties agreed to submit the matter for Summary Decision. A briefing schedule was established and the record was closed with the expiration of the date set for petitioner's rebuttal (December 5, 1980), which was not received.

The matter is now ripe for Summary Decision based on the pleadings, jointly executed stipulation of facts, discovery documents ordered at the prehearing conference, briefs and conclusions of law.

Counsel for the parties submitted a jointly executed stipulation of facts, which are adopted herein as FINDINGS OF FACT as if they were my own, and are reproduced in entirety:

1. Petitioner commenced employment in Respondent school district in September 1977.

2. Petitioner was employed full time from September 1977 through June 30, 1980.

3. On March 31, 1980 at a closed session held by the Respondent Board of Education, the Superintendent of Schools recommended that the Petitioner not receive a renewal of her contract. A true copy of the Minutes of the closed meeting held on March 31, 1980 are attached hereto and incorporated herein by reference.

4. On April 1, 1980, Petitioner was notified by letter from the Superintendent of Schools that she would not be offered a contract for the 1980-81 school year.

5. On April 15, 1980, the Respondent through its Board Secretary advised Petitioner that she would not be offered a contract for the 1980-81 school year. A true copy of letter dated April 15, 1980 is annexed hereto.

6. On April 22, 1980, Petitioner wrote to the Board Secretary requesting detailed reasons why her contract was not renewed. A true copy of said letter is annexed hereto.

7. On April 28, 1980, the Board Secretary wrote to the Petitioner advising her that she was not offered a teaching contract for the 1980-81 school year because she was absent from her position for fifty-five and one-half (55 1/2) days in the two and three-quarter (2 3/4) school years that she had been in the Respondent's employ. She was told that such absences have interrupted the continuity of classroom instruction thereby inhibiting a thorough and efficient education for the students assigned to the Petitioner. A true copy of letter dated April 28, 1980 is annexed hereto.

8. On April 30, 1980, Petitioner wrote to the Superintendent of Schools requesting a meeting with the Board of Education pertaining to her non-renewal of employment. A true copy of said letter is annexed hereto.

9. On May 7, 1980, the Superintendent of Schools advised Petitioner that an appearance before the Board of Education has been scheduled for May 19, 1980. A true copy of said letter is annexed hereto and also encloses a copy of the Administrative Code setting forth the procedures of such hearing.

10. On May 19, 1980, at a closed session of the Board of Education, Petitioner appeared along with representatives from the Teachers' Association and representatives from the N.J.E.A. regarding the non-renewal of the Petitioner. A true copy of the Board Minutes of this meeting are annexed hereto.

11. At the conclusion of the meeting, by a recorded roll-call vote of four to five, the Board of Education defeated a motion to rehire Petitioner Lynda Bundy for the 1980-81 school year.

12. By letter dated May 21, 1980, Petitioner was advised that the Board of Education had reaffirmed its decision not to offer Petitioner a contract for 1980-81 school year. A true copy of said letter is annexed hereto.

13. A true copy of the Petitioner's employee absence record is annexed hereto and incorporated herein by reference which reflects the following information:

    A. For the 1977-78 school year, Petitioner took twenty-four (24) days off for personal illness; ten (10) paid - fourteen (14) unpaid. In the same year, Petitioner took

two (2) paid days off for family illness. During the same school year, Petitioner took five (5) paid days off for death in the family. During the same school year, Petitioner took one (1) paid day off for personal business.

B. For the 1978-79 school year, Petitioner took eleven (11) days off for personal illness; ten (10) paid days and one (1) unpaid day. During the same school year, Petitioner took one and one-half (1 1/2) paid days off for personal business.

C. During the 1979-80 school year up until and including March 30, 1980, Petitioner took eight (8) paid days off for personal illness. During the same school year up until March 30, 1980, Petitioner took three (3) paid days off for family illness.

14. During the years in question, the Board of Education accepted the reasons for Petitioner's absences as given without further inquiry.

15. The Board prerogative to require a physician's certificate for sick leave was either not exercised and, in those instances where it was exercised, such certificate was submitted.

16. All leaves taken by the Petitioner were in compliance with the negotiated agreement between the Jefferson Township Board of Education and the Jefferson Township Education Association.

17. Petitioner argues that at no time was she informed that her absenteeism was a factor and was a source of concern in the Board's consideration of continued employment, prior to notification on April 1, 1980. The Board of Education argues that as a teaching staff member, the Petitioner should have known that her attendance at work would be considered as a factor for continued employment.

18. During the 1977-78 school year, Petitioner was absent twenty-four (24) days due to personal illness for an operation and recuperation which was verified by a medical certificate; that for ten (10) of these days she received sick pay and for the remainder she was unpaid; that during the 1978-79 school year she was absent eleven (11) days for personal illness due to a broken leg; that for the 1979-80 school year she was absent eight (8) days due to personal illness due to having the flu for which a medical certificate was submitted; that all these leaves were in accordance with the Collective

Bargaining Agreement between the Jefferson Township Board of Education and the Jefferson Township Education Association; and that she also had a leave of absence in 1977-78 for two (2) days for family illness and five (5) days for the death of her mother; in 1978-79, one and one-half (1 1/2) days personal business for a divorce, and in 1979-80, three (3) days for family illness when her husband broke his foot; that all these leaves were granted in compliance with the negotiated agreement; that she also was entitled under the negotiated agreement to five (5) days for marriage and honeymoon which she did not take; that at no time was she formally warned or notified that absenteeism would be a factor for reemployment; and that by letter of April 1, 1980, she received notification from the Superintendent of Schools that he had recommended to the Board that she not be offered a contract for the 1980-81 school year because of her absences as noted above. However, the Petitioner availed herself of paid sick leave and other leaves of absence for which she received payment, in accordance with the collective bargaining agreement. In no way, did the Board of Education leave the Petitioner to believe that by availing herself of these paid leaves of absence, that the Board of Education was waiving its right to consider the number of days of absence as it affected the school children of the district whom she taught.

19. Each and every observation and supervisory report from the inception of her employment was categorized as either good, excellent or satisfactory, with none checked as fair or poor, with no indication on any of the evaluations of any problems because of absenteeism.

Petitioner argues that her non-renewal by the Board was procedurally and fatally defective in that the record is barren of minutes inscribing the Board's action not to renew prior to April 30 by a recorded roll-call vote, and refers to Patricia Bolger and Frances Feller v. Board of Education of the Township of Ridgefield Park, 1975 S.L.D. 93, as well as McKay v. Red Bank, 1972 S.L.D. 606.

I FIND the above rationale supporting petitioner's contention to be without merit. In Bolger, the Commissioner recommended "that each local board of education inscribe in the minutes..., prior to April 30, that it has made a determination..." (emphasis added). In McKay, the Commissioner cautioned local boards "to comply strictly with the legislative mandate to record the roll-call majority votes of the full membership of the board in each instance required by statute." (emphasis added)

Failure to adhere to the Commissioner's recommendation cannot be construed to be procedurally or fatally defective, but in the instant matter, the minutes of the

Board's March 31, 1980 closed meeting on personnel has inscribed the fact that the administration would not be recommending three nontenured staff members for non-renewal and "The Board granted permission for such notification" when requested by the Superintendent.

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

> 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 for a contract for employment for the next succeeding year... or (b) a written notice that such employment will not be offered.

In the instant matter, petitioner was noticed by the Superintendent by letter under date of April 1, 1980 that he recommended to the Board that she not be offered a contract for 1980-81 (and detailed her absenteeism record as the reason). Petitioner was also noticed by letter under date of April 15, 1980 from the Board Secretary that the Board "will not be offering you a contract for the 1980-81 school year." She requested reasons in a letter of April 22 and was advised of same by the Board Secretary in a letter of April 28.

McKay involved the abolishment of one of two vice-principal positions, one of which was held by petitioner, and the transfer of the petitioner to a position of classroom teacher. The Commissioner's dicta relating to the recording of roll-call votes referred to the failure of the minutes to show same when McKay was originally appointed as vice principal. Said recorded vote is required by N.J.S.A. 18A:27-1.

The statute is silent of any required roll-call vote or the recording of same in the minutes for non-renewal action.

It is interesting to note that the minutes of the Board's May 19, 1980 closed personnel session has inscribed the roll-call vote of Board members on a proposed resolution to reappoint the petitioner for 1980-81. Said resolution failed to carry.

Petitioner also relies on Elaine DiRicco v. Board of Education of the Town of West Orange, 1979 S.L.D. ___ (decided November 15, 1979), aff'd State v. Board of Education, 1980 S.L.D. ___ (decided June 11, 1980).

In DiRicco, the petitioner was non-renewed for excessive absenteeism. Her record of absenteeism totaled 26 days for her three years of employment, which represented 4 days less than allowable sick leave as per N.J.S.A. 18A:30-2 and N.J.S.A. 18A:30-3.

In the instant matter the petitioner's absence totaled 55 1/2 days during her 2 3/4 years of employment, and is clearly distinguished from DiRicco in that excessive absenteeism was the reason for non-renewal, and found to be invalid there. In this matter, **I FIND** the same reason to have merit.

The Court in Gilchrist v. The Board of Education of Haddonfield, 155 N.J. Super. 358 (App. Div. 1978) said:

> We deem it a perfectly rational goal for the board to be vitally interested in avoiding, where possible, the interruptions in the continuity of classroom instruction that would arise from teachers' absences... The avoidance of a detrimental interruption in the continuity of classroom instruction is an admirable goal whether the interruption be caused by pregnancy, lominectomy, or orchiectomy, prostatectomy or any nonmedical reason. (at 368)

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 stated 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. (89 N.J. Super. at 332)

I FIND in the instant matter that the Board did not abuse its discretionary authority when it did not renew the employment of petitioner for the 1980-81 school year. **I CONCLUDE**, therefore, that the Petition of Appeal shall be and is hereby **DISMISSED**.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, FRED G. BURKE,** who by law is empowered to make a final decision in this matter. However, if Fred G. Burke does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

OAL DKT. NO. EDU 3313-80

I HEREBY FILE my Initial Decision with FRED G. BURKE for consideration.

17 December 1980
DATE

WARD R. YOUNG, ALJ

Receipt Acknowledged:

18 December 1980
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

December 22, 1980
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

thf

OAL DKT. NO. EDU 3313-80

LYNDA BUNDY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF JEFFERSON, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law.

The Commissioner observes that exceptions were filed by the Board pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Board in its exceptions supports the initial decision of the Honorable Ward R. Young, ALJ.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

February 2, 1981

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3525-80
AGENCY DKT. NO. 260-5/80A

IN THE MATTER OF:

MICHAEL ROSAMILIA, JAMES SILVESTRI,
ARTHUR PICO, JOSEPH GROSCH,
MICHAEL NARDIELLO, GEORGE NUCERA,
FRANK SCELBA, AUSTIN MACARTHUR,
MARIO DIMAGGIO, NICK PETTI AND JOHN WESTLAKE,
PETITIONERS
v.
THE BELLEVILLE BOARD OF EDUCATION,
RESPONDENT

Record Closed:
Received by Agency: Dec. 23, 1980

Decided: December 17, 1980
Mailed to Parties: Dec. 29, 1980

APPEARANCES:

Alan G. Kelley, Esq., for Petitioners
(Greenberg & Mellk, attorneys)
Lawrence S. Schwartz, Esq., for Respondent
(Schwartz, Pisano & Nuzzi, attorneys)

BEFORE **ROBERT P. GLICKMAN,** ALJ:

This matter comes before the Court by way of petition filed pursuant to N.J.S.A. 18A:6-9 vesting the Commissioner of Education with jurisdiction to hear or determine all controversies and disputes arising under the school laws. The matter was

transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

As a result of a prehearing conference on October 31, 1980, the following issues were identified:

1. Did respondent comply with N.J.S.A. 18A:29-11 in giving petitioners credit on the salary guide for their military service experience?

2. If not, what sum of money is owed petitioners?

3. Are petitioners barred from recovery by the doctrine of laches, and/or the statute of limitations and/or waiver?

On November 19, 1980, respondent filed a motion with accompanying brief for summary judgment or summary decision pursuant to N.J.A.C. 1:1-13.1 et seq. and the guidelines embodied in New Jersey Court Rule 4:46-1 et seq. On December 1, 1980 petitioner filed a brief in opposition to respondent's motion to dismiss.

Because there are no material facts in dispute, this Court feels that this matter is ripe for summary decision.

The dispositive issue in this case is whether or not petitioners are barred from recovery by the statute of limitations.

At the prehearing conference on October 31, 1980, the following stipulations were entered into, which this Court adopts as its FINDINGS OF FACT:

1. Petitioner Michael Rosamilia commenced his employment with respondent and has been continuously employed since 1950.

2. Petitioner James Silvestri commenced his employment with respondent and has been continuously employed since 1963.

3. Petitioner Arthur Pico commenced his employment with respondent and has been continuously employed since 1964.

4. Petitioner Joseph Grosch commenced his employment with respondent and has been continuously employed since 1962.

5. Petitioner Michael Nardiello commenced his employment with respondent and has been continuously employed since 1951.

6. Petitioner Joseph Nucera commenced his employment with respondent and has been continuously employed since 1955.

7. Petitioner Frank Scelba commenced his employment with respondent and has been continuously employed since 1953.

8. Petitioner Austin MacArthur commenced his employment with respondent and has been continuously employed since 1950.

9. Petitioner Mario DiMaggio commenced his employment with respondent and has been continuously employed since 1953.

10. Petitioner Nick Petti commenced his employment with respondent and has been continuously employed since 1960.

11. Petitioner John Westlake commenced his employment with respondent and has been continuously employed since 1956.

12. All petitioners filed their verified petition with the Commissioner of Education on May 28, 1980.

Respondent contends that the aforementioned petitioners failed to institute their actions within the time period prescribed by N.J.S.A. 2A:14-1 which states:

> Every action at law...upon a contractual claim or liability, express or implied...shall be commenced within six years next after the cause of any such action shall have accrued.

In the instant case, it is undisputed that petitioners commenced their actions on May 28, 1980 by filing a petition with the Commissioner of Education. Thus, it is clear that all petitioners commenced their actions more than six years after their initial employment with the Board of Education which dates of employment have previously been stipulated. Or, putting it another way, petitioners did not commence their action within six years after their cause of action accrued, which would be the date of their initial contract of employment with the Board.

Although the Commissioner of Education has previously held that the statute of limitations does not apply in actions involving military service credits (see Lavin v. Board of Education of the Borough of Hackensack, Bergen County, 1979 S.L.D. 94 and Kastner v. Plumstead Board of Education, 1979 S.L.D. decided June 11, 1979), the State Board of Education has recently reversed the Commissioner of Education and has held that the six-year statute of limitations is applicable to bar a stale claim for military

service credit. Basil M. Kastner v. Plumstead Township Board of Education, (State Board of Education decided December 5, 1979). In Kastner, supra, the petitioner sought to obtain additional pay to which military service entitled him between the years 1958 and 1969. Petitioner's claim was not asserted, however, until 1977, 18 years after the accrual of the initial cause of action. The State Board in Kastner stated at p. 5:

> The Commissioner's decision herein cites authorities to the effect that a governmental body is not exempt from the principles of fair dealing. By the same token, we believe that in fairness a Board of Education should be protected from the assertion of stale monetary claims which an employee has failed to prosecute within the period of limitations deemed reasonable by the legislature.

The State Board of Education cited with approval in its Kastner decision, Miller v. Bd. of Chosen Freeholders, Hudson County, 10 N.J. 398 (1952). In Miller, supra, the Court held that claims by public employees for compensation based on a salary statute were in fact contractual claims and thus subject to the applicable statute of limitations. As stated in Miller at p. 415:

> ...the claim of plaintiffs in the present case rested not in statute but upon the contractual status of their intestates as employees of the county. The substance of their action was one for compensation for services rendered raising the implied contract to pay the reasonable value thereof as established by statute....

Additionally, the Court at p. 409 stated:

> In actions such as these, the substantive right stems from the rendition of services; the statutory rate of pay is the measure by which the true value of the service performed is proved, and this is the more apparent by virtue of the fact that these legislative enactments make no provision for their enforcement, a clear legislative recognition of the availability of ordinary legal remedies. The only conclusion to be reached, therefore, is that the six-year statute of limitations, R.S. 2:24-1 supra, clearly applies to such actions and was a valid defense in this case...[1] (Emphasis in text.)

Additionally, the Court in Greenwald v. Board of Education of the City of Camden, (Docket No. A-1051-77 N.J. Superior Court, App. Div. decided October 31, 1978) adopted the reasoning of Miller, supra, and held that plaintiff's claim for additional

[1] In Miller, supra, the Court dealt with the construction of R.S. 2:24-1, the predecessor of N.J.S.A. 2A:14-1. For the purpose of this opinion, the statutes are similar.

monies based on defendant's failure to properly credit him for time spent in the military service pursuant to N.J.S.A. 18A:29-11 was barred by the six-year statute of limitations, N.J.S.A. 2A:14-1. In Greenwald, supra, plaintiff brought his claim 30 years after he commenced work. The Court in Greenwald indicated that plaintiff was basing his claim on N.J.S.A. 18A:29-11, the same statute on which petitioners herein are basing their claims, which provides:

> Every member who, after July 1, 1940, has served or hereafter shall serve, in the active military or naval service of the United States or of this State, including active service in the Women's Army Corps, the Women's Reserve of the Naval Reserve, or any similar organization authorized by the United States to serve with the army or navy, in time of war or an emergency, or for or during any period of training, or pursuant to or in connection with the operation of any system of selective service, 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 State or territory of the United States, except that the period of such service shall not be credited for more than four employment or adjustment increments.
>
> Nothing contained in this section shall be construed to reduce the number of employment or adjustment increments to which any member may be entitled under the terms of any law, or regulation, or action of any employing board or officer, of this State, relating to leaves of absences.

The Court in Greenwald, supra, stated at p. 5:

> The statute relied upon by the plaintiff merely furnishes the measure of his compensation as one of the terms and conditions of his employment. His right is to compensation founded in contract. Consequently, his cause of action is barred by the statute of limitations.

Because the nature of the petitioners' claims in the instant case are clearly founded in contract and not statute as indicated in both Miller, supra, and Greenwald, supra, and since N.J.S.A. 2A:14-1 would be applicable, it is clear that the claims of petitioners are stale for their failure to commence actions within six years after their cause of actions had accrued. See also Mezichraiky, et al v. Board of Education of the City of Newark, OAL Docket No. EDU 2273-79 (February 19, 1980), Frederick Morris v. Board of Education of the Township of Berkeley Heights, OAL Docket No. EDU 0757-80 (June 17, 1980), Robert McKellin v. Board of Education of the Town of Kearny, OAL Docket No. EDU 0624-80 (June 23, 1980), aff'd by Commissioner August 11, 1980 and

Hoffman, et al. v. Board of Education of Kearny, OAL Docket No. EDU 4148-80 (November 17,1980).

Accordingly, it is **CONCLUDED** that respondent's motion for summary decision be and is hereby **GRANTED.**

All other issues raised in this prehearing order are deemed to be without merit.

It is, therefore, **ORDERED** that the petition be **DISMISSED WITH PREJUDICE.**

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, FRED G. BURKE,** who by law is empowered to make a final decision in this matter. However, if Fred G. Burke does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

OAL DKT. NO. EDU 3525-80

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

December 17, 1980
DATE

Robert P. Glickman
ROBERT P. GLICKMAN, ALJ

Receipt Acknowledged:

December 23, 1980
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

Dec. 29, 1980
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

db

MICHAEL ROSAMILIA ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF BELLEVILLE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law.

The Commissioner observes that exceptions were filed by petitioners pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Petitioners except to the holding of the Honorable Robert P. Glickman, ALJ of the applicability of Castner, supra, to the instant case. The Commissioner finds no merit in such argument and concludes that Castner is determinative of the instant matter.

However, the Commissioner notes the subsequent decisions issued by the State Board on March 5, 1980 in Lavin v. Board of Education of Hackensack Borough and Union Township Teachers Association v. Board of Education of Union Township. Further, the Commissioner observes Judge Glickman's reliance on Hoffman et al., supra, and is constrained to point out that Hoffman was modified on January 5, 1981 as follows:

> "***Therein the proposition has been established that each new school year that petitioners were employed at a salary not properly recognizing their military service credit created a new course of action. In the matter herein controverted it is undisputed that petitioners commenced their action on or about June 24, 1980 by filing a Petition with the Commissioner. The Board, at that time, was put on notice for its payment as a contingency in the budget for the ensuing year for the prospective recognition of military service salary guide credit not previously awarded.***"
> (Slip Opinion at 13)

The Commissioner determines that as in Hoffman, supra, the action of the Court in dismissing the Petition is set aside. Petitioners herein filed their Petition with the Commissioner on May 28, 1980. Commencing with the 1980-81 school year the Board is directed to accord petitioners prospective recognition of military service credit to which they may be entitled, if any, based upon their position on the negotiated salary guide.

It is so directed.

COMMISSIONER OF EDUCATION

February 6, 1981

MICHAEL ROSAMILIA, ET AL., :

PETITIONERS-APPELLANTS, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE TOWN OF BELLEVILLE, ESSEX COUNTY, : DECISION

RESPONDENT-APPELLEE. :

:

Decided by the Commissioner of Education, February 6, 1981

For the Petitioners-Appellants, Greenberg & Mellk (Alan G. Kelley, Esq., of Counsel)

For the Respondent-Appellee, Schwartz, Pisano & Nuzzi (Lawrence S. Schwartz, Esq., of Counsel)

We affirm the Commissioner's decision. The Commissioner correctly recognized that since each year in which a teaching staff member is not paid at the correct step of the salary guide is a separate cause of action, the applicable statute of limitations, N.J.S.A. 2A:14-1, runs from each year of underpayment and not simply from the date of the commencement of employment. Therefore, N.J.S.A. 2A:14-1 bars petitioners from relief for those years of employment which are more than 6 years prior to the date of the filing of their petition of appeal. Within those 6 years, the equitable doctrine of laches bars petitioners from all relief except prospective from the date of the filing of the petition of appeal. Lavin v. Board of Education of the Borough of Hackensack, 178 N.J. Super. 221 (App. Div. 1981). Accordingly, petitioners are entitled to prospective relief in accordance with the decision on remand of the Commissioner in Trenton Education Association v. Board of Education of the City of Trenton (decided May 27, 1981).

August 5, 1981

Pending New Jersey Superior Court

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NOS. EDU 3315-80
EDU 3564-80
AGENCY REF. NOS. 243-5/80A
267-6/80A

IN THE MATTER OF:

FRANKLIN EDUCATION ASSOCIATION
v.
BOARD OF EDUCATION OF THE WALLKILL VALLEY REGIONAL SCHOOL DISTRICT, SUSSEX COUNTY

Record Closed: November 24, 1980
Received by Agency: 12/16/80

Decided: December 12, 1980
Mailed to Parties: 12/18/80

APPEARANCES:

Richard A. Friedman, Esq.. for the Association
Donald L. Kovach, Esq., for the Board
N. Peter Conforti, Esq., for a Non-Association Teaching Staff Member

Before **WARD R. YOUNG,** ALJ:

The Franklin Education Association opened this matter on May 20, 1980 by the filing of a Petition of Appeal with the Commissioner of Education, wherein it was alleged that a resolution adopted by the Wallkill Valley Regional Board of Education on February 26, 1980, which states that said Board would only recognize tenure rights of those employees who achieved tenure by November 28, 1972, was in violation of New Jersey Statutes.

An Answer was filed by the Board on June 2, 1980 after the matter had been transmitted to the Office of Administrative Law on May 28 as a contested case pursuant to N.J.S.A. 52:14F-1 et seq and is docketed as EDU 3315-80.

On June 2, 1980 the Board filed a Petition for Declaratory Judgment with the Commissioner of Education, wherein it contends that only tenure rights acquired prior to the creation of the Regional District (presumably voter approval on November 28, 1972) are preserved without regard to the actual commencement date of operations of the regional district.

An Answer was filed with the Commissioner by the Association on June 18, 1980 after the matter had been transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq., and is docketed as EDU 3564-80.

A prehearing conference was held on August 15, 1980, at which time the matters were consolidated by agreement. Although the matters will retain their docket numbers, the Association will be referred to as the petitioner, and the Board as the respondent. It was also agreed at said conference that the standing of petitioner would not be an issue in this proceeding, and further that the matter is to be submitted for Declaratory Judgment as no material relevant facts are in dispute.

A request for participation as a party petitioner from counsel for a teaching staff member who is not an Association member was received and granted.

A briefing schedule was determined at the prehearing conference with rebuttals due no later than November 24, 1980. All parties submitted timely briefs and the record was closed on that date. The matter is now ripe for declaratory judgement.

Henry Kunkel, a teaching staff member, had been dismissed without prejudice as a petitioner by agreement at the prehearing conference. His re-application as a party petitioner is granted.

A jointly executed Stipulation of Facts was submitted on September 5, 1980; is adopted as **FINDINGS OF FACTS** as if my own; and is reproduced in pertinent part as follows:

> The Franklin Borough School District is an established K through 12 District located in Sussex County. In addition to the students in the Franklin District, students from Hamburg Borough School District, Hardyston Township School District and Ogdensburg Borough School District also attend the 9 through 12 high school program at Franklin pursuant to a long established sending-receiving relationship. After an appropriate feasibility study conducted through the County Superintendent of Schools by the Boards of Education of the School Districts of Franklin, Hamburg, Hardyston Township and Ogdensburg, an election proposal to regionalize said Districts on a 9 through 12 grade level was presented on November 28, 1972 and approved by the voters of each District. Thereafter, the Wallkill Valley Regional High School District, encompassing the four School Districts, was organized pursuant to N.J.S.A.18A:13-36 et seq. Being without a suitable facility to accommodate the students the respective Districts from which the Regional District was formed continued to be responsible for the students in the 9 through 12 category.
>
> Based upon the residual authority of each constituent District the Ogdensburg Board of Education petitioned the New Jersey Commissioner of Education seeking to terminate the sending-receiving relationship with Franklin and establish such a relationship with the Sparta Township School System. The Commissioner

approved said application in 1978 excepting from the authorization of transfer those students attending the Franklin High School Program at the time of the approval. The Franklin to Ogdensburg transfer specifically allowed the students attending the Franklin High School Program to complete their course of study at that institution. There remains within the Franklin School System the 12th grade students from Ogdensburg which are the residue of the 9 through 12 students to complete their education at Franklin since the Commissioner's order. Upon their graduation no further Ogdensburg students will be attending the Franklin High School Program. The Commissioner's order approving the Ogdensburg-Sparta sending-receiving relationship further provided that the same is to terminate immediately upon the assumption of responsibility by the Wallkill Valley Regional High School District for the education of the students of each constituent District. This will occur when the High School Plant, presently under construction by Wallkill Valley is completed and certified by the Commissioner pursuant to N.J.S.A. 18A:13-41.

On June 29, 1978 a referendum authorizing the expenditure and bonding of $8,264,000 for the construction of new high school, together with the necessary furniture and equipment therefore, was approved by the voters of the Wallkill Valley Regional High School District. It is anticipated that the school will be completed and opened for the September 1982 term. At that time a 9 through 12 student population of approximately 750 is expected representing the students of the Franklin, Hamburg, Hardyston and Ogdensburg School Districts.

At the time of the formation of the Wallkill Valley Regional High School District there were 29 teachers who had accumulated tenure prior to the November 28, 1972 date. These teachers are

identified within Category I. Each will be hired by the Wallkill Valley Regional High School Board if the teacher so chooses and provided there is no conflict of teaching positions requiring the imposition of N.J.A.C. 6:3-1.10.

Those teachers identified as Category II represent personnel who, while in the employ of the Franklin District on the date of the regionalization election, did not obtain tenure until after said date.

Another category of teachers, set forth as Category III, lists those teachers who were not employed by the Franklin Board of Education at the time of the regionalization election in November of 1972 but who have or may obtain Franklin tenure prior to the Wallkill Valley Regional High School opening.

The final group is identified as Category IV and lists those teachers hired after said regionalization election who will not have obtained tenure prior to the school opening.

The Wallkill Valley Regional High School Board of Education, by letter dated February 29, 1980, notified the Franklin Board of Education that it intended to hire all Category I teachers and sought a "letter of intent" from each in the fall of 1980. The subject letter also indicated that hiring any teachers in Categories II, III and IV was optional with the Wallkill Valley Board. A similar notice of the Wallkill Valley position as to teacher tenure status and its effect upon the hiring practices of the Regional Board was directed to the Franklin Education Association and all teachers in each respective category by letter dated February 29, 1980. Despite the lack of representation by the Franklin Education Association of all teachers within the subject categories of employment, the Wallkill Valley Regional Board of Education, by

its initiation of the petition to the Commissioner, nevertheless seeks a disposition of the issue as to all personnel involved which will be achieved by the final judgment of this Administrative Law Court, or any appeal thereof. (Subject to affirmation, reversal or modification by the Commissioner.)

The parties further acknowledge that the personnel within the Franklin School System that may be entitled to tenure includes secretaries not otherwise set forth in the list of teachers contained in Categories I through IV. Accordingly, the language of the "issue" as framed in the Prehearing Order shall be deemed amended to include all secretaries in the employ of the Franklin School System.

The Wallkill Valley Regional Board conceded that any teacher it hires who has been employed by the Franklin School System will be entitled to full recognition of all accrued service for tenure and seniority rights obtained at Franklin in the obtaining of similar benefits after employment at Wallkill Valley.

It is acknowledged by both parties that this action shall not affect the right of the Wallkill Valley Regional High School District to implement the provisions of N.J.A.C. 6:3-1.10 involving any of the subject teachers in this action where the same becomes legitimately necessary in the future hiring practices of the Board of Education.

The recitation of the jointly executed stipulation of facts is thus concluded. The categorization of petitioning teaching staff members and secretaries are summarized as follows:

CATEGORY I: Those employees who acquired tenure by law on or prior to November 28, 1972, when the voters approved the regionalization of the high school district.

CATEGORY II: Those employees who did not acquire tenure on or prior to November 28, 1972, but did acquire tenure by law on or prior to June 29, 1978, when the voters of the regional district authorized the expenditure and bonding of $8,264,000 for the construction and furnishing of the regional high school facility.

CATEGORY III: Those employees who did not acquire tenure on or prior to June 29, 1978, but have or will acquire tenure by law prior to the expected commencement of regional district operations with the opening of the high school facility in September 1982.

CATEGORY IV: Those employees who will not have acquired tenure by law at the expected commencement of regional district operations with the opening of the high school facility in September 1982.

It has been conceded by the respondent Board that all Category I employees will be accorded their lawful entitlement of tenure and seniority. Therefore, only the entitlement of tenure and seniority rights for employees in the three remaining categories will be addressed.

The statutes considered relevant by the parties, but upon which there are disagreements concerning interpretation and applicability, are as follows:

N.J.S.A. 18A:13-42. Pension and tenure rights; certain teachers transferred to regional districts; preserved

Whenever a regional district has been created subsequent to April 1, 1951, or shall hereafter be created for high school or junior high school education, the tenure and pension rights of any high school or junior high school teacher, who, at the time of the holding of the election to create such regional district, was assigned for a majority of his time in a grade or grades from grades seven to 12 inclusive, in any high school or junior high school in any of the constituent districts of such regional district, shall be recognized and preserved by the board of education of the regional district in the organization and operation of any high school or junior high school in the regional district, and any period of employment in any one or more of the high schools or junior high schools of any such constituent district or districts, shall count toward the acquisition of tenure in the regional district, but nothing in this section shall be applicable to any superintendent or high school or junior high school principal.

N.J.S.A. 18A:13-49. Principals, teachers and employees transferred

All principals, teachers and employees in the employ of any dissolving local district shall be transferred to and continue in their respective employments in the employ of the regional school district and their rights to tenure, pension and accumulated leave of absence accorded under the laws of the state shall not be affected by their transfer to the employ of the regional school district.

N.J.S.A. 18A:28-6.1 Tenure upon discontinuance of school

Whenever, heretofore or hereafter, any board of education in any school district in this state shall discontinue any high school, junior high school, elementary school or any one or more of the grades from kindergarten through grade 12 in the district and shall, by agreement with another board of education, send the pupils in such schools or grades to such other district, all teaching staff members who are assigned for a majority of their time in such school, grade or grades and who have tenure of office at the time such schools or grades are discontinued shall be employed by the board of education of such other district in the same or nearest equivalent position; provided that any such teaching staff members may elect to remain in the employ of the former district in any position to which he may be entitled by virtue of his tenure and seniority rights by giving notice of said election to the boards of educaton in each of the school districts at least three months prior to the date on which such school, grade, or grades are to be discontinued.

Teaching staff members so employed in such other district shall have their rights to tenure, seniority, pension and accumulated leave of absence, accorded under the laws of this state, recognized and preserved by the board of education of that district. Any periods of prior employment in such sending district shall count toward the acquisition of tenure in the other district to the same extent as if all such prior employment had been in such other district.

N.J.S.A. 18A:28-15. Effect of change of government of district on tenure

No teaching staff member in the public schools shall be in any manner affected, in relation to his tenure of service or tenure of service rights, heretofore obtained or hereafter to be obtained, under this or any other law, because of any change in the method of government of the school district or school districts by which he was employed on the date of such change, or by reason of any change of name or title of the position, so held by him on said date, resulting from any such change of government, but he shall continue in said position by its original or changed name or title, as the case may be, with the same tenure of service and the same tenure of service rights which he would have had if such change in the method of government had not occurred.

N.J.S.A. 18A:28-16. Operation of school by state agency previously under operation of school district; employment rights of teaching staff members

Whenever an Educational Service Commission, a Jointure Commission, the Commissioner of Education, the State Board of Education, the Chancellor, the State Board of Higher Education or the board of trustees of any State college, or any officer, board or commission under his, its or their authority shall undertake the operation of any school previously operated by a school district in this State, all accumulated sick leave, tenure and pension rights of all teaching staff members in said school shall be recognized and preserved by the agency assuming operational control of the school, and any periods of prior employment in such school district shall count toward the acquisition of tenure to the same extent as if all of such employment had been under the Educational Services Commission, Jointure Commission, the Commissioner of Education, the State Board of Education, the Chancellor, the State Board of Higher Education or the board of trustees of any State college, as the case may be.

N.J.S.A. 18A:28-17. Operation of school by school district previously under operation of state agency; employment rights of teaching staff members

> Whenever the local board of education of any school district in this State shall undertake the operation of any school previously operated by an Educational Services Commission, a Jointure Commission, the Commissioner of Education, the State Board of Education, the Chancellor, the State Board of Higher Education or the board of trustees of any State college, or any officer, board or commission under his, its or their authority, all accumulated sick leave, tenure and pension rights of all teaching staff members in said school, shall be recognized and preserved by the board assuming operational control of the school, and any periods of prior employment, by said Educational Services Commission, Jointure Commission, Commissioner of Education, State Board of Education or board of trustees of any State college, or any officer, board or commission under his, its or their authority, shall count toward the acquisition of tenure to the same extent as if all of such employment had been in such school district.

The issue to be addresssed, which was agreed to by the parties in the prehearing conference, is as follows:

> WHAT TENURE AND/OR SERVICE TIME RECOGNITION ARE THE TEACHING STAFF MEMBERS AND SECRETARIES EMPLOYED BY THE FRANKLIN SCHOOL DISTRICT ENTITLED TO IN THE WALLKILL VALLEY REGIONAL HIGH SCHOOL DISTRICT?

The issue will be addressed to include all teaching staff members and secretaries assigned in the high school of the Franklin Borough School District, regardless of whether said employees are members of the Franklin Education Association.

A concomitant issue must be recognized and also addressed, and that is whether a tenured teaching staff member in Franklin, certified in grades K-12 at the time of initial employment but assigned only in grades below 7, is lawfully entitled to rights of tenure and seniority in the Wallkill Valley Regional High School district. If the

determination therein is affirmative, would said rights also be applicable to similar teaching staff members in the constituent districts of Hamburg Borough, Hardyston Township and Ogdensburg Borough?

In order to reduce the categories of employees to be addressed as they relate to the principal issue herein, Category IV will be addressed first since the issue concerning Category I teachers is not in dispute.

The protection of an employee's seniority rights accrues with the acquisition of tenure for teaching staff members as the result of legislative action and the authority for same is incorporated in N.J.S.A. 18A:28-1 et seq. Tenure for secretaries is authorized by N.J.S.A. 18A:17-2(b). Category IV employees, however, will not have achieved a tenure status by the opening of the regional high school, and are not entitled by law to the protection afforded tenured employees. **I SO FIND** and **CONCLUDE** that the employment of Category IV employees in the regional district is within the discretion of the regional Board.

The heart of this controversy lies with Category II and III employees.

The Board relies heavily on N.J.S.A. 18A:13-42 in support of its contention that the entitlement of tenure and seniority protection is limited to those employees who had acquired tenure on or prior to November 28, 1972, when the regional district was created by voter approval. This law clearly supports the Board's recognition of the tenure protection of Category I employees. Since this law does not address the status of employees who may acquire tenure after the creation of the regional district but prior to the dissolution of the constituent high school and functional operation of the regional high school, **I FIND** this statute inapplicable to Category II and III employees.

N.J.S.A. 18A:13-49 clearly addresses the gap of time after the creation of the regional district which is conspicuously absent in N.J.S.A. 18A:13-42. The Board correctly points out, however, that this law is applicable when an all purpose regional district is created or a limited purpose regional district is formed and thereafter the local district

which dissolved a portion of its district has joined or shall join in the formation of another regional district for all other school purposes. N.J.S.A. 18A:13-48. I **FIND** that N.J.S.A. 18A:13-49 is inapplicable to Franklin Category II and III employees.

The Board also relies heavily on In the Matter of the Closing of Jamesburg High School, 169 N.J. Super 328 (App. Div. 1979), aff'd 83 N.J. 540 (1980). In that matter the commissioner closed the Jamesburg High School pursuant to N.J.S.A. 18A:7A-15 and designated Monroe and Spotswood as receiving districts pursuant to N.J.S.A. 18A:38-8. Said determination was not appealed or addressed by the courts. At the State Board's direction Jamesburg residents who had been enrolled as students in the school's 9th through 12th grades were designated tuition pupils at the Monroe Township High School.

The Commissioner also found in Jamesburg that the tenured teachers employed at that facility should be transferred to Monroe and Spotswood pursuant to N.J.S.A. 18A:28-6.1, which was affirmed by the State Board of Education. The courts reversed and set aside the determinations of the Commissioner and the State Board based on the fact that the receiving districts had not agreed pursuant to that statute to be receiving districts or to accept the transfer of tenured teachers formerly employed at Jamesburg.

Jamesburg, however, is clearly distinguished from the instant matter. The Wallkill Valley Regional school district is a creature of the legislature, having been created by the will of the voters of the constituent districts. It is not a receiving district, but a school district in and of itself with the statutory authority and responsibility of educating its own pupils who reside in the communities comprising the regional district. I **FIND,** therefore, the court decisions in Jamesburg as well as N.J.S.A. 18A:28-6.1 inapplicable to Franklin Category II and III employees.

Article 4 of Chapter 28 in Title 18A of the New Jersey Statutes is entitled **Effects of Change of Government.** N.J.S.A. 18A:28-16 and 28-17 addresses employment rights of teaching staff members in districts which are or had been operated by a state agency, and are inapplicable herein. **I SO FIND.**

N.J.S.A. 18A:28-15 was enacted into law in 1952 and precedes all other statutes thus far addressed. It has not been repealed.

Other than the temporary change of designation of a receiving district for Ogdensburg high school pupils by the Commissioner until the Wallkill facility is operational, all high school pupils of the constituent districts of the regional district have been educated at the Franklin High School under the jurisdiction of the Franklin Borough Board of Education, the members of which reside in Franklin Borough. With the opening of the Wallkill Valley high school facility, the education of these very same high school pupils will continue with but two fundamental changes taking place:

1. The pupils will be housed and educated in a new facility, and

2. The jurisdiction of the high school will come under the Wallkill Valley Regional Board of Education, the members of which must reside in one of the communities comprising the new district.

I **FIND** that the opening of the Wallkill Valley Regional High School under the jurisdiction of the Wallkill Valley Regional High School represents a change of government, and **CONCLUDE**, therefore, that N.J.S.A. 18A:28-15 is applicable to Franklin Category II and III teaching staff members.

Relative to Franklin Category II and III secretaries, **I FIND** the Commissioner's decision in Sheridan v. Board of Education of the Township of Ridgefield Park, 76 S.L.D. 995 to be dispositive. Said employees are to be accorded their lawful entitlement of tenure protection. However, no statute, regulation or case law authorizes an entitlement of seniority rights.

The remaining issue to be addressed relates to petitioner Kunkel, a tenured physical education teacher in the Franklin Borough schools, certified in grades K-12 at the time of initial employment but assigned only in grades below 7. It is noted that thus far in this matter the issue addressed has related only to employees assigned in the Franklin High School.

Relative to Kunkel, he indeed is entitled to tenure and seniority rights pursuant to N.J.A.C. 6:3-1.10(k 27, 28) in the Franklin school district. Seniority rights are asserted when a Board acts to reduce its force. See Popovich v. Board of Education of the Borough of Wharton 75 S.L.D. 737. The record in this matter is barren of any evidence that the petitioner's employment is in jeopardy due to a reduction in force. It is well established that seniority rights do not entitle a teaching staff member a preference of assignment and can only claim rights of seniority when noticed that his continued employment is to be terminated due to a reduction in force. Such claims must be determined on a case by case basis and adjudicated on findings of fact and conclusion of law. In the absence of the above, I must CONCLUDE that no declaratory judgment can be made for the guidance of petitioner Kunkel.

In summary it is hereby **DECLARED** that:

1) Category I, II and III Franklin high school teaching staff members are entitled to tenure rights in the Wallkill Valley Regional high school district and are also entitled to assert seniority rights in said district if necessary.

2) Category I, II and III Franklin high school secretaries are entitled to tenure rights in the Wallkill Valley Regional high school district but have no legal entitlement to seniority rights.

3) Category IV Franklin teaching staff members and secretaries have no entitlement to employment in the Wallkill Valley Regional high school district, but if said Board chooses to employ a Category IV employee, the time served in Franklin will count toward the acquisition of tenure in the regional district pursuant to N.J.S.A. 18A:13-42.

4) Declaratory judgment cannot be rendered relative to petitioner Kunkel.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, FRED G. BURKE,** who by law is empowered to make a final decision in this matter. However, if **Fred G. Burke** does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

12 December 1980
DATE

Ward R. Young
WARD R. YOUNG, ALJ.

Receipt Acknowledged:

16 December 1980
DATE

Seymour L. Weis
DEPARTMENT OF EDUCATION

Mailed To Parties:

December 18, 1980
DATE

Ronald A. Parker/bg
FOR OFFICE OF ADMINISTRATIVE LAW

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FRANKLIN EDUCATION ASSOCIATION,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE WALLKILL VALLEY REGIONAL HIGH SCHOOL DISTRICT, SUSSEX COUNTY,	:	
RESPONDENT.	:	

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law.

The Commissioner observes that exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Commissioner observes that a plethora of exceptions has been filed in the instant matter some of which have no authorization in law. The Commissioner notes the filing of primary exceptions by both parties with reply exceptions filed by petitioner, all in a timely fashion. Subsequent exception not authorized by law were not considered.

Petitioner's primary exceptions are a concurrence with the holdings of the Honorable Ward R. Young, ALJ as to the status of secretaries and teachers in the present matter. Petitioner argues therein that N.J.S.A. 18A:13-42 clearly provides that service in the local district subsequent to the regionalization election must be fully credited by the regional district toward tenure attainment.

The Board in its primary exceptions argues that N.J.S.A. 18A:13-42 establishes that only certain teachers, those with tenure in the constituent district on the date of the regional referendum passage, are automatically entitled to jobs in the regional district. The Board excepts to the determinations by Judge Young that Jamesburg, supra, is not dispositive of the present matter. Finally the Board denies the applicability of N.J.S.A. 18A:28-15 to the present matter contending there is no dissolution of the constituent districts involved as they will continue to function and to be governed as in the past.

Petitioner's reply exceptions refute the primary exceptions filed by the Board. Petitioner contends that N.J.S.A. 18A:13-42 speaks to two different concepts, the preservation of

tenure and (emphasis petitioner's) the acquisition of tenure affecting both category II and III teachers. Petitioner's reply exceptions affirm the determination by the Court that Jamesburg is distinguishable from the case at hand. Finally, petitioner supports the application of N.J.S.A. 18A:28-15 by Judge Young in the instant matter and refutes respondent's rejection of its applicability.

The Commissioner has carefully examined the record herein and the arguments advanced by the parties. He finds merit in the affirmation of Judge Young's determination by petitioner. However, the Commissioner concludes that Judge Young erred by including secretaries as well as teaching staff members with protected entitlement to tenure and service time recognition by the Wallkill Valley Regional High School District. Judge Young erroneously cites Sheridan, supra, as dispositive in the present case. In the Commissioner's opinion Sheridan establishes the right of secretaries to attain tenure in a system without entitlement to seniority rights but has no application to the transfer of such tenured positions to the regional district as in the present matter. The Commissioner notes that in both N.J.S.A. 18A:13-42 and 28-15 reference is made therein only to teaching staff members and has no application to the status of secretaries.

The Commissioner agrees with the determination by the Court of the inapplicability of N.J.S.A. 18A:13-48 and 49 and the decision of the Court in Jamesburg for the reasons expressed.

In summary, the Commissioner finds that Franklin High School teaching staff members in Categories I, II and III have entitlement to tenure and seniority rights in the Wallkill Valley Regional High School District. The Commissioner sets aside the determination by the Court herein of the entitlement of secretaries to tenure rights in the regional high school. Concerning Category IV employees and Petitioner Kunkel, the Commissioner agrees with the determination of the Court herein.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter as modified and adopts them as his own.

The Commissioner so holds.

COMMISSIONER OF EDUCATION

February 6, 1981

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2422-79
AGENCY DKT. NO 417-12/78

IN THE MATTER OF:

FRANCES GROSSMAN, COLLINGSWOOD EDUCATION ASSOCIATION,
Petitioners
v.
BOARD OF EDUCATION OF THE BOROUGH OF COLLINGSWOOD, COUNTY OF CAMDEN,
Respondent.

Record Closed: November 18, 1980
Received by Agency: 1/5/81

Decided: December 31, 1980
Mailed to Parties: 1/8/81

APPEARANCES:

John E. Collins for the Petitioners

Joseph F. Greene, Jr. for the Respondent

BEFORE **BEATRICE TYLUTKI,** ALJ:

This matter concerns the placement of Frances Grossman on the Collingswood salary schedule. The hearing was held on August 8, 1980 and briefs were submitted thereafter.

The facts are not in dispute. Ms. Grossman began her teaching career in September 1961. She served as a full-time high school teacher in Wayne Township for a

period of four years and four months, and as a part-time home instructor for two months (T39-41). As of January 1, 1966, she went on maternity leave (T40) and thereafter her family relocated in South Jersey (T41).

Ms. Grossman's next teaching employment was as an English Reading Teacher, working in a 2/3 time position, in Washington Township during the 1968-69 school year (T45-6). Her contract provided that her salary was to be computed based on the 5 1/2 step of the Bachelor's Degree Guide (P1) thereby giving her credit for 4 1/2 years of teaching experience in Wayne Township (T45). Petitioner left her employment after the 1968-69 school year because of the birth of her second child (T46-7).

Subsequently, Ms. Grossman was employed as a part-time supplemental teacher by the Deptford Township Board of Education pursuant to a contract dated November 22, 1971 (P2). She tutored students in need of remediation in language arts, was paid an hourly rate and served in this capacity from November 1971 through June 1972 (T48-9).

Ms. Grossman's next employment was with the Respondent as a part-time supplemental and home instructor, beginning January 1973 (T50). She worked between seven and eight hours a day and was paid an hourly rate (T50, 76). On April 17, 1973, Ms. Grossman wrote Walter C. Ande, Superintendent of Schools, requesting that she receive a full-time supplemental instruction position beginning September 1973 (P3). Petitioner was offered a contract to teach High School English for the 1973-74 school year at a salary of $9,175.00 (P5). This salary represented the fifth step of the salary guide (R3) and gave her credit for four years of prior teaching experience. Petitioner wrote a letter dated July 3, 1973 to Mr. Ande stating that she had teaching experience for which she was being given no credit and asking to be placed at the sixth step (P6). By letter dated July 9, 1973, Mr. Ande told Ms. Grossman that she could not be placed above the fifth step of the salary guide (P7). It was the Respondent's policy to give no credit for part-time experience and a maximum credit of four years for prior teaching experience (T109-10).

After her request for the additional credit was denied, Ms. Grossman signed the 1973 contract and has been employed as an English teacher at the Collingswood High School from September 1973 to the present time (T39).

The 1973 collective bargaining agreement for Collingswood contained the following clause:

> "B.1. Each teacher shall be placed on his proper step of the salary schedule as of the beginning of the 1973-1974 school year in accordance with paragraph 2 below.
>
> 2. Credit up to the full step of any salary level on the Teacher Salary Schedule shall be given for previous outside teaching experience in a duly accredited school upon initial employment in accordance with the provisions of Schedule A." (R1 at p. 4).

Subsequent agreements have contained a similar clause.

Petitioner became aware of this clause in the collective bargaining agreements in 1978, after a grievance had been settled involving another teacher, Donna Coursen (T65). Petitioner then filed a grievance (P8) which was denied by the Respondent on October 12, 1978 (T69-70). The petition was filed with the Commissioner of Education on December 4, 1978 and alleged that Ms. Grossman was entitled to an additional two years of teaching credit.

In the grievance (P8), Petitioner alleged that she should have been credited an additional 2 1/16 years based on the following work experiences:

1/2 year at Wayne Township,
2/3 year at Washington Township,
1/2 year at Deptford Township,
1/2 year at Collingswood Borough.

It is clear that the collective bargaining agreement controls and should be applied even though it may conflict with the Respondent's policy, Board of Education of the City of Englewood v. Englewood Teachers Association, 64 N.J. 1 (1973). The agreement provided that credit "shall be given for previous outside teaching experience in a duly accredited school" (R1). In the absence of a definition of what constitutes "previous outside teaching experience" it is reasonable to include part-time employment, and employment as a supplemental and home instructor. Breese v. Board of Education of the Borough of Jamesburg, 1980 S.L.D. ____ (Commissioner's decision, March 18, 1980)

Therefore, based on the facts **I FIND** that Petitioner was entitled in 1973 to an additional two years credit pursuant to the collective bargaining agreement.

The next issue is whether the Petitioner's claim for the two years credit is barred due to the passage of time. **I FIND,** based on the facts, that the doctrines of laches and equitable estoppel are applicable in this matter as to back salary, Giorno v. Township of South Brunswick, 170 N.J. Super. 162 (App. Div. 1979), Kloss v. Township of Parsippany-Troy Hills, 170 N.J. Super. 153 (App. Div. 1979), Union Township T.A. v. Board of Education of the Township of Union, 1980 S.L.D. ____ (State Board Decision, March 5, 1980). In 1973, Ms. Grossman objected to the amount of credit given for her prior experience and she had the opportunity to pursue her claim at that time. The fact that she was not aware of the contents of the collective bargaining contract in 1973 does not justify the five year delay in pursuing the matter. See, Brewington v. Board of Education of East Orange, 1978 S.L.D. 50. Therefore, **I FIND** that the Petitioner is not entitled to back pay to 1973.

Also, **I FIND** that Ms. Grossman's claim for back pay to 1973 is barred by the provisions of N.J.A.C. 6:24-1.2 which requires that the petition be filed with the Commissioner of Education within ninety (90) days after notice. Ms. Grossman was notified in 1973 that the Respondent would give her only a four year credit.

Ms. Grossman's actions in 1973 did not result in a wavier of her right to prior teaching credit. West Jersey Tile & Guar. Co. v. Industrial Trust, Co., 27 N.J. 144(1958). Since her grievance was filed at the end of the 1977-78 school year, **I CONCLUDE** that Ms. Grossman shall be given an additional two year credit starting with the 1978-79 school year and placed in the appropriate step on the Collingswood Salary Schedule as of that date. Further **I CONCLUDE** that Ms. Grossman shall receive back salary for the difference from the start of the 1978-79 school year until the adjustment is made regarding her current salary pursuant to the final decision in this matter.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, FRED G. BURKE,** who by law is empowered to make a final decision in this matter. However, if Fred G. Burke does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

OAL DKT. NO. EDU 2422-79

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

December 31, 1980
DATE

Beatrice S. Tylutki
BEATRICE TYLUTKI, ALJ

Receipt Acknowledged:

January 5, 1981
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

January 8, 1981
DATE

Ronald L. Fisher/ss
OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

Exhibits Admitted Into Evidence:

P-1 Employment Contract between Frances B. Grossman and Board of Education of Washington Township, dated August 13, 1968

P-2 Employment Contract between Frances Grossman and Board of Education of Deptford Township, dated November 22, 1971

P-3 Letter from Frances Grossman to Mr. Ande, dated April 17, 1973

P-4 Teacher Application of Frances B. Grossman to the Collingswood Public Schools, dated June 1973

P-5 Employment Contract between Frances B. Grossman and the Board of Education of Collingswood, dated July 12, 1973

P-6 Letter from Ms. Grossman to Mr. Ande, dated July 3, 1973

P-7 Letter from Mr. Ande to Ms. Grossman, dated July 9, 1973

P-8 Grievance Report regarding Frances Grossman, dated June 6, 1978

R-1 Agreement between the Board of Education of Collingswood and the Collingswood Education Association entered into on June 7, 1973

R-2 Teacher Application of Frances Grossman to the Collingswood Public Schools, dated July 20, 1966

R-3 Letter from Mr. Ande to Ms. Grossman, dated June 29, 1973

R-4 Teaching Candidate Recommendation, dated July 1973

R-5 Letter from Mr. Ande to Internal Revenue Service Inspector, dated October 17, 1973 and letter from Ms. Grossman to Mr. Ande, dated October 15, 1973

R-6 The Salary Schedules for the Collingswood Public Schools from 1973 through 1980

WITNESSES FOR PETITIONER:

John Bloxsom
Joan V. Snyder
Frances Grossman

WITNESS FOR RESPONDENT:

Walter C. Ande

FRANCES GROSSMAN, COLLINGSWOOD EDUCATION ASSOCIATION,	:	COMMISSIONER OF EDUCATION
PETITIONERS,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF COLLINGSWOOD, CAMDEN COUNTY,	:	
RESPONDENT.	:	

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law.

The Commissioner observes that no exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

The Board shall accord petitioner two additional years' credit on the Collingswood Salary Schedule effective the 1978-79 school year with payment between the difference that she actually received and should now receive by the pay period ending the month of this decision by the Commissioner.

It is so directed.

COMMISSIONER OF EDUCATION

February 11, 1981

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1924-80
AGENCY DKT. NO. 79-3/80A

IN THE MATTER OF:

JEAN CASTANIEN
AND FRANK FEHN,
Petitioners,
v.
BOARDS OF EDUCATION OF THE TOWNSHIPS OF BETHLEHEM AND FRANKLIN AND THE BOROUGHS OF HAMPTON, GLEN GARDNER, CALIFON AND LEBANON, HUNTERDON COUNTY,
Respondents.

Record Closed: October 14, 1980
Received by Agency: 12/12/80

Decided: December 12, 1980
Mailed to Parties: 12/16/80

APPEARANCES:

For Petitioners: **Richard A. Friedman,** Esq. (Ruhlman & Butrym)

For Respondents: **Richard Dieterly,** Esq. (Gebhardt & Kiefer)

BEFORE **ERIC G. ERRICKSON,** ALJ:

Petitioners Fehn and Castanien were employed full time until June 30, 1980 and are now employed part time by the North Hunterdon Regional School District (Regional District) on a child study team which served pupils not only in the Regional

District, but also pupils enrolled in the six (6) individually named Respondent Elementary Districts (Elementary Districts) which are among the component municipalities in the Regional District. They claim entitlement to lost salary and to part time employment on the child study team now administered by the Bethlehem Board which, since July 1, 1980 has provided services to the Elementary Districts. The six (6) Respondent Elementary School Districts ("Elementary Districts") conversely contend that petitioners have no legal right to employment or salary beyond that which they were paid by the Regional District.

PROCEDURAL RECITATION:

This matter was originally filed in the spring of 1980 before the Commissioner of Education as Wayne Phillips, et al. v. Board of Education of North Hunterdon Regional High School District, et al., OAL Dkt. No. EDU 1924-80 together with the following companion cases: OAL Dkt. No. EDU 3314-80; OAL Dkt. No. EDU 3329-80 and OAL Dkt. No. EDU 4145-80. These four Petitions together with timely Answers were referred to the Office of Administrative Law for processing as contested cases pursuant to N.J.S.A. 52:14F-1, et seq.

Interlocutory Decisions on Motions were issued on May 9, and June 4, 1980 subsequent to the filing of memoranda and oral argument conducted on May 6, 1980. (Tr. I) Therein, Petitioners' Motion for Interim Relief was denied on insufficient showing of irreparable harm. Also denied was Petitioners' Motion requesting interim restraint on the manner in which the Boards could staff and operate their child study teams. Similarly denied was a motion by the Respondent Regional District to dismiss the Regional District as a respondent. Also denied was a Motion by certain Petitioners to enter summary decision on behalf of those Petitioners.

Thereafter, a plenary hearing of nine (9) days duration was conducted in Hunterdon County between June 10 and August 5, 1980. (Tr. II-IV, VI-X) Early during those proceedings, the parties attempted a settlement of all differences. (Tr. V) Post hearing briefs were filed by the parties. Settlement was reached regarding relief sought from the Respondent Boards by Petitioners Phillips, Goddard, Gutherz, Schreiber, Bunting and the North Hunterdon Regional High School Education Association in respect to the following docketed cases: EDU 1924-80; EDU 3314-80; EDU 3329-80; EDU 4145-80.

In a Commissioner's Decision issued November 13, 1980, incorporated herein by reference, those settlements were approved and the claims made by those petitioners were dismissed with prejudice leaving viable only those claims raised by Petitioners Fehn and Castanien in EDU 1924-80. The central issue remaining is whether, as the result of their child study team service, prior to July 1, 1980, they have tenure and seniority rights to employment on the child study team administered by the Bethlehem Township Board.

CONTEXTUAL SETTING OF THE DISPUTE:

Those uncontroverted facts which reveal the contextual setting of the dispute are here set forth, as follows:

Pursuant to the enactment of statutory requirement on local school districts to provide child study team services to evaluate, classify and devise appropriate programs for handicapped pupils the Regional District, during the 1968-69 school year, first employed and housed at its North Hunterdon Regional High School a child study team (CST). (PC-2, 3) Eventually, a second team was formed and housed at the Regional Board's Voorhees High School. Those teams provided services both to pupils of the Regional District and, at one time, to pupils of nine of the Regional District's component municipalities. Among the nine are the six (6) named Respondent Elementary Districts. The Regional District billed and collected payment from the Elementary Districts for those services. The education boards of some municipalities which once received and paid for services of that child study team later discontinued to utilize the services of the child study teams. The six (6) named Respondent Elementary Boards, however, have received such services at least from the 1971-72 school year through June 30, 1980.

Midway through the 1979-80 school year, notice was served by the Elementary Districts on the Regional Board that they would cease to receive and pay for child study team services from the Regional Board's teams effective the beginning of the 1980-81 school year. (PC-24,28) Thereupon, the Regional Board notified Petitioners Fehn and Castanien that they would be employed and paid during ensuing 1980-81 school year for only three days per week. The Elementary Boards, in turn, proceeded to advertise for and interview prospective child study team members for a team to be housed and administered by the Bethlehem Township Board to provide child study team services to the six (6) Respondent Elementary Boards.

Petitioner Castanien is certified and was hired by the Regional Board on August 15, 1972 as a full time learning disabilities teacher consultant (LDTC). (REL-1) Her service thereafter until June 30, 1980 was uninterrupted. Her May 5, 1980 application for a full time learning disabilities consultant with the CST to be operated by the Bethlehem Township Board was not accepted. (PC-10-11) Petitioner Fehn is certified and was employed without interruption as a school social worker from 1976 through June 30, 1980. He was interviewed for a full time social worker position but declined to accept an appointment because of lesser salary offered as compared to his 1979-80 salary at North Hunterdon. Both provided services in the area of their specialty to various of the named Respondent Elementary Districts.

SUMMARY OF TESTIMONY:

The North Hunterdon Board's Assistant Superintendent for Pupil Personnel between 1966 and 1975 testified that after the Regional Board on March 19, 1968 had passed a motion to "*** endorse the idea and plan for forming a North Hunterdon Child Study Team," (PC-2) it voted unanimously on June 18, 1968 to employ a twelve (12) month psychologist at $12,500 and a ten (10) month social worker at $10,235, "***the cost to be shared by Bethlehem, Califon, Clinton Town, Clinton Township, Lebanon Boro, Lebanon Township and North Hunterdon Regional High School." (PC-3)

He also testified that from 1966 until 1975, he attended regular meetings of an articulation committee ("articulation committee") consisting of administrators from the Regional and each of its component Elementary Districts to consider and discuss matters of common interest. The Assistant Superintendent testified that he personally chaired and distributed minutes of the less frequent meetings of a subcommittee ("subcommittee") consisting of representatives of the Regional district and all component elementary districts which received services from the child study team. He further testified that a sub-subcommittee ("sub-subcommittee") consisting of himself and two to three administrators from elementary districts met on occasion to perform various functions. He testified that the subcommittee's function was basically to make policy as contrasted to the sub-subcommittee's executive function of carrying out that policy and making recommendations to the subcommittee, each of whose members shared an equal vote. He testified that he, himself, regularly made up a proposed budget, presented it to the sub-subcommittee for discussion and modification and recommended a budget for each ensuing year to the subcommittee, whose approval was then forwarded to the Regional Board for

action. He testified that the sub-subcommittee met less and less frequently after 1970 carrying out their functions by telephone or by mail. He testified, however, that members of both the subcommittee and the sub-subcommittee not only interviewed and recommended candidates for child study team positions, and advised them where they would work, but also evaluated their performance and made recommendations for the continuation or termination of child study team personnel. He testified, also, that both the sub-subcommittee and the subcommittee had input into the time assignments of CST members to the participating district.

The Assistant Superintendent testified that the North Hunterdon Board actually hired and paid members but gave no directions on how to search for and screen candidates, leaving these duties to the discretion of the aforementioned committees.

The Regional Board's psychologist on its first child study team testified that prior to his appointment in 1968 he had been interviewed by the Regional Board's Assistant Superintendent and the Administrative Principals of Lebanon Boro and Hampton Boro. He testified that at the interview he was given a set of proposed rules for administering the child study team which stated, inter alia, that in decision making, each district receiving services would have one vote with majority rule, that costs would be shared on a per pupil basis, that time to each district would be allocated on the basis of its enrollment as a percentage of total pupil enrollment, and that salary would be paid according to the contracting Regional District's salary guide. (PC-5) The psychologist testified that he thereafter scheduled the child study team allocating hours of its members on the basis of each district's percentage of total pupil enrollment. He testified that over the years some of the Regional's component Elementary Districts were, on request, added to those receiving CST services and that others, on request, were dropped from the districts served. He also testified that, at year end, he was called by the Assistant Superintendent to review written evaluations of his performance which had been submitted by the elementary school principals.

The psychologist testified that his duties included administering the CST, devising referral forms for pupils, conferring with principals on CST services, establishing the CST calendar, speaking at PTA's and faculty workshops, screening pupils for services, and in conjunction with the Assistant Superintendent and Elementary District principals, interviewing prospective CST members. Similar testimony was elicited from the Board's

other school psychologist who was later employed and assigned to a second CST housed at the Regional Board's Voorhees High School.

The psychologist on the Regional's second CST who was employed in April 1977 testified that she was interviewed by an array of administrators including two Elementary Principals. She testified that, in her capacity as director of special services for Voorhees High School, she received but had to refuse frequent requests for additional time to the four elementary districts served by her team. She testified that she and members of her CST conducted drug programs, handled complaints, conferred with parents and elementary principals, spoke at their PTA's, inservice workshops, and faculty meetings. She testified that the ever-increasing load and overwhelming paperwork requirements resulted in her requesting additional personnel to cope with the load.

The Administrative Principal of Lebanon Boro who had served on the sub-subcommittee testified that it was formed to interview prospective CST personnel and to formulate CST budgets. He testified that the sub-subcommittee had met two to three times yearly through the 1972-73 year after which regular meetings ceased in favor of conducting most business by telephone. He testified that he had participated in interviews of the two aforementioned school psychologists, a social worker and Petitioner Castanien. He also testified that he had participated in telephone conversations with the Assistant Superintendent concerning the performances of a CST employee who was later dismissed. He stated, however, that he was never called on to cast a vote which led to that dismissal.

The Lebanon Boro Principal also testifed that, when the elementary principals raised strong objection to the appointment of a coordinator of CST services, the Regional Superintendent stated: "***It's my team, I can appoint whoever I want to appoint, I am paying the bill.***" (Tr. IX-51) He testified that, when the sub-subcommittee interviewed Petitioner Castanien and another candidate, the committee's choice declined to accept the LDTC position and Castanien was employed without further input.

He testified that at no time did his Board enter into a written contract with the Regional Board concerning CST services. In regard to the authorization to participate, he testified as follows:

> "***There was no motion made. It was like paying a bill for textbooks or whatever else, there was no formal motion made to

> join. My recommendation was that we purchase services, or we join the Child Study Team, whatever arrangement we want to make out, and the board went along with my agreement without any formal motion.***"

He testified further that the Regional Superintendent as early as 1977 had advised that the Elementary Boards should establish their own CST team.

Califon's Administrative Principal testified that he has had no input into the formulation of the CST budget and that all CST information and scheduling flowed to him from Regional personnel. He testified that he participated not only in the recent discussions which led to the decision to form a CST to serve the Elementary Boards but also in the screening of applicants for that team.

The Franklin and Hampton Administrative Principals also testified that they had no input into the Regional CST budget, provided no facilities for use of CST members, and did not evaluate CST members.

Bethlehem's Administrative Principal, who had formerly served as the Franklin Board's Principal, similarly testified that his district had no input or control over the CST budget services provided, the CST personnel who provided them, or the Regional Board's administration of the services. He testified that, although he had been present at Petitioner Fehn's interview, he considered it only a courtesy invitation. He testified that it was a lack of funds by any one district in 1968 that prompted the Regional and Elementary Boards, on recommendation of their administrators, to adopt the expedient of sharing the services of one team. He testified that his Board had, on his recommendation, without formal action, agreed to purchase CST services from the Regional Board.

Petitioner Castanien testified that she was interviewed in 1972 by both the Regional and Elementary District administrators, all of whom actively participated in those interviews. She testified that in performing her duties, she met with principals and teachers, spoke at PTA's, faculty meetings and workshops, visited classified pupils placed in schools outside the districts. She testified that she had received no written evaluations until 1978 after which she was evaluated by the school psychologist who schedules and directs her activities. She testified that when she first learned of the Elementary Boards' intent to form a new CST from an advertisement in the paper, she interviewed for a full time LDTC position but was not employed.

Petitioner Fehn testified that, although both Regional and Elementary District Administrators participated in his interview, one of the Regional administrators apologized that it was not possible for all of the participating elementary administrators to be present. He testified that as a social worker he conferred with principals and teachers, visited homes, spoke at in service programs, PTA's and drug workshops, and visited pupils placed out of district. He testified that he was formally evaluated on only one occasion and that that evaluation was performed by a Regional Board supervisor. He testified, further, that after he had been interviewed for a full time social worker position for the CST to be administered by the Bethlehem Board, he declined an offer since the Bethlehem District's salary scale was substantially lower than that of the Regional District.

The Regional Board's Business Administrator testified that billings to the Elementary Boards for CST services was on the basis of the percentage of time allocated to each district. He testified that actual costs, rather than budgeted costs formed the basis of the billing which included charges for salaries, travel costs, heat, air conditioning, light, furniture, custodial services, supplies and telephone. He also testified that no formal contracts were ever entered into by the Regional and Elementary Boards regarding CST services or charges. This testimony is unrebutted in the record.

FINDINGS OF FACT:

Having considered the testimony of witnesses, and the documentary evidence within the record, I **FIND**, on the basis of a preponderance of credible evidence, the following to be additional relevant facts to be considered in arriving at a determination:

1. The Regional District's Child Study costs were budgeted and paid on the basis of each participating district's percentage of enrollment as compared to total enrollment in the Regional and participating Elementary Districts. In the early years of CST operation, recommended annual budgets for the child study teams were prepared by the Assistant Superintendent, reviewed by the sub-subcommittee and the sub-committee composed of Regional and Elementary administrators and forwarded to the Regional Board for incorporation in its adopted budget. Since 1975 the Regional District has simply notified the Elementary Districts of the amount to incorporate into their budgets for CST costs.

2. Administrative Principals of the Elementary Districts by common consent did have input into the screening of candidates and their employment on child study teams. While their recommendations were usually followed, the ultimate decision remained with the employing Regional Board and its administrative agents.

3. Petitioner Castanien, as of June 30, 1980, was providing services as an LDTC in the Regional District and in Bethlehem Township and Lebanon Boro. In certain prior years she had also provided those services to the Califon, Hampton and Glen Gardner Districts. There is no evidence on which to base a conclusion that she, at any time, provided services to Franklin Township pupils. Her assignment was at the sole discretion of the administering Regional District.

4. Petitioner Fehn, as of June 30, 1980, had performed the duties of social worker for a uninterrupted period in excess of three years in the Regional District and in the Franklin, Glen Gardner, Hampton, Califon districts. There is no evidence that he, at any time, provided services to pupils in Lebanon Boro or Bethlehem Township schools. His assignment was at the sole discretion of the administering Regional District.

5. While the Elementary Districts could and did express preferences over what CST personnel should serve them, the ultimate decision in this regard was made by the Regional District's personnel.

6. Elementary Principals often prioritized the time of CST staff to meet emergent needs. Petitioners and other CST personnel endeavored to adjust their schedules to meet these needs.

7. No written or oral contract between the Regional and the Elementary District Boards was ever proposed, formulated or otherwise approved by official resolutions entered into regarding CST costs, services, or controls.

8. No plan of administrative control or decision making was ever acted on by either the Regional or Elementary Boards. The day to day operation was left to their administrative agents. Such limited, nebulous language as does appear in the minutes of the Elementary Boards merely indicates approval to participate, cooperate, join, share in and support the formation and continuance of a North Hunterdon CST.

9. No board of trustees, chairman or other officers were established approved by the participating Boards. Nor were regular meetings scheduled or held.

10. The proposed rules to govern CST operations which were formulated by the Assistant Superintendent were never acted upon by the Regional Board or any Elementary Board. While they provided a framework acceptable to the administrators of districts receiving services, they lacked the authority which flows from official board adoption. There is no evidence on which to base a conclusion that the tenets thereof were obligatory.

11. Meetings of the aforementioned sub-subcommittee and subcommittee had effectively ceased by 1975 when the Assistant Superintendent was reassigned to other duties. Thereafter, until 1980, no meetings were held other than those wherein elementary administrators were invited to participate in interviews of candidates for CST positions.

12. Elementary administrators provided some written evaluations of CST members prior to 1972. Thereafter, that practice ceased.

13. At no time did any of the Elementary Boards act to approve the employment of petitioners or other CST personnel.

14. No application was ever formulated, forwarded to the Commissioner or acted upon by him in regard to approval of a jointure commission pursuant to N.J.S.A. 18A:46-25,26 which provide as follows:

N.J.S.A. 18A:46-25

"When two or more boards of education determine to carry out jointly by agreement the duties imposed upon them in regard to the education and training of handicapped pupils the said boards may, in accordance with rules and regulations of the state board, and with the approval of the commissioner by the adoption of similar resolutions establish a jointure commission for the purpose of providing such services. Said commission shall, in accordance with rules of the state board, be composed of representatives of the respective boards of education, and shall organize by the election of a president and vice president."

N.J.S.A. 18A:46-26

"The commission may, in accordance with rules of the state board:

"a. Provide and maintain the necessary facilities by acquiring land, building, enlarging, repairing, furnishing, leasing or renting:***

"c. Employ necessary principals, teachers and other officers and employees, who shall have the same rights and privileges as those who are similarly employed by local boards of education:***

"e. Apportion among the contracting districts the amounts of the capital and current operating costs of the program so undertaken.

"Within the limited responsibilities of this chapter and except as otherwise provided, the commission shall have and may exercise all the powers of a board of education in carrying out the purpose of this chapter."

DISCUSSION AND CONCLUSIONS:

Petitioners assert tenure and seniority rights to employment with the newly formed team which is now operated by the Bethlehem Township Board. They ground this assertion on the Commissioner's holding in Faulcon Bisson v. Boards of Education of the Borough of Alpha, Townships of Greenwich, Lopatcong and Pohatcong, Warren County, 1978 S.L.D. 187. Therein, it was held that Bisson, a school psychologist had rights to continued employment by reason of existence of a de facto jointure commission. Such was the determination despite a change in which Lopatcong assumed responsibility for administering the operation of the Commission which had formerly been administered by Pohatcong.

The two cases, however, are distinguishable by reason of important factual differences. The de facto commission in Bisson, supra, before and after the change in the administering district, was comprised of the same four schools. It had at all times, an organized board of directors, held regular monthly meetings, presided over by an administrator chairman who served a one year term in that capacity. In the Bisson case, each Board which formed the de facto commission approved by resolution the team's proposed annual budgets, Bisson's salary and the addition of personnel to the CST. Bisson himself served each of the schools operated by the participating Boards.

In sharp contrast to the factual context in Bisson, the respondent Elementary Districts herein had no board of directors or designated chairman and held no regular meetings. For at least the last five years, no meetings at all were held by the subcommittee or the sub-subcommittee except for limited attendance at interviews of prospective CST members. Petitioners have not served pupils in all of the participating schools. The final decisions on employment of CST members was not contingent on approval by each of the Elementary Boards. Nor was the salary of team members or the teams' annual budget ever approved by the respondent Elementary Boards.

I CONCLUDE that the Regional District maintained ultimate control over its own CST at all times. The limited and loosely exercised efforts of the sub-subcommittee and subcommittee were, like all efforts of the parent articulation committee, an attempt to facilitate in harmonious fashion those programs wherein both the Regional and the Elementary Boards had mutual interest. Accordingly, I CONCLUDE that, herein, unlike Bisson, supra, no de facto jointure commission ever existed.

Petitioners argue that even if no de facto commission existed, they have employment rights in those districts in which they provided services for a period in excess of three years.

Here, too, their assertion is without basis. It is a common practice for public school districts operating child study teams to make reasonable charges to other districts who wish to purchase such services. Absent a contract of employment in those districts, the certified CST members who are so assigned gain no tenure except with their employing boards.

Petitioners were, at all times, employed only by the Regional Board which scheduled them to serve a majority of their time in its own high schools and a lesser time in certain of the respondents' elementary schools. Petitioners were never under contract to any Respondent Board. No tenure rights accrued to petitioners in those Districts. The Regional Board has, in order of seniority, recognized their right to part time employment. I CONCLUDE that their claims to either part time or full time employment in the Elementary Districts must fail since those claims are not substantiated by tenure or seniority entitlement.

I further CONCLUDE that N.J.S.A. 18A:26-6.1 has no applicability to the factual context presented herein since petitioners' claims did not arise as the result of the discontinuance of a child study team. That this is so is amply demonstrated by the fact that they continue to be employed by the same Regional Board, albeit on a part time basis. For this same reason that no discontinuance of a child study team occurred, the case of Susan Stuermer v. Board of Education of the Special Services School District of Bergen County, 1978 S.L.D. 628 is similarly inapplicable.

In consideration of the facts and conclusions heretofore set forth, IT IS ORDERED that the relief requested by petitioners in the form of employment on the newly formed CST administered by the Elementary Districts, together with the request for lost salary and emoluments, is DENIED. The Petition of Appeal is DISMISSED.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, FRED G. BURKE,** who by law is empowered to make a final decision in this matter. However, if Fred G. Burke does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

OAL DKT. NO. EDU 1924-80

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

December 12, 1980
DATE

Eric G. Errickson
ERIC G. ERRICKSON, ALJ

Receipt Acknowledged:

12/12/80
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

December 16, 1980
DATE

Ronald L. Parker/pf
OFFICE OF ADMINISTRATIVE LAW

plb

DOCUMENTS IN EVIDENCE:

REL-1	Letter of employment Acceptance to Castanien from Hall, dated August 17, 1972
REL-3	Memo to special service teams from Roth, dated November 28, 1973
REL-4	Application to purchase speech correctionist time
PP-1	1968-69 schedule CST Time Allocation
PP-2	Proposed 1968-69 Budget, dated October 31, 1968
PP-3	Computation of 1969 Budget
PP-4	Computation of 1970-71 Budget
PP-5	Computation of Time Schedule of 1971-72 Psychologist
PP-6	Proposed CST Budget for 1969-70
PP-7	Roth to Connaly, dated July 6, 1972
PC-1	Job Description Coordinator Special Services
PC-2	Minutes NHR, dated March 19, 1962
PC-3	Minutes NHR, dated June 18, 1968
PC-4	1971-72 Summary-Psychologist's Schedule
PC-5	Proposed Rules for operation of CST
PC-6	Minutes of Subcommittee, dated November 12, 1969
PC-7	Minutes of Subcommittee, dated June 25, 1970
PC-8	Minutes of Articulation Committee
PC-9	Castanien's Certification
PC-10	Castanien to O'Brien, dated February 12, 1980
PC-11	O'Brien to Castanien
PC-12	Fehn to Castanien
PC-13	Fehn to Bertch, dated April 2, 1980
PC-14	Fehn Schedule 1979-80
PC-15	Schreiber to Salomon, dated July 15, 1977
PC-16	Schreiber to Curzi, dated July 15, 1977
PC-17	Schreiber to O'Brien, dated July 15, 1977
PC-18	Schreiber to Alercia, dated July 15, 1977
PC-19	Curzi to Schreiber, dated March 13, 1978
PC-20	Curzi to Schreiber, dated November 14, 1978
PC-21	Spera to Schreiber, dated May 22, 1979

PC-22	Board Secretary to Director CST, dated May 1980
PC-23	Schedule of Castanien 1978-80
PC-24	Board Minutes 1979-80
PC-25	Board Minutes A through R
PC-26	Minutes of meeting, February 2, 1979
PC-27	Schaufele Affidavit, dated May 6, 1980
PC-28	O'Brien to Neuman, dated December 11, 1979
PC-29	Affidavit of O'Brien

JEAN CASTANIEN AND FRANK FEHN,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARDS OF EDUCATION OF THE TOWNSHIPS OF BETHLEHEM AND FRANKLIN AND THE BOROUGHS OF HAMPTON, GLEN GARDNER, CALIFON AND LEBANON, HUNTERDON COUNTY,	:	
RESPONDENTS.	:	

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law.

The Commissioner observes that exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Commissioner has reviewed petitioners' exceptions to the initial decision in this matter which are grounded on the following contentions:

1. There is no existing statutory or regulatory authority which permits local boards of education to purchase CST services from another school district. Petitioners point out that the provisions of N.J.A.C. 6:28-1.5(b) do, however, permit local boards to purchase CST services from diagnostic clinics, agencies or professionals in private schools.

2. Petitioners, in view of the exceptions set forth above, maintain that respondents' actions herein clearly establish the fact that the long-term relationship for CST services which they had entered into with the North Hunterdon Regional School District was, in effect, their tacit approval to formally establish a jointure commission. This is so, petitioners contend, notwithstanding the fact that such commission failed to conform to the technical requirements of applicable State law and regulations of the State Board of Education.

3. Petitioners argue that the distinctions made herein by Judge Errickson in re Bisson, supra, are misplaced. Petitioners, in their reliance on the specific language of the Commissioner therein, maintain that the failure of respondents herein to follow the proper statutory procedures to establish a

jointure commission (N.J.S.A. 18A:46-25 et seq.) does not negate the fact that a de facto jointure commission had been effected. Thus, petitioners argue that such failure of respondents may not deprive them of their tenure and seniority rights claimed herein.

Respondents in their reply exceptions categorically reject the position taken by petitioners herein and urge that the initial decision of Judge Errickson be affirmed by the Commissioner.

In the Commissioner's judgment petitioners' reliance on Bisson, supra, in support of the factual circumstances in the instant matter is without merit. The Commissioner in arriving at this finding and determination concurs with the findings of fact and conclusion of law set forth in the initial decision and adopts them as his own with one exception.

In this regard the Commissioner is constrained to note the observation made by Judge Errickson that "***It is a common practice for public school districts operating child study teams to make reasonable charges to other districts who wish to purchase such services.***" (ante, at p. 12) If indeed such practices do exist, in other school districts, they contravene the regulations promulgated by the State Board of Education which read as follows:

> "(a) A basic child study team shall consist of a school psychologist, a learning disabilities teacher-consultant and a school social worker. All members of the basic child study team shall be employees of the local board of education, have an identifiable apportioned time commitment to the local school district and shall be available during the hours pupils are in attendance.
>
> "(b) Each local public school district shall employ basic child study teams in numbers sufficient to ensure provision of required services pursuant to these regulations.***" (N.J.A.C. 6:28-1.3)
>
> (Emphasis supplied)

Local boards of education are required to adhere to the mandate set forth in this section of the State Board rules.

In arriving at the above determination, the Commissioner does not mean to imply that local boards of education may not enter into agreements for joint facilities pursuant to the provisions of N.J.S.A. 18A:46-24 which read as follows:

> "Any two or more districts may provide for facilities, examinations or transportation under this chapter under the terms of an agreement adopted by resolutions of each of the boards of education concerned setting forth the essential information concerning the facilities, examination or transportation to be provided, the method of apportioning the cost among the districts and of computing the proportion of the state aid to which each district shall be entitled, and any other matters deemed necessary to carry out the purpose of the agreement. No such agreements shall become effective until approved by the Commissioner."

It is evident herein that the Respondent boards did not invoke the applicable provisions of State Board rule or statutory prescription for the employment of a basic child study team(s).

Consequently, the actions of respondents herein, as well as the North Hunterdon Regional School District, were unauthorized and in effect caused this matter to be litigated before the Commissioner. Such action cannot be condoned; however, it is equally clear that petitioners were in the employ of the North Hunterdon Regional Board of Education at all times herein controverted and that the tenure and seniority rights to which they seek to lay claim may only be exercised by them as employees of said school district. The Commissioner so holds.

Accordingly, petitioners' prayer for relief is hereby denied and the instant Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

February 17, 1981

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5434-80
AGENCY DKT. NO. 376-7/80A

IN THE MATTER OF:

MARION KUTAWSKI,
Petitioner
v.
EAST BRUNSWICK BOARD OF EDUCATION, MIDDLESEX COUNTY,
Respondent.

Record Closed: November 25, 1980
Received by Agency: 1/6/81

Decided: January 5, 1981
Mailed to Parties: 1/9/81

APPEARANCES:

For Petitioner: **Jack Wysoker,** Esq. (Mandel, Wysoker, Sherman, Glassner & Weingartner)

For Respondent: **David B. Rubin,** Esq. (Rubin, Lerner & Rubin)

BEFORE **ERIC G. ERRICKSON,** ALJ:

Petitioner alleges that an action of the East Brunswick Board of Education ("Board") abolishing her supervisory position and appointing her, effective September 1, 1980, to the position of supplemental instructor, was in violation of her tenure and seniority rights to an alternate supervisory position. The Board, conversely, denies that she has entitlement to an alternate position.

PROCEDURAL RECITATION:

Following his receipt of the Petition of Appeal in July 1980 and the filing of a timely Answer, the Commissioner, on August 27, 1980, transferred the matter as a contested case to the Office of Administrative Law pursuant to N.J.S.A. 52:14F-1 et seq. On August 29, 1980, petitioner filed Notice of Motion for Summary Judgment with accompanying affidavit and Memorandum of Law. Respondent filed an answering Memorandum of Law with accompanying affidavit on October 10, 1980.

Oral argument on the Motion was held on November 3, 1980. On the same date, issues were framed in a scheduled prehearing conference. Petitioner, urging that there is no genuine issue of material fact requiring a hearing, avers that the case may be decided as a matter of law. A thorough review of the case record supports petitioner's contention that there is no material fact in dispute and that the matter is ripe for summary decision. Judson v. Peoples Bank and Trust Company of Westfield, 17 N.J. 67.

UNCONTROVERTED FACTS:

The following facts are admitted in the pleadings or otherwise established in the affidavits and exhibits accompanying the pleadings and the memoranda of law:

Petitioner is certified as an elementary teacher (1960), as a supervisor (1972), and as a principal/supervisor (1978). (Exhibit C) She has been employed by the Board as follows:

1956-62	Classroom Teacher
1962-64	Helping Teacher
1964-71	K-8 Coordinator of Language Arts and Social Studies
1971-August 31, 1980	General Elementary Supervisor K-6

While serving as General Elementary Supervisor from 1971-80, petitioner had at times been responsible for supervising in grades K-8 language arts, social studies, science and mathematics. At no time did petitioner supervise in grades 9-12.

Petitioner and the Board executed a contract for her to continue as general elementary supervisor for the ensuing 1980-81 school year, at a salary of $30,945. Or

June 25, 1980, however, the Board abolished petitioner's position of K-6 General Elementary Supervisor and transferred her to a position as supplemental instructor at its Chittick Elementary School at a salary of $23,921.

During 1978, the Board had abolished another general elementary supervisor's position and established in its stead a K-12 English coordinator position. It is this position, occupied by a non-tenured individual, when this action was brought, to which petitioner lays claim by reason of seniority.

The Board's thoroughly detailed job description for the position of subject coordinator does not specify what certificate is required for the position but specifies inter alia, the following duties:

A. Administration
Advise on personnel needs, help select textbooks, supplies, and equipment, prepare subject area reports, conduct department head meetings, develop long range plans, organize curriculum development teams, organize committees and advise on formulations of systemswide policies and practices.

B. Subject Leadership
Become informed and serve as consultant in subject areas, implement systemwide concepts, stimulate personnel, visit classrooms and confer with teachers in a non-evaluative relationship, enhance morale, coordinate committee efforts.

C. Curriculum
Lead in development of curriculum in concert with principals, department heads, and teachers, propose, plan and evaluate innovative programs, encourage library development, articulate the subject area K-12.

D. In Service Training
Direct in-service training for teachers, department heads and principals through workshops, inter classroom visitation, committee work and teams, conduct demonstrations, stimulate participation in activities fostering professional growth, foster and coordinate in-service training.

E. Student Evaluation
Prepare tests and select standardized tests, assist with testing, and make recommendations on basis of pupil performance.

F. Budgeting and Materials Control
Advise on budget requests and disbursements.

G. Liaison and Communication
Serve as subject area liaison, interpret and inform personnel of systems-wide policies and rules, keep supervisors informed and supplied with public relations materials and represent the district at meetings.

H. Subject Advisory Committee (Since 1978)
Insure that meetings are held, enlist aid of the committee in formulation of K-2 objectives, evaluation, and promotion of programs and dissemination of information.

I-J. Relation to Principals and Department Heads
Consult with school principals and department heads to insure that they will take full advantage of the services of the subject area coordinator.

DISCUSSION AND CONCLUSIONS:

Petitioner was, without question, by reason of her ten years of service as a general elementary supervisor, tenured in that position. That position, by its exact title, is recognized in section (K)(12) of N.J.A.C. 6:3-1.10 which sets forth categories and procedures for determining seniority. N.J.A.C. 6:3-1.10(h) specifies 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. If he shall have insufficient seniority for employment in the same category, he shall revert to the category in which he held employment prior to his employment in the same category, and shall be placed and remain upon the preferred eligible list of the category from which he reverted until a vacancy shall occur in such category to which his seniority entitles him."

The Board had statutory discretionary authority to effect a reduction in staff by abolishing the second of its two general elementary supervisor positions. N.J.S.A. 18A:28-9 All boards, however, when effecting such a reduction, are obligated to determine the seniority of a tenured teaching staff member whose position is abolished. N.J.S.A. 18A:28-11 specifies that:

> "In the case of any such reduction the board of education shall determine the seniority of the persons affected according to such standards and shall notify each such person as to his seniority status, and the board may request the commissioner for an advisory opinion with respect to the applicability of the standards to particular situations, which request shall be referred to a panel consisting of the county superintendent of the county, the secretary of the state board of examiners and an assistant commissioner of education designated by the commissioner and an advisory opinion shall be furnished by said panel. No determination of such panel shall be binding upon the board of education or any other party in interest or upon the commissioner or the state board if any controversy or dispute arises as a result of such determination and an appeal is taken therefrom pursuant to the provisions of this title."

There is no showing, herein, that the Board sought the assistance of a Commissioner's panel in determining what seniority rights petitioner held in respect to any other supervisory position, namely the coordinator of English position to which she claims entitlement. Nor is there a showing that the Board notified petitioner of what it believed to be her seniority rights which had accrued after her more than 15 years as a coordinator and general elementary supervisor. I CONCLUDE from the clear language of the statute that the Board should have but failed to follow the statutory directive set forth in N.J.S.A. 18A:28-11.

It was, of course, within the Board's authority to abolish both of its general elementary supervisor positions. It must, however, be examined whether, when petitioner's position was abolished, any other supervisory position existed to which she had entitlement by reason of her nine years of seniority as a general elementary supervisor.

Petitioner claims entitlement to a position as English coordinator K-12, an unrecognized title. The Commissioner was similarly called upon to determine entitlement of a tenured employee in the case of an unrecognized title in Arthur L. Page v. Board of Education of the City of Trenton, et al., 1973 S.L.D. 704 and 1975 S.L.D. 644. Therein, he determined at 1975 S.L.D. 644 at 651 that Page, who had served as an assistant to an

assistant superintendent for personnel, a position which was abolished, had gained tenure by reason of his duties as a principal and was entitled to reassignment and salary as a principal.

Having examined the duties set forth in the job description of English coordinator, ante, **I CONCLUDE** that they are in substance the duties which petitioner performed as a general elementary supervisor and as a coordinator of language arts in the elementary grades. I further **CONCLUDE** that they are the duties normally performed by a supervisor or an administrator. Petitioner holds certificates as a supervisor and as a principal entitling her to serve therein in grades K-12.

The Board argues that petitioner lacks experience and expertise to serve as a coordinator of grades 9-12 for lack of service in those grades. This argument, however, must fail given the relevant precedents in case law.

In James J. Flanagan v. Board of Education of the City of Camden, 1980 S.L.D. ____ (decided November 6, 1980), the Commissioner stated, of a supervisor who had served his board only as a supervisor of audio visual programs, that:

> "***Petitioner herein holds a certificate both as a principal and supervisor. *** Holding such a certificate entitles him to supervise any grade or subject matter area established in respondent's school district. The Commissioner so holds.***" (Emphasis supplied.)

Similarly, it has been held by the Commissioner, the State Board of Education and the Courts that principals are subject to transfer and reassignment by their boards regardless of salary expectation or prior experience in the schools or grades to which they are assigned. Jeannette A. Williams v. Board of Education of Plainfield, 1979 S.L.D. ____ (decided June 1, 1979); aff'd in part, rev'd in part, State Board of Education, January 9, 1980; aff'd New Jersey Superior Court, App. Div. Dkt. No. A-2102-79A, November 6, 1980; George Morell v. Board of Education of the Township of Parsippany-Troy Hills, 1980 S.L.D. ____ (decided June 5, 1980); Frank Stanzl v. Board of Education of the City of Paterson, 1980 S.L.D. ____ (decided April 11, 1980)

N.J.A.C. 6:11-10.4(c) provides as follows:

> "(c) Supervisor: This endorsement is required for supervisors of instruction who do not hold a school administrator's or principal's endorsement. The supervisor shall be defined as any school officer who is charged with authority and responsibility for the continuing direction and guidance of the work of instructional personnel. This endorsement also authorizes appointment as an assistant superintendent in charge of curriculum and/or instruction."

The Board's appointee to its post of English coordinator, as required by the duties set forth in the job description of subject coordinator, is clothed with responsibility and authority to direct, guide and administer the work of instructional personnel. Such duties in the field of language arts and other subject areas were performed by petitioner from 1964 to 1971. That petitioner was not assigned at any time to coordinate or supervise teachers of English grades 9-12 is no bar to her entitlement to the position of English coordinator. Accordingly, I CONCLUDE that petitioner, by reason of having more years of seniority as a supervisor than the holder of that position, is and was entitled to assignment to that position. Flanagan, supra; Williams, supra; Stanzl, supra.

To address the issue of petitioner's allegation that the Board failed to meet the requirements of the Open Public Meetings Act would serve no useful purpose since the end result would not alter the determination or the relief ordered, post.

DETERMINATION:

Having concluded that the Board failed to act in accord with N.J.S.A. 18A:28-11, that the English coordinator's duties are those of a supervisor, and that petitioner was and is entitled by reason of her seniority as a supervisor to be appointed to the English coordinator post, IT IS ORDERED that:

1. Summary Decision is entered in favor of petitioner;

2. the Board shall forthwith, upon issuance of a final decision in this matter, appoint petitioner to the post of English coordinator at a salary in keeping with its salary policies but not less than the contract salary of $30,945 which she was receiving until August 31, 1980;

3. the Board shall provide petitioner with the difference in salary from that which she has received as a teacher since September 1, 1980 and the amount which she would have received as an English coordinator K-12 in keeping with the Board's salary policies;

4. the Board shall provide petitioner with any other emoluments to which she would have been entitled had she been appointed to the English coordinator position effective September 1, 1980.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, FRED G. BURKE,** who by law is empowered to make a final decision in this matter. However, if Fred G. Burke does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

January 5, 1981
DATE

Eric G. Errickson
ERIC G. ERRICKSON, ALJ

Receipt Acknowledged:

1/6/81
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

January 9, 1981
DATE

Richard J. Parker /st
OFFICE OF ADMINISTRATIVE LAW

ms

MARION KUTAWSKI,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,	:	
RESPONDENT.	:	
	:	

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law.

The Commissioner observes that exceptions were filed by the Board pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Board maintains in its exceptions that petitioner, in moving for summary judgment in the instant matter, bears the burden of proving that no genuine issue of material fact exists. The Board further maintains that all inferences with respect to such factual circumstances must therefore be granted in its favor.

The Board argues that seniority, according to the provisions of N.J.A.C. 6:3-1.10(b), is determined by virtue of the time served by a teaching staff member in specific categories. Consequently, the Board takes the position that petitioner's seniority was achieved in the categories of elementary teacher (N.J.A.C. 6:3-1.10(k)(28)) and General Elementary Supervisor (N.J.A.C. 6:3-1.10(k)(10)) respectively.

Absent any claim by petitioner that her position of General Elementary Supervisor was abolished in bad faith, the Board relies on its job description for the position of K-12 English Coordinator to be that which is comparable to the category of "Subject Supervisor" (N.J.A.C. 6:3-1.10(k)(22)) albeit approval was not obtained pursuant to the provisions of N.J.A.C. 6:11-3.6 which state:

> "(a) School districts shall assign position titles to teaching staff members which are recognized in these regulations.
>
> "(b) If a local board of education determines that the use of an unrecognized position title is desirable, or if a previously-established unrecognized title exists, such board shall submit a written request for

> permission to use the proposed title to the county superintendent of schools, prior to making such appointment. Such request shall include a detailed job description. The county superintendent shall exercise his/her discretion regarding approval of such request, and make a determination of the appropriate certification and title for the position. The county superintendent of schools shall review annually all previously approved unrecognized position titles, and determine whether such titles shall be continued for the next school year."

Finally the Board argues that the conclusions and determination reached by Judge Errickson that petitioner's supervisory employment experience from 1971-80 earned her the right to continue in a supervisory position are in error. In this regard the Board maintains that although such position is taken by petitioner in her affidavit, such claim is refuted by the Board affidavit from the Assistant Superintendent in charge of Personnel. Thus, the Board avers that summary judgment proceedings would require that an inference be drawn in the Board's favor with respect to the opposing statements contained in these affidavits. The Board concludes that, in the event the Commissioner determines the need to have these issues of material fact made part of the record in this matter, then summary judgment may not be granted and this matter should then be remanded to the Office of Administrative Law for further proceedings.

The Commissioner has carefully reviewed the entire record of this matter. The Commissioner does not condone the fact that the Board failed to comply with the provisions of N.J.A.C. 6:11-3.6, ante, when it created the position of "Subject Coordinator" in 1978. He observes that said position had been filled by the Board approximately two years prior to the time it abolished petitioner's position as General Elementary Supervisor.

In the Commissioner's view, it is without question that petitioner was duly certified as a supervisor for a sufficient period of time to acquire tenure under said certification which thereby accorded her seniority in the category of General Elementary Supervisor (N.J.A.C. 6:3-1.10(k)(12)). The Commissioner does not agree, however, that the seniority she possesses in said category extends to the recently created Board position of Subject Coordinator K-12. It is clear that the aforementioned position encompasses both elementary and secondary seniority categories; however, petitioner has not served in the latter category.

Accordingly, the initial decision in this matter is hereby reversed for the reasons set forth above. The Commissioner is further constrained to direct the Board to forward its

job description for the position of Subject Coordinator to the Middlesex County Superintendent of Schools so that an annual review and determination of this unrecognized job title may be made pursuant to the provisions of N.J.A.C. 6:11-3.6.

The instant Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

February 20, 1981

MARION KUTAWSKI,	:	
PETITIONER-APPELLANT,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,	:	STATE BOARD OF EDUCATION
	:	DECISION
RESPONDENT-APPELLEE.	:	
	:	

Decided by the Commissioner of Education, February 20, 1981

For the Petitioner-Appellant, Mandel, Wysoker, Sherman, Glassner & Weingartner (Jack Wysoker, Esq., of Counsel)

For the Respondent-Appellee, Rubin, Lerner & Rubin (David B. Rubin, Esq., of Counsel)

The State Board of Education affirms the Commissioner's decision for the reasons expressed therein.

June 3, 1981

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 0298-80

AGENCY DKT. NO. 447-12/79A

IN THE MATTER OF:

BOARD OF EDUCATION OF THE TOWNSHIP OF ROCKAWAY, MORRIS COUNTY

v.

ROBERT OOSTDYK and JANET LAURIE OOSTDYK, WILLIAM MULROY and BRENDA MULROY, and JEANNE GANDEE

Record Closed: December 4, 1980
Received by Agency: 1/9/81

Decided: January 8, 1981
Mailed to Parties: 1/13/81

APPEARANCES:

Jacob Green, Esq., and
Ellen Harrison, Esq., for the Petitioner,
Board of Education of the Township of Rockaway
(Green and Dzwilewski, attorneys)
Robert Oostdyk, Respondent, Pro se

BEFORE **ARNOLD SAMUELS**, ALJ:

On December 4, 1979, the Board of Education of the Township of Rockaway filed a petition with the Commissioner of Education alleging that the respondents intentionally withdrew their children and kept them from attending the public schools of the district, in violation of the Compulsory Education Law, N.J.S.A. 18A:38-25 et seq.; and that they refused to provide information as to any equivalent instruction being given their children elsewhere, as required by the above statute.

The action was commenced pursuant to the authority of the Commissioner to hear and determine controversies under the School Law, N.J.S.A. 18A:6-9; and the matter was transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

Robert Oostdyk answered the petition and also appeared on behalf of his wife, Janet Laurie Oostdyk. In his answer he admitted that he and his wife withdrew their five children from school on or about February 23 or March 1, 1980, and he indicated that they did so because of the school's alleged lack of compliance with his demands for information, following a dispute over unsatisfactory grades given his son, Jon.[1]

William Mulroy, Brenda Mulroy and Jeanne Gandee did not answer the petition served on them and did not appear in the action in any manner. On October 30, 1980, the petitioner withdrew its allegations as to William Mulroy and Brenda Mulroy because of the re-enrollment of their daughter in the schools of the district. Jeanne Gandee has defaulted by virtue of her non-appearance.

On May 9, 1980, a prehearing conference was held at the Office of Administrative Law in Newark, New Jersey, and a prehearing order dated May 14, 1980 resulted.

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1 In the early stages of this matter, Robert Oostdyk and Janet Laurie Oostdyk, his wife, were represented by an attorney, Delia V. Edoga, Esq. In the latter part of February 1980, Ms. Edoga was relieved of her representation by Robert Oostdyk, who informed the court that he would thereafter appear on his own behalf, without an attorney.

The prehearing order fixed an initial hearing date of July 22 and 23, 1980. All discovery (answers to written interrogatories) was to be completed on or before July 9, 1980. The petitioner had previously served written interrogatories on respondent Robert Oostdyk. When timely answers were not received from him, the hearing was adjourned to October 7 and 8, 1980. Sometime thereafter, respondent Robert Oostdyk returned his answers to the petitioner. In September 1980, the petitioner moved for more specific answers, in accordance with the applicable rules of procedure. Hearing on the motion was reserved to the hearing date of October 7. Requests for Admissions were also served on the respondent in July 1980 and were never answered by him.

Prehearing memoranda were also requested of the parties. Respondent Oostdyk filed a memorandum in June 1980, but he did not serve a copy on the petitioner. The contents of Robert Oostdyk's memorandum solely referred to his complaint about the school's failure to communicate with him about his son Jon; but it failed to address the relevant questions in issue. Petitioner did not file its memorandum until the hearing date, claiming inability to prepare it due to the respondent's failure to answer interrogatories.

The hearing proceeded on October 7, 1980. The respondent stipulated and admitted that he had withdrawn his children from school, as charged, and that he had not returned them to school at any time since March 1, 1979. Considering the above admission, respondent Oostdyk was then advised that the sole relevant issue remaining to be decided was whether the children were being given equivalent instruction; and on that question the burden was on him to come forward with evidence of any such equivalent instruction. Respondent Oostdyk then stated that he refused to give any information or evidence until the court agreed to hear his complaints about his children's problems when they were in school prior to March 1979. He was advised at length that his demand would not be accepted, since the testimony he insisted on giving was irrelevant and was unrelated to the issue of whether or not his children were now being given an equivalent education. Respondent Oostdyk remained adamant in his demand, despite careful and lengthy explanations given him by the court, together with repeated opportunities to reconsider his position.

The hearing then proceeded to the merits of petitioner's motion for more specific answers to interrogatories and for answers to its Request for Admissions. It was found that the respondent's answers to 8 out of 12 questions in the written interrogatories were incomplete, unresponsive, non-specific and evasive. Each of the questions were found to be relevant, and the respondent was advised that he was obliged to furnish more specific answers to the interrogatories and to provide answers to the Request for Admissions. He was also advised that the hearing would be continued in order to allow him sufficient time to provide such answers.

Jessie D. Dillon, Jr., Superintendent of Schools, testified for the petitioner. Dr. Dillon stated that in the 1978/9 school year, the following children of respondents Robert and Janet Laurie Oostdyk were registered in and were attending the schools of the district:

Name	Date of Birth	Grade
Jonathan	January 1, 1969	4
Robert	May 9, 1968	5
Jeanne	June 28, 1973	Kindergarten
Amy	May 1, 1971	2
Shannon	May 22, 1972	1

Dr. Dillon indicated that on or about March 1, 1979 all of the children were withdrawn from school by the respondents, and they have not returned since. As of March 1, 1979, each of the above named children, except Jeanne, were of compulsory school age. However, as of the date of hearing, October 7, 1980, Jeanne was also of compulsory school age.

The following exhibits were marked into evidence during Dr. Dillon's testimony:

P-1 Letter from Irwin Fidel, Principal, to Rev. & Mrs. Robert Oostdyk, dated March 8, 1979, noting that their children had not been in attendance at school for five consecutive days. N.J.S.A. 18A:38-25, 29 and 31 were quoted at length, and the respondents were advised that if the children did not

commence attending school within five days, legal proceedings would be instituted to assure their return.

P-2 Letter from Irwin Fidel, Principal, to Rev. & Mrs. Robert Oostdyk, dated March 13, 1979, enclosing a duplicate copy of P-1, because proof of receipt of P-1 had not yet been received.

P-3 Letter from Rev. Robert Oostdyk to Dr. J. Dillon, dated March 19, 1979, advising that, as of that date, his daughter Jeanne's attendance in Kindergarten was not required by the State of New Jersey. Mr. Fidel's requests were rejected; any further conference between them was refused; and Rev. Oostdyk stated that since he did not know what the school's system of instruction consists of, it was impossible for him to provide an equivalent curriculum.

Respondent Robert Oostdyk was given an opportunity to cross-examine Dr. Dillon. That cross-examination did not adversely affect the import of the testimony previously given by the Superintendent.

At the request of respondent Oostdyk, three exhibits were introduced into evidence and marked in his behalf:

R-1 Letter from Dr. Dillon to Rev. & Mrs. Robert Oostdyk, dated March 19, 1979, advising the respondents that their children had not been in attendance at school. This letter reminded the respondents of the applicable statutes requiring attendance of the children at school or at such other place where they would receive equivalent instruction. The respondents were warned that legal proceedings would be instituted in the future if they did not comply with legal requirements.

R-2 Letter from Jacob Green, Esq., attorney for the petitioner, addressed to Rev. Robert Oostdyk, dated September 7, 1979, essentially reiterating the above advice and warning, together with a fuller explanation of the legal requirements.

R-3 Letter from counsel for the petitioner to Rev. and Mrs. Robert Oostdyk, dated September 27, 1979, again reminding them that their children had not yet been

returned to school despite both of the foregoing warnings. This letter again indicated that appropriate legal proceedings would be commenced if the statutory requirements were not complied with by the respondents.

At that point in the hearing, respondent Oostdyk unexpectedly announced that he refused to comply with the court's Order to provide the petitioner with more complete and responsive answers to interrogatories and with answers to the Request for Admissions. The respondent was repeatedly admonished and reminded of the consequences of refusing to comply with the Rules of Procedure regarding discovery. Despite repeated admonitions, explanations and opportunities given him to reconsider, the respondent persisted in this refusal. The reason for the respondent's refusal seemed to be as follows:

Most of the questions asked by the petitioner in its discovery sought disclosure by the respondent of the specific facts of any equivalent education that the children might be getting. The respondent had loosely hinted that his children were being educated at home by his wife and friends. However, he refused to furnish details of any such equivalent education because, in his opinion, that would force him to disclose information about his house, his children, his wife and his friends. In the process of refusing to make such a disclosure, the respondent freely indicated that he was guilty of violating the existing law; but he nevertheless refused to engage in these proceedings by way of defense or avoidance of the charges against him.

After continued and repeated explanations and entreaties by the court, the respondent still adamantly refused to furnish the discovery or to proceed further with the hearing in accordance with the rules.

The respondent was then informed at length of the sanctions that could be imposed against him under N.J.A.C. 1:1-3.5 et seq., for unreasonable failure to comply with any order of a Judge, or with requirements of the Uniform Administrative Procedure Rules of Practice. He was specifically instructed that such sanctions could include suppression of a party's defense or claim, or exclusion of evidence that might be presented by a party. N.J.A.C. 1:1-3.5(b)2,3. The respondent remained firm in his position of refusal to complete discovery or to comply with the Rules of Procedure in any other manner.

At that point, the court indicated that the respondent's defenses would be suppressed and he would be precluded from presenting evidence, in accordance with the foregoing rules. However, in order to give him another opportunity to reconsider his actions, the hearing was adjourned, and respondent was given until October 24, 1980, 17 days later, to cure his default. An Order was entered, dated October 10, 1980, to compel the Respondent to furnish more complete and responsive answers to interrogatories and answers to the Request for Admissions, on or before October 24, 1980. Thereafter, no further communication was received by anyone from respondent Robert Oostdyk, and he did not take advantage of the opportunity given him to recant and cure his violation of the rules. Respondents did not comply with the above Order.

On November 14, 1980, the petitioner filed a request for entry of default judgment against respondents Robert and Janet Laurie Oostdyk pursuant to N.J.A.C. 1:1-3.5(b). In support of this request, petitioner filed an affidavit attesting to the respondent's continued violation of the above Order and the Rules of Procedure, an affidavit of proof of service of the verified petition, and proof of mailing of all of the foregoing upon the respondents. No response or communication was filed by respondents.

On November 14, 1980, petitioner filed a request for entry of default judgment against respondent Jeanne Gandee for failure to appear or otherwise defend, pursuant to N.J.A.C. 1:1-3.5(a)(3). In support of this application, petitioner also filed an affidavit of proof by the Superintendent of Schools, Dr. Jessie D. Dillon, Jr., an affidavit of service of the verified petition upon Jeanne Gandee, and proof of mailing of the foregoing to Ms. Gandee. No response or communication was received or filed by her.

The record in this matter closed on December 4, 1980, 20 days after service and filing of the foregoing, in accordance with N.J.A.C. 1:1-9.2, which deals with the time within which action shall be taken on written motions.

All of the foregoing constitute FINDINGS OF FACT.

Additional FINDINGS OF FACT are incorporated herein by virtue of the stipulations agreed to by the parties in the prehearing order, as follows:

1. Robert Oostdyk and Janet Laurie Oostdyk are residents of Rockaway Township.

2. The five children of Robert Oostdyk and Janet Laurie Oostdyk: Jon, Amy, Robert, Shannon and Jeanne, were attending the public schools of the Township of Rockaway prior to March 1979.

3. At the present time all five of the above-named children are of compulsory school age, but at the time the complaint was filed, December 4, 1979, only four of the above named five children were of compulsory school age.

4. All five of the above-named children were withdrawn from the Rockaway Township public schools by their parents, Robert Oostdyk and Janet Laurie Oostdyk, on or about February 26 - March 1, 1979.

5. All five of the above named children returned to the Rockaway Township public schools for approximately one week during the period between February 26 and March 1, 1979.

6. Thereafter, all five were withdrawn from the public schools again, and none have returned since.

Further FINDINGS OF FACT are as follows:

7. Petitioner has withdrawn the allegations of the petition against William Mulroy and Brenda Mulroy.

8. Jeanne Gandee did not appear at any stage of the proceeding and no communication of any kind was received from her or on her behalf.

9. Respondents Robert Oostdyk and Janet Laurie Oostdyk are parents having charge and control of the five above-named children between the ages of 6 and 16 years, who reside within the school district of the Board of Education of the Township of Rockaway, Morris County, New Jersey.

10. Respondents Robert Oostdyk and Janet Laurie Oostdyk knowingly, willfully and intentionally caused their five children to be continually absent from the public schools of the district or from a day school in which there is given instruction equivalent to that provided in the public schools for children of similar grades and attainments, and they similarly failed to insure that said children would receive equivalent instruction elsewhere than at school.

11. Respondents Robert Oostdyk and Janet Laurie Oostdyk unreasonably failed and refused to comply with the orders of the Court (the Office of Administrative Law) and with the requirements of the New Jersey Uniform Administrative Procedure Rules. They are therefore in default to the extent that their right to give evidence is excluded, and their defenses and claims are suppressed.

The Compulsory Education Law, N.J.S.A. 18A:38-25 et seq. provides as follows:

> "Attendance Required of Children Between 6 and 16: Exceptions
>
> Every parent, guardian or other person having custody and control of a child between the ages of 6 and 16 years shall cause such child regularly to attend the public schools of the district or a day school in which there is given instruction equivalent to that provided in the public schools for children of similar grades and attainments, or to receive equivalent instruction elsewhere than at school."

N.J.S.A. 18A:38-31 provides for penalties in cases of violations of the foregoing:

> "A parent, guardian or other person having charge and control of a child between the ages of 6 and 16 years, who shall fail to comply with any of the provisions of this article relating to his duties shall be deemed to be a disorderly person and shall be subject to a fine of not more than $5 for a first offense, and not more than $25 for each subsequent offense, in the discretion of the court.
>
> In any such proceeding, the summons issuing therein, or in special circumstances a warrant, shall be directed to the alleged disorderly person and the child."

A parent charged with failing to cause a child to attend school has the burden of introducing evidence showing that alternative education is being substituted, and if there is such evidence, the ultimate burden of persuasion remains with the State. State v. Massa, 95 N.J. Super. 382, (L. Div. 1967).

The foregoing statute is enforceable in the Municipal Court, by virtue of its denomination of a violator to be a disorderly person, who is subject to payment of a small fine. N.J.S.A. 2A:8-21. A summons or warrant is utilized there as process. However, the Compulsory Education Law is an integral part of the School Laws, and the Commissioner of Education possesses fundamental jurisdiction over all disputes arising under the School Laws. N.J.S.A. 18A:6-9. Hinfey v. Matawan Regional Board of Education, 77 N.J. 514 (1978). See also Sukin v. Northfield Board of Education, 171 N.J. Super. 184 (App. Div. 1979), where the court held that the Commissioner of Education has concurrent jurisdiction with the Superior Court in connection with enforcement of the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq. The same reasoning is applicable here, and the Commissioner of Education has concurrent jurisdiction with the Municipal Court in enforcement of N.J.S.A. 18A:38-25 et seq. It also follows that the petition served upon respondents in accordance with the rules of procedure governing the authority of the Commissioner to hear and determine controversies under the School Laws is a suitable substitute for the summons or warrant that would be used by the Municipal Court.

Nevertheless, since a judgment of violation of the Compulsory Education Act, N.J.S.A. 18A:38-31, declares that a violator is a disorderly person, the charge should be proven beyond a reasonable doubt, rather than the usual administrative standard of proof by a preponderance of the credible evidence.

Based upon the foregoing, it is **CONCLUDED** as follows:

A. That the petitioner has withdrawn all allegations against respondents William Mulroy and Brenda Mulroy, his wife.

B. That respondent Jeanne Gandee is in default.

C. That respondents Robert Oostdyk and Janet Laurie Oostdyk intentionally, knowingly and willfully violated N.J.S.A. 18A:38-25, which violation has been proven beyond a reasonable doubt.

It is, therefore, ORDERED:

A. That the allegations of the petition against William Mulroy and Brenda Mulroy be DISMISSED.

B. That respondent Jeanne Gandee is deemed to be a disorderly person and is fined the sum of $5; said fine to be suspended.

C. That respondents Robert Oostdyk and Janet Laurie Oostdyk are deemed to be disorderly persons and each of them is fined the sum of $5; which fines are suspended.

D. That, in accordance with the authority of the Commissioner to enforce the school laws, respondents Jeanne Gandee, Robert Oostdyk and Janet Laurie Oostdyk are hereby ORDERED and directed to immediately cause their children, between the ages of 6 and 16 years, to be enrolled in and to attend the public schools of the petitioner school district or a day school in which there is given instruction equivalent to that provided in the public schools for children of similar grades and attainments, or to receive equivalent instruction elsewhere than at school. In the event said respondents comply with this order by causing them to attend alternative schools or to receive equivalent education elsewhere than in the public schools of the district, specific and itemized proof of equivalency shall be furnished to the petitioner at the beginning of and periodically during such attendance or enrollment; such proof to be approved by and accepted as satisfactory by the petitioner.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, FRED G. BURKE,** who by law is empowered to make a final decision in this matter. However, if Fred G. Burke does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

January 8, 1981
DATE

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

January 9, 1981
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

January 13, 1981
DATE

OFFICE OF ADMINISTRATIVE LAW

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BOARD OF EDUCATION OF THE TOWNSHIP OF ROCKAWAY, MORRIS COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
ROBERT OOSTDYK AND JANET LAURIE OOSTDYK, WILLIAM MULROY AND BRENDA MULROY AND JEANNE GANDEE,	:	DECISION
RESPONDENTS.	:	

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law.

The Commissioner observes that no exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Commissioner observes that the Honorable Arnold Samuels, ALJ properly cited the Compulsory Education Law N.J.S.A. 18A:38-25 et seq. which requires attendance of children between the ages of 6 and 16 in public schools or to receive equivalent instruction in some other form. Judge Samuels in citing N.J.S.A. 18A:38-31 which provides for penalties in case of violations of the Compulsory Education Law failed to note the amendment thereto provided in Chapter 153, Laws of 1980 approved November 24. This act which modified the original law established in 1915 (c. 224, P.L. 1915) retained all of the language of that law except to raise the amount of the fine of not more than $5.00 to $25.00 for a first offense and not more than $25.00 to $100.00 for each subsequent offense.

The Commissioner deems it important that N.J.S.A. 18A:38-31, as amended, be set down in full:

> "A parent, guardian or other person having charge and control of a child between the ages of 6 and 16 years, who shall fail to comply with any of the provisions of this article relating to his duties, shall be deemed to be a disorderly person and shall be subject to a fine of not more than $25.00 for a first offense and not more than $100.00 for each subsequent offense, in the discretion of the court.

> "In any such proceeding, the summons issuing therein, or in special circumstances a warrant, (sic) shall be directed to the alleged disorderly person and the child."

The Commissioner observes that the legislative intent therein is clear expressing as it does the continued concern of the State that its children receive the education which is their constitutional right. Nor did this recent amendment absolve the parent or guardian having charge and control of a child of compulsory attendance age of the heavy responsibility to comply with the provisions of the Compulsory Education Law. Rather, this most recent amendment of a law in existence for sixty-five years established fines consonant with today's economy by replacing those determined by the Legislature to be "insufficient and unrealistic."

An examination of the record herein causes the Commissioner to express his deepest concern over the continued absence from school since March 1, 1979 of four children between the ages of 6 and 16 years and one who has since reached school age, who reside within the school district. The Commissioner notes and deplores the refusal of the parents in the instant matter to cooperate in any way with Judge Samuels or the school district. Barring any evidence to the contrary, such continuing obdurate refusal can only lead the Commissioner to conclude that the five named children are being deprived of their constitutional rights to an education by parents of extreme obdurateness.

Judge Samuels concludes that the Commissioner has concurrent jurisdiction with the Municipal Court in the enforcement of N.J.S.A. 18A:38-25 et seq. The Commissioner cannot agree. A judgment of violation of the Compulsory Education Law, N.J.S.A. 18A:38-31, declares a violator to be a disorderly person with fines to be levied according to the discretion of the court. Summons or a warrant shall be issued by the court as determined by circumstances.

In the judgment of the Commissioner, for him to enforce such a quasi-criminal proceeding simply does not conform with the express legislative scheme for the enforcement of school attendance. This does not mitigate the Commissioner's concern that children are herein forced into the role of truancy by the actions of recalcitrant parents. Such parents are not without proper recourse and due process. State v. Massa, 95 N.J. Super. 382 (Law Div. 1967) Such recourse however does not include making truants of their children.

The five named children shall be returned to school. Absent such action by their parents, the Board is directed to promptly institute proceedings in the appropriate judicial forum.

Similar action shall be taken with respect to Respondent Jeanne Gandee.

It is so directed.

COMMISSIONER OF EDUCATION

February 23, 1981

BOARD OF EDUCATION OF THE TOWNSHIP OF ROCKAWAY, MORRIS COUNTY,

PETITIONER-APPELLANT,

V.

ROBERT OOSTDYK AND JANET LAURIE OOSTDYK, WILLIAM MULROY AND BRENDA MULROY AND JEANNE GANDEE,

RESPONDENTS-APPELLEES.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, February 23, 1981

For the Petitioner-Appellant, Green & Dzwilewski (Ellen Harrison and Jacob Green, Esq., of Counsel)

For the Respondents-Appellees, Reverend Robert Oostdyk, Pro Se

The State Board of Education affirms the Commissioner's decision with the modification that, directive (d) of the Administrative Law Judge be reinstated which reads:

> "(d) that, in accordance with the authority of the Commissioner to enforce the school laws, respondents Jeanne Gandee, Robert Oostdyk and Janet Laurie Oostdyk are hereby ORDERED and directed to immediately cause their children, between the ages of 6 and 16 years, to be enrolled in and to attend the public schools of the petitioner school district or a day school in which there is given instruction equivalent to that provided in the public schools for children of similar grades and attainments, or to receive equivalent instruction elsewhere than at school. In the event said respondents comply with this order by causing them to attend alternative schools or to receive equivalent education elsewhere than in the public schools of the district, specific and itemized proof of equivalency shall be furnished to the petitioner at the beginning of and periodically during such attendance or enrollment; such proof to be approved by and accepted as satisfactory by the petitioner."

July 1, 1981

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5687-79
AGENCY DKT. NO. 285-7/79

IN THE MATTER OF:

THE TENURE HEARING OF CHARLES LANZA, SCHOOL DISTRICT OF THE BOROUGH OF EATONTOWN, MONMOUTH COUNTY

Record Closed: December 2, 1980
Received by Agency: 1/16/81

Decided: January 16, 1981
Mailed to Parties: 1/21/81

APPEARANCES:

For the Complainant Board: **Eugene Iadanza,** Esq. (Gagliano, Tucci & Kennedy)

For the Respondent: **Robert M. Schwartz,** Esq.

BEFORE **ERIC G. ERRICKSON,** ALJ:

The Board of Education of the School District of the Borough of Eatontown, hereinafter "Board," opened this matter before the Commissioner of Education on July 12, 1979 by certifying charges of unbecoming conduct, pursuant to N.J.S.A. 18A:6-11, et seq., against respondent, a principal of the Board's Meadowbrook School and a professionally certificated staff member with a tenure status. Respondent Lanza denies that he was at any time guilty of unbecoming conduct.

PROCEDURAL RECITATION:

When respondent moved for dismissal of the charges of unbecoming conduct on grounds of procedural insufficiency and alleged filing before an improper jurisdictional authority, oral argument was conducted by a representative of the Commissioner on August 14, 1979 at the Department of Education, Trenton, New Jersey. In a Decision on Motion issued November 21, 1979, respondent's Motion to Dismiss was denied. The State Board of Education on April 8, 1980 affirmed the Commissioner's decision of November 21, 1979 for the reasons expressed therein.

In the interim, the Commissioner on December 6, 1980 transferred the matter to the Office of Administrative Law for processing as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. Thereafter, a prehearing conference was conducted on January 29, 1980 at which respondent gave Notice of Motion for Summary Judgement which Motion was the subject of briefing by counsel. In an interlocutory Decision, respondent's Motion to Dismiss was denied on grounds that unestablished relevant material facts required a plenary hearing prior to determination. Thereafter, a plenary hearing of two (2) days was conducted during October. Post hearing Briefs were filed by counsel for both litigants.

UNCONTESTED FACTS:

The charges as recast and recertified by the Board in compliance with the prehearing order dated January 31, 1980 are as follows:

> "Subsequent to a decision of the Superintendent of Schools on February 9, 1979 wherein Mrs. Carol Lombardo was successful in grieving an action of Charles Lanza, principal, said principal engaged in a course of conduct outlined hereinafter which was unbecoming of a teaching staff member:
>
> a. Charles Lanza did harass Mrs. Carol Lombardo by requiring her to continue with lunchroom duty necessitating the use of the "buddy system" he developed and then formally criticized her for following his directions.
>
> b. Charles Lanza did harass Mrs. Carol Lombardo by personally directing that a copy of his March 21, 1979 memo be forwarded to the Superintendent's office, whereupon it would be placed in her personal [sic] file, without indicating to Mrs. Lombardo that such action had been taken, thereby

preventing her from exercising her rights to comment on the memo.

c. Charles Lanza did harass Mrs. Lombardo by including in an evaluation dated 3/27/79 an allegation that she had neglected her duty to supervise her students, in particular, on one occasion which she was unaware of (2/28/79) and on another when she was following the direction of the principal (3/21/79)."

(Board Minutes of February 4, 1980)

Respondent, who had served the Board as a principal for twenty-five years was, during the events relevant herein, principal of the Board's Meadowbrook School where Mrs. Carol Lombardo taught a class of trainable mentally retarded (MTR) pupils. During 1977, respondent observed and rated her teaching performances on three (3) occasions. In March and November 1977, she was commended for her teaching techniques, the enthusiastic, correct, eager responses of pupils, her rapport with pupils, her gentle but firm attitudes expressed in the classroom, and her compassionate competency as a teacher. (P-7, 8) A third rating in April 1977 was critical of a number of Mrs. Lombardo's teaching procedures. To these detailed criticisms she submitted a response. (P-10).

During November 1978, Mrs. Lombardo filed Grievance No. 18 wherein she stated:

"***My trainable/retarded class has been assigned to the school nurse for a 30 minute period following lunch. While the nurse is with my class, I have been placed in charge of a regular sixth grade classroom. This constitutes a change in terms and conditions of my employment (see ARTICLE XXI, Paragraph D).

"This situation presents an educational problem for which I am responsible. These handicapped children are being deprived of the educational use of my time during this 30 minute period of their regular day. *** The school nurse is not in a position to have responsibility for my class for this 30 minute period. Also, as a certified teacher of the handicapped, I am in charge of a classroom requiring a certified teacher of elementary education.***" (P-3)

The Superintendent, after reaffirming the authority of Principal Lanza, ruled in Mrs. Lombardo's favor as follows:

"***However, in reviewing Grievance No. 18, with all parties concerned, the educational and physical needs of the Trainable

> Class can be better met by their classroom teacher who is certified in Special Education. The classroom teacher is also a Registered Nurse.
>
> "Since no schedule or time frames are affected, the Superintendent is directing the Principal, Mr. Charles H. Lanza, to reassign Mrs. Carol Lombardo to her classroom for the supervision of her pupils during the thirty-minutes (30) period following lunch. The reassignment of Mrs. Lombardo shall take effect immediately." (P-3)

Respondent agreed to and did comply with the Superintendent's directive.

Respondent, in a rating dated January 26, 1979, commended Mrs. Lombardo for her ingenious teaching techniques in a well executed lesson. (P-9) In a rating dated March 27, he commended her for good planning, teaching aids posted in her room and help and encouragement to her pupils. However, he stated therein that:

> "[F]rom time to time, Mrs. Lombardo is away from her pupils when her services and attention may be needed most. This has occured on two notable instances - 2/28/79 - an occasion when one child had been upset and was left with one instructor. The other instance was 3/21/79 about which I wrote the teacher.
>
> "I recommend that this neglect of duty be studiously avoided at all costs." (P-5)

To this, Mrs. Lombardo responded that she intended to grieve the matter and take legal action. She did so, charging respondent with harassing her because of the grievance which had been settled in her favor in the prior year and with insertion into her personnel files of material without advising her in accordance with a requirement of the negotiated agreement. (R-1) The grievances were not settled to Mrs. Lombardo's satisfaction at the administrative levels. Thereafter, the Board, having received and reviewed the grievances, took action to certify tenure charges and suspend respondent pending a decision by the Commissioner.

TESTIMONY OF WITNESSES:

Mrs. Lombardo, who is both a registered nurse and a certified teacher of the handicapped, testified that, after Grievance No. 18 had been resolved in her favor, no

further discussions ensued and that although she noticed no changes in his relationship to her as a teacher, she felt that he was hostile toward her.

She testified that on February 28, 1979, she had arranged with the adaptive physical education teacher to accompany her classroom from a scheduled library period to her classroom. She testified that, when she arrived from the teacher's room at her classroom, respondent was there and the school nurse was taking the blood pressure of one of her pupils who had a congenital heart disease. She testified that respondent did not speak to her about the child's problem and that she then walked the pupil to the van which routinely transported her home.

In regard to respondent's reference to respondent's complaint that she was away from her pupils on March 21, 1979, she testified that she received the following memo from respondent:

> "I noticed that your girls, *** were outdoors with the fifth and sixth graders. There were two teachers with these children - *** - who were supervising a total of 92 children in addition to your youngsters. While I observed this group, I saw D become "angry" and throw sand at some sixth graders. Then F and D became engaged in a wrestling match and were physically restrained by [a teacher].
>
> "I do not consider it fair to the teachers on duty to be additionally burdened with the supervision of pupils for whom they are not certified - I consider it hazardous for these pupils to be supervised so loosely and direct you to take them in your charge at those times - such as today - when you have completed your lunch - in compliance with the Superintendent's directive dated February 9th, 1979 which says in part....'reassign Mrs. Lombardo to her classroom for the supervision of her pupils during the thirty minutes (30) period following lunch.'
>
> "Your failure to do so is a dereliction of your responsibilities. I would not want you to jeopardize your professional integrity any more than I wish to see the pupils compromised." (P-4)

She testified that the reason she was not on duty on the playground was that a "buddy system" was in effect, at respondent's direction, under which she and two (2) other teachers took turns supervising pupils on the playground rather than supervising each day. That such a "buddy system" was in effect was corroborated by one teacher on playground duty that day, and by other teachers in respondent's school.

Mrs. Lombardo testified that when she received P-4, she noted no indication of a carbon copy having been forwarded to the Superintendent. She testified that she later learned that a copy thereof had been placed in her personnel file without notice to her.

Respondent testified that he summoned a nurse when, on February 28, he heard crying, investigated and found a child with known cardiac disease distraught and blue in color in Mrs. Lombardo's room with the physical education teacher in charge. He testified that, although he twice inquired of Mrs. Lombardo where she had been, without response, he made no further inquiry or record since this was the first such instance.

Respondent testified that he had viewed the incident on the playground on March 21 at a distance from the west wing of the school. He testified that since the incident of February 28 had been the first time he had noted Mrs. Lombardo away from her class, he did not discuss it with her or make written record thereof until the playground incident of March 21.

Respondent testified that since this was the second time in a month he had observed respondent away from her class, he wrote P-4 intending that it be strictly a communication between himself and Mrs. Lombardo. He testified, however, that after discussing the matter with a member of the Board, he followed the Board member's advice to send a copy of P-4 memo to the Superintendent for his own protection. That Board member testified that he did so advise because of animosities he knew to exist against respondent. The Board member testified that respondent, with some reluctance, agreed to send a copy of the memo to the Superintendent.

The Superintendent testified that P-4 was received by him without explanation and with a handwritten, undated "CC" appended. He testified that he assumed that Mrs. Lombardo had been properly notified and routinely filed it in her personnel folder and, only later, became aware that her copy had no indication that a carbon copy had been forwarded.

A teacher on playground duty on March 21 testified that when she observed one of Mrs. Lombardo's pupils entangled in playground equipment, she noted that her head was dangling with her hair in the sand. She testified that another child tried to assist her, that she herself helped extricate and soothe the child, and that no fighting between

children occurred. She further testified that she had noted that, although respondent had been watching these events from a distance over 100 feet away, he made no inquiry of her concerning the matter.

The physical education teacher present at the incident of February 28 testified that the pupil who became cyanotic had become angered at a decision of the librarian not to allow her to take a book, and threw a tantrum. He testified that since this was not an uncommon occurrence with this child, he had not deemed it necessary to summon the nurse whose presence he believed to have aggravated her condition.

The nurse testified that, although these incidents were not unusual, she found the child's pulse and cyanotic condition more pronounced than usual on this occasion and advised the parent of the incident.

Respondent's secretary for the past 17 years testified that in these events as in all other events she had observed respondent to maintain a demeanor which was calm, devoid of anger, excitability or vindictiveness.

FINDINGS OF FACT:

After careful review of the documents in evidence and the transcripts of testimony of the ten witnesses, I **FIND** the following to be additional relevant facts to be considered together with those uncontested facts previously set forth:

1. Respondent complied promptly with the Superintendent's directive at Level II of Grievance No. 18 to reassign Mrs. Lombardo to her own class rather than another teacher's class during the controverted 30 minute period. His subsequent evaluation of Mrs. Lombardo in January 1979 was highly commendatory as was the first part of her evaluation of March 27. (P-5, 9) Such comments do not normally flow from one seeking to rataliate. The remainder of the March 27 evaluation, however, was a stern reprimand and warning not to be away from direct supervision of her class.

2. This reprimand was not based on complete knowledge by respondent of the contextual setting of the incidents of February 28 or March 21.

Mrs. Lombardo, on February 28, had not left her class unattended. Rather she and the physical education teacher had agreed that he would return them from the library to her classroom after their library period. He was, in fact, supervising them when respondent heard crying and investigated. Mrs. Lombardo's voluntary choice to allow another teacher to supervise her class when she was unassigned and available does, however, appear inconsistent with her own expressed concern in Grievance No. 18 that her class have the benefit of her expertise at all possible times.

3. Mrs. Lombardo appeared on the scene momentarily to resume her supervisory and teaching responsibilities for her class without being summoned.

4. There was a two-way inability on the part of both Mrs. Lombardo and respondent to communicate concerning the details of what actually happened on February 28. The only communication between them appeared to be terse, unanswered questions: "Where were you?" and "Who called her (the nurse)?" Nor was there any follow up conference or written explanation by either to attempt to inform the other.

5. Respondent again acted on the basis of incomplete information when on March 21 he assumed a fight occurred on the playground involving, again, the cyanotic child. The weight of credible evidence establishes that no fight occurred and that the incident was handled competently by a teacher on playground duty.

6. Respondent in this instance acted on the assumption that Mrs. Lombardo was willfully absenting herself from assigned playground duty. The weight of credible evidence, however, establishes that it was the common and honest understanding of Mrs. Lombardo and the fifth and sixth grade teachers that the "buddy system" in effect authorized one teacher to have a preparation period while the other two were on playground duty.

7. Mrs. Lombardo's class was not, in any event, without supervision on the playground.

8. The "buddy system" was properly instituted by respondent in an attempt to both equalize duty assignments for teachers and provide needed supervision of pupils in group situations. Unfortunately, all the ramifications of the somewhat complex and confusing "buddy system" were not fully understood by either the teachers or respondent who, in all good faith, had authorized it.

9. Respondent, in respect to the events of February 28 and March 21, was motivated primarily by his concern for the welfare of pupils in his school. He acted precipitately and without all of the information which he should have had in his sharp rebuke of Mrs. Lombardo. Given the cyanotic condition of the pupil, however, respondent had good reason for his concern.

10. Respondent never intended that P-4 should be inserted into Mrs. Lombardo's personnel file which was under sole control of the Superintendent. When respondent became aware that it had been placed there, he promptly advised Mrs. Lombardo and the Superintendent that that was not his intent and asked that it be removed. This, the Superintendent declined to do.

CONCLUSIONS AND DETERMINATION:

Given the facts set forth above, **I CONCLUDE** that respondent, without full knowledge of the contextual setting involving his own authorized "buddy system", unfairly criticized Mrs. Lombardo for not being on duty on the playground on March 21.

I FURTHER CONCLUDE that, given the statements of Mrs. Lombardo and the Superintendent arising from Grievance No. 18, respondent had good reason to expect that she accompany and supervise her own class returning from its library period on February 18.

I ALSO CONCLUDE that respondent's requirement that Mrs. Lombardo, along with other teachers, continue to supervise pupils in the cafeteria, was necessary and justified. Parsippany-Troy Hills Board of Education v. Parsippany-Troy Hills Education Association, 1977 S.L.D. 1080

Mrs. Lombardo's duty assignment, being neither greater nor lesser than those of other teachers, cannot be categorized as harassment. Respondent, with limited available staff, reasonably authorized the "buddy system" in order to provide maximum supervision in the interest of a safe school environment. Accordingly, **IT IS ORDERED** that Charge No. 1 be **DISMISSED** by reason of failure to prove that respondent harassed Mrs. Lombardo by requiring her and others to participate in the "buddy system."

Grounded on the finding that at no time did respondent intend that P-4 be placed in Mrs. Lombardo's personnel file and his request that it be removed after he learned it had been placed there, **IT IS ORDERED** that Charge No. 2 also be **DISMISSED** for failure to prove either intent or attempt by respondent to harass Mrs. Lombardo.

It has been found that respondent acted without sufficient knowledge of the two incidents on February 28 and March 21. His contention that Mrs. Lombardo should have been with her class on February 28, however, has logical and reasonable basis. Such was not the case, however, concerning the playground incident of March 21. Harassment has been defined as "systematic persecution by beseting with annoyances, threats, or demands.***" (American Heritage Dictionary of the English Language, 1979) The single instance in which respondent criticized Mrs. Lombardo totally without reasonableness on March 21 is insufficient to establish the repetitiveness inherent in harassment as alleged in Charge No. 3. Accordingly, **IT IS ORDERED** that Charge No. 3 also be **DISMISSED.**

Respondent's precipitate and unjustified criticism, however, has initiated costly legal procedures to determine whether harassment did indeed take place. Despite this unfortunate occurrence which has interrupted the normal, orderly operation of the school system and undoubtedly polarized opinions which might better have remained fluid, the penalty of dismissal or reduction in salary would be inappropriate. Respondent, by reason of his suspension and the threat of a tenure hearing to his thirty-eight year professional career has already sustained sufficient penalty. The Commissioner in Genevieve Rinaldi v. School District of the City of Orange, 1976 S.L.D. 344 wrote the following cautionary words:

> "***Respondent's indiscretion, however, must be viewed within the context of her commendable teaching service for the Board which extends over a period of twenty-six years. 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. The Commissioner determines that dismissal of respondent would be an unduly harsh penalty which is not warranted in this instance. Accordingly, it is determined that her penalty shall be limited to the forfeiture of one month's salary.***"

Absent a finding that respondent harassed a teacher, it is determined that no further penalty beyond that already sustained in the form of anguish and threat to livelihood and professional reputation would be appropriate. Accordingly, **IT IS ORDERED** that the Board shall, upon issuance of a final decision in this matter, reinstate respondent forthwith to his position as principal together with all benefits and authority pertinent thereto.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, FRED G. BURKE,** who by law is empowered to make a final decision in this matter. However, if Fred G. Burke does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

January 16, 1981
DATE

Eric G. Errickson
ERIC G. ERRICKSON, ALJ

Receipt Acknowledged:

January 16, 1981
DATE

Seymour Weis
DEPARTMENT OF EDUCATION

Mailed To Parties:

January 21, 1981
DATE

Donald A. Parker 1/21
OFFICE OF ADMINISTRATIVE LAW

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EXHIBITS IN EVIDENCE:

P-1 Policy No. 208 - Job Description Elementary Principal

P-2 Policy No. 324 - Personnel Files

P-3 Grievance No. 18

P-4 Lanza to Lombardo, dated March 21, 1979

P-5 General Rating, Lanza of Lombardo, dated March 27, 1979

P-6 Lanza to Lombardo, dated March 21, 1979 without CC

P-7 General Rating, Lanza of Lombardo, dated October 21, 1977

P-8 General Rating, Lanza of Lombardo, dated November 28, 1977

P-9 General Rating, Lanza of Lombardo, dated January 22, 1979

P-10 General Rating, Lanza of Berry, dated April 20, 1977

P-11 Lanza to Palmisano, dated March 28, 1979

R-1 Grievance No. 23

R-2 Nurse's Log for February 28, 1979

R-3 Grievance No. 22

R-4 Grievance No. 24, dated April 6, 1979

IN THE MATTER OF THE TENURE	:	
HEARING OF CHARLES LANZA,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION
BOROUGH OF EATONTOWN,	:	
MONMOUTH COUNTY.	:	
	:	

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law.

The Commissioner observes that exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Both the complainant Board and respondent principal filed primary exceptions.

The Board excepts to the findings by the Honorable Eric G. Errickson, ALJ that the three charges herein filed against respondent did not constitute harassment of Mrs. Lombardo. The Commissioner finds no merit in the Board's reference to document P-10 and another teacher allegedly having been harassed by respondent. There is nothing in the record to substantiate that the evaluations (P-10) constituted any form of harassment.

Respondent's primary exceptions do not refer to Judge Errickson's decision as it pertains to his dismissal of the charges but rather to his determination that respondent's rebuking of Mrs. Lombardo for the events of February 28 and March 21 constituted precipitate and unjustified action.

In answering the exceptions filed by each party, the Commissioner determines that an inspection of the record, the testimony elicited and the exhibits filed therein convinces him that Judge Errickson properly weighed and evaluated the facts and circumstances of the present case in reaching his determinations. The Commissioner finds no merit in the primary exceptions of either party.

Respondent's reply exceptions refute those of the Board and affirm the decision of the Court concerning the dismissal of the three charges.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

Accordingly, the Board shall reinstate respondent to his position as principal with all benefits and responsibilities pertinent thereto.

It is so directed.

COMMISSIONER OF EDUCATION

March 2, 1981

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3621-80
AGENCY DKT. NO. 270-6/80A

IN THE MATTER OF:

BLOOMINGDALE TEACHERS ASSOCIATION, SUSAN MARICONDA, CAROL KEPPEL and SUSAN La MANNA
v.
BOARD OF EDUCATION OF THE BOROUGH OF BLOOMINGDALE, PASSAIC COUNTY

Record Closed: December 19, 1980
Received by Agency: 1/19/81

Decided: January 16, 1981
Mailed to Parties: 1/22/81

APPEARANCES:

Saul R. Alexander, Esq., for the Petitioners,
Bloomingdale Teachers Association,
Susan Mariconda, Carol Keppel and Susan LaManna

Gordon D. Meyer, Esq., for the Respondent,
Board of Education of the Borough of Bloomingdale
(Jeffer, Hopkinson & Vogel, attorneys)

BEFORE **ARNOLD SAMUELS,** ALJ:

Petitioners Susan Mariconda, Carol Keppel and Susan LaManna, are employed as teachers for the respondent, Board of Education of the Borough of Bloomingdale. The Bloomingdale Teachers Association is their designated representative. On June 3, 1980 petitioners filed an appeal with the Commissioner of Education, challenging the Board's policy of declining to give credit for a year's advancement on the salary guide for less than a half year's service. The respondent filed an answer defending its policy. On June 10, 1980, the matter was transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

A prehearing conference was held on August 28, 1980, and a prehearing order was filed. The issues were defined as follows:

A. Assuming that there is in existence a long-standing, unwritten Board policy and practice that requires a teacher to be employed on February 1 and for the five month period immediately preceding or succeeding that date, in order to qualify for placement on the next step of the guide, is such policy lawful and binding upon the Petitioners?

B. Is such a policy as described above unlawful and not binding solely because it is unwritten?

A hearing was held at the Office of Administrative Law in Newark, New Jersey on November 12, 1980. Post-hearing briefs were filed by the parties, and the record closed on December 19, 1980.

At the hearing it was explained and accepted as fact that February 1 is used as the cut-off date because it is the five month halfway mark in the ten month school year, which begins for most all teachers on or about September 1. (Testimony of William F. Spreen, Superintendent of Schools).

The petitioners' relevant employment dates for the periods of time in dispute were stipulated (Exhibit J-1), and can be summarized as follows:

SUSAN MARICONDA

Starting date 2/6/79 - on 4th step of salary guide
Ended that school year - 6/30/79
Returned - September 1979
She did not advance, but was retained on the 4th step for the 1979-80 school year.

CAROL KEPPEL

Maternity leave began-May 1978
Starting date -2/5/79 - on 4th step of salary guide
Ended that school year-6/30/79
Returned-September 1979
She did not advance, but was retained on the 4th step for the 1979-80 school year.

SUSAN La MANNA

Starting date - 9/1/76 - on 9th step of salary guide
Ended work (for maternity leave)-December 31, 1976
Returned - Sept. 1977
She was not advanced, but was retained on the 9th step for the 1977-78 school year.

The above data was confirmed by the testimony of the petitioners. Each of them also stated that they were not aware of the Board's policy before it was actually applied to them, at the time they received their first paychecks for the new school year. The policy was not written or communicated generally to employees in advance of its being used in individual cases.

Another stipulated document marked in evidence as part of J-1 was a list of 20 occasions since 1968/9 when the policy had been applied by the Board. In 15 of these situations, the affected teachers served 5 months or more out of a full school year, and they received full credit on the salary guide for an annual step. In five situations, which included the three petitioners, no credit was given for less than five months' teaching during the school year. The respondent represented that these 20 cases constituted all of the situations in which the policy was used, in one direction or the other, in the last 11 years.

The salary guide itself (in which the annual incremental steps are established) is silent on the question of advancement for only part of a year's service.

Deborah Kirsch, Co-President of the Bloomingdale Teachers Association, also testified in order to establish the fact that the policy was not generally disseminated by the Board in advance of its application. Although she is not one of the individual petitioners, her testimony also established that in 1979/80 she received a full annual step up in the guide, because in the previous year she returned from an 11 month maternity leave, on January 3, 1979 (prior to February 1), and taught for the balance of that school year. When she began that maternity leave on January 22, 1978, she was not eligible for credit on the guide for the time she taught from the beginning of that school year - September 1, 1977. Her replacement, hired before February 1, 1978, was given credit for the full step.

In the case of Ms. Kirsch, it balanced out. She was away for practically a full year and did not receive credit for it. When she returned, she received credit for the prior year in which she worked. If the petitioner's theory (that the full increment should be awarded so long as any time is served, no matter how brief) would have been carried to its logical conclusion in Ms. Kirsch's case, she would have been entitled to advance a double step on the guide for one total year's service when she returned for the 1979-80 year.

On the other hand, the petitioners claim that instances could arise where the Board would avoid having to move a teacher up on the guide if that teacher left school before February 1, did not return next year, and her replacement was hired after February 1.

William F. Spreen, Superintendent of Schools in Bloomingdale, testified that the policy in question has been in existence since prior to 1969 when he began in the district. He looked back at the personnel records for those 11 years and did not find any instances where the policy was not followed. Mr. Spreen stated that the rationale of the policy was to award the full step for service of a half-year or more and to deny it for less than a half year's teaching. He feels it is most fair. Mr. Spreen acknowledged that the Board's policy was unwritten and was not generally disseminated unless and until the need arose to apply it in individual cases.

Having heard and observed the witnesses, and having considered the argument of counsel and the briefs filed by them, the court **FINDS** the following facts:

1. The foregoing discussion and the facts included therein are incorporated herein by reference.

2. A long-standing Board policy and practice does exist in the respondent school district that requires a teacher to be employed on February 1 and for the five month period immediately preceding or succeeding that date in order to qualify for placement on the next incremental step of the salary guide.

3. The above policy was unwritten and was not generally disseminated to the teaching staff until applied in individually appropriate cases.

4. The Board constantly, unfailingly and uniformly applied the above policy and its standard in every applicable case for the past 11 years.

The petitioners argue that the policy is unlawful and not binding solely because it is unwritten, regardless of its fairness or reasonableness. This argument is not accepted.

The responsibility of boards of education to establish salary policy is delineated in N.J.S.A. 18A:29-4.1:

> "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 . . . "

There is no requirement, expressed or implied, that every aspect of such policy must be written, or that it must, in the alternative, be declared void or voidable (as in a "statute of frauds"). The petitioners have the burden of proving such a contention, and they have not done so. The lack of memorialization may more easily subject a policy to attack, but it does not necessarily render it void.

Lack of general publication or dissemination of the policy similarly subjects it more easily to question, and prior decisions of the Commissioner of Education have explored the question of whether a particular unwritten standard or policy is unfair, arbitrary or unreasonable. If and when found to be unfair, arbitrary or unreasonable,

they have been set aside. Mary Ann Basile, et als. v. Board of Education of the Borough of Elmwood Park, EDU 191-5/78 (N.J.O.A.L. May 21, 1980), aff'd. 1980 S.L.D., (July 21, 1980); Eileen Shahbazian, et als. v. Board of Education of the Township of Weehawken, 1977 S.L.D. 952.

It logically follows from the above that if no element of facial illegality, unfairness, unreasonableness or arbitrariness is found, then there is no necessary impediment to the validity of an existing and uniformly applied unwritten policy.

There is also no finding here, as alleged by the petitioners, that the instant policy is in violation of, or attempts to amend or supersede, a controlling statute.

Based upon all of the foregoing, it is **CONCLUDED** that the policy in question is fair and reasonable under all of the circumstances; and the petitioners have not shown that it is unlawful or that there is any justifiable reason for the policy to be set aside or to be declared non-binding.

It is further **CONCLUDED** that, because the long-standing proven policy and standard is fair, reasonable and consistently applied, lack of actual communication of it to all staff members does not, in and of itself, render it void, because no prejudice results therefrom. If the policy had been generally disseminated and disclosed, there could have been no complaint about it when used; and all of the factors in favor of upholding the validity of the stated policy outweigh any imagined disadvantages that resulted from its restricted disclosure.

It is, therefore, **ORDERED** that the appeal be **DISMISSED** as to all petitioners.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, FRED G. BURKE,** who by law is empowered to make a final decision in this matter. However, if Fred G. Burke does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

OAL DKT. NO. EDU 3621-80

I **HEREBY FILE** my Initial Decision with **FRED G. BURKE** for consideration.

January 16, 1981
DATE

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

January 19, 1981
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

January 22, 1981
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

db

WITNESSES

For Petitioners:

Susan Mariconda
Carol Keppel
Susan LaManna
Deborah Kirsch

For Respondent:

William F. Spreen

EXHIBITS

P-1 Letter dated February 29, 1980
J-1 Stipulation, with attachments recited therein

BLOOMINGDALE TEACHERS ASSOCIATION, SUSAN MARICONDA, CAROL KEPPEL AND SUSAN LA MANNA,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BLOOMINGDALE, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law.

The Commissioner observes that exceptions were filed by petitioners pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Petitioners except to the conclusion of the Honorable Arnold Samuels, ALJ that the Board properly relied on and applied its unwritten policy concerning salary guide placement keyed to teacher employment on February 1 and the five-month period immediately preceding and succeeding that date.

Petitioners' reliance on Mabel Marriott v. Board of Education of the Township of Hamilton, 1949-50 S.L.D. 57, aff'd 1950-51 S.L.D. 69 is misplaced. The reasoning therein espoused that every steadily employed staff member be allowed at least 10 days of sick leave in any school year regardless of whenever employment began in that year has been set aside by the decision of the State Board in Raymond F. Schwartz, William A. Bulmer and Dover Education Association v. Board of Education of the Town of Dover, Morris County, August 6, 1980. Therein the State Board ruled that sick leave is earned by a minimum of one day's accumulative sick leave per month worked, rather than a minimum of 10 days in any one year regardless of the length of time worked. The Commissioner finds no merit in petitioners' exceptions.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

March 3, 1981

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6856-80
AGENCY DKT. NO. 531-11/80A

IN THE MATTER OF:

BOARD OF EDUCATION OF THE TOWNSHIP OF RANDOLPH, MORRIS COUNTY, NEW JERSEY,

Petitioner

v.

JOHN MARFIA, JR.,

Respondent

Record Closed: Dec. 17, 1981 Decided: Jan. 21, 1981
Received by Agency: 1/23/81 Mailed to Parties: 1/26/81

APPEARANCES:

David B. Rand, Esq., for Petitioner
(Schenck, Price, Smith & King, attorneys)
Saul R. Alexander, Esq., for Respondent

BEFORE **JACK BERMAN**, ALJ:

On November 2, 1980, a Petition was filed with the Division of Controversies and Disputes of the Office of the Commissioner of Education (Commissioner) pursuant to N.J.S.A. 18A:6-9, vesting jurisdiction with the Commissioner to conduct hearings involving educational disputes. This matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

The petitioner, the Board of Education of the Township of Randolph, petitions the Commissioner to declare that the action taken by it in assigning the respondent, John Marfia, Jr., to the position of head wrestling coach is a valid and reasonable exercise of its discretionary power, and that consistent with such declaration that respondent be declared obligated to perform such assigned duties through the end of the 1980-81 wrestling season. The petitioner further requests that the Commissioner order respondent to fully comply with the requirements of the position of head wrestling coach in consideration for receiving the salary established by the written agreement between it and the Randolph Education Association. The petitioner further seeks a declaration that should respondent willfully and intentionally refuse to perform the assigned duties as wrestling coach, such conduct would constitute an act of insubordination by him, and would render him subject to dismissal or other penalties in accordance with the provisions and procedures of N.J.S.A. Title 18A.

These proceedings were commenced by petitioner by an Order to Show Cause seeking interim relief declaring petitioner Board's action as valid. Subsequent to oral argument on November 10, 1980 the petitioner's application was denied. (See Opinion on Interim Relief November 13, 1980 and Order December 12, 1980.) Also on November 10, 1980 at the conclusion of oral argument the parties agreed to waive pre-hearing and hearing and submit the matter for summary decision.

I **FIND**, based on the following undisputed facts, obtained from respondent's admission in its answer as well as those unrefuted facts contained in the affidavit of respondent's Superintendent of Schools, Matthew Weiner, that:

1. The Board of Education of the Township of Randolph is a Type II school district, which maintains a kindergarten through twelfth grade public education program within the Randolph Township School District (School District).

2. In September 1975, respondent commenced employment as a teacher of mathematics within the School District. At all relevant times, respondent has continued to be employed by the School District in this capacity.

3. Commencing in September 1977, until the end of the 1979-80 season, respondent was assigned and performed duties as head wrestling coach for Randolph High School.

4. The salary for wrestling coach positions, as well as other athletic coaching positions, is established through negotiations between the Board and the Randolph Education Association.

5. On August 13, 1980, respondent transmitted a letter to the attention of the Superintendent, addressed to the Board of his intent to resign as head wrestling coach at Randolph High School effective September 1, 1980.

At that time, substantially all of the personnel vacancies within the Randolph School District had been filled. As a result, it became practically impossible for the Board to advertise for and select a new head wrestling coach within the limited time available to it. Additionally, petitioner's two assistant coaches, employed during the 1979-80 wrestling season, had also resigned during the Spring of 1980. Because of the resignations of the assistant coaches, the Board had advertised for replacement assistant coaches and had hired a teacher for a position in Randolph Intermediate School, who was also assigned the duty as assistant wrestling coach under respondent.

6. As of October 30, 1980 respondent was the best suited and most appropriate candidate for assignment to the position of head wrestling coach among petitioner's certificated personnel employed within its district.

7. The Board, in rejecting respondent's tendered resignation, insisted on his performance of the duties as head wrestling coach, being primarily concerned with the well-being and safety of the students participating in the wrestling program. It is well-known that wrestling is among the most hazardous of all sports sponsored by public schools within the State of New Jersey. The Board is particularly sensitive to coaching assignments in this sport and insists upon having the best suited personnel to instruct, supervise, and control this activity.

8. The foregoing views were expressly made known to respondent by the Board, both orally during the course of its meeting with respondent and in the subsequent correspondence sent to him. Nevertheless, respondent continues to refuse to perform the Board assigned duties for one additional season.

9. On October 3, 1980, respondent requested an opportunity to confer with the Board regarding this assignment.

10. The Board, notwithstanding, determined to reject the resignation of respondent as head wrestling coach and to assign these duties to him. Respondent maintains that he will not perform his duties as head wrestling coach which were scheduled to commence November 15, 1980.

On this limited set of facts the parties seek a determination as to whether petitioner's assignment of respondent to the position of head wrestling coach for the 1980-81 coaching season was a reasonable exercise of its discretion?

Respondent also requests a ruling with respect to the methodology employed by petitioner in making such an assignment. However, although respondent in oral argument and brief asserts that petitioner's method in doing so was punitive in nature and hence void, no facts have been submitted by respondent to support this contention.

Therefore, I **CONCLUDE**, based upon the within facts, that petitioner's method of assigning respondent to the position of head wrestling coach was valid.

Respondent agrees that a Board of Education has the right under its discretionary powers to assign a teacher to extracurricular activities irrespective of compensation, if such assignment is reasonable. Respondent asserts that the assignment herein is unreasonable in that he is a tenured mathematics teacher and that the service sought by petitioner is not within the scope of his teaching duties.

Respondent relies on Board of Education of the City of Asbury Park v. Asbury Park Education Association, 145 N.J. Super. 495 (Ch. 1976), where the Court states at p. 503:

> The board may not impose upon a teacher a duty foreign to the field of instruction for which he is licensed or employed. A board may not, for instance, require a mathematics teacher to coach intramural teams.(Emphasis in decision.)

However, there are no reported cases which have examined factually the unreasonableness of appointing a certificated mathematics teacher to coach a co-curricular sports activity and thus there has been no legal holding that such an assignment cannot be made. Contrariwise, the recognized law with which respondent does not take issue is that a Board of Education does have the discretionary power to make co-curricular or extracurricular assignments of its teachers provided that such assignments are reasonable. The reasonableness of an assignment may be determined by facts in a case regarding hours established, Asbury, 145 N.J. Super. at 502; the duty in relationship with the scope of the teacher's license, Id.; whether the assignment was nondiscriminatory, Id. at 500; the relationship of the assignment to the teacher's interest and expertise, Id. at 506; whether it is professional in nature, Id. at 500; other factors peculiar to the situation, i.e., the effect the assignment would have upon the teacher's ability to meet his responsibilities to both his class and the students coached Id. at 500; and whether "[a]dditional pay, customarily has been awarded only for those assignments which require the expenditure of great numbers of hours ... ", Id. at 506. Respondent, having the burden to rebut the legal presumption that the petitioner's assignment of him was valid, has failed to place any relevant facts before this court to meet his burden.

It is, therefore, **CONCLUDED** that petitioner's action of assigning respondent to the position of head coach of its wrestling team was a valid and reasonable exercise of its discretionary power.

Accordingly, it is **ORDERED** that the action taken by petitioner in assigning respondent to the position of head wrestling coach is a valid and reasonable exercise of its discretionary power; and,

It is **FURTHER ORDERED** that respondent is obligated to perform such assigned duties through the end of the 1980-81 wrestling season; and,

It is **FURTHER ORDERED** that respondent comply, in every respect, with the assignment made by petitioner and that he fully and completely comply with the requirements of the position of head wrestling coach; and,

It is **FURTHER ORDERED** that if respondent willfully and intentionally refuses to perform the assigned duties as wrestling coach, that such conduct constitutes an act of insubordination by respondent rendering him subject to penalties in accordance with the provisions and procedures of N.J.S.A. Title 18A, New Jersey Statutes Annotated.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, FRED G. BURKE,** who by law is empowered to make a final decision in this matter. However, if Fred G. Burke does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

January 21, 1981
DATE

for **JACK BERMAN**, ALJ

Receipt Acknowledged:

January 23, 1981
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

January 26, 1981
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

BOARD OF EDUCATION OF THE TOWNSHIP OF RANDOLPH, MORRIS COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
JOHN MARFIA, JR.,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law.

The Commissioner observes that exceptions were filed by respondent pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Respondent excepts to the determination of the Honorable Jack Berman, ALJ that the Board's action in assigning him to act as head wrestling coach is within the parameter of its discretionary authority. The Commissioner cannot agree. Respondent erred in his exceptions. The Commissioner notes that the issues raised in the instant matter have been adjudged in a recent case, Mainland Regional Teachers Association v. Board of Education of Mainland Regional School District, 176 N.J. Super. 476 (App. Div. 1980). In very similar circumstances, the board of education unilaterally assigned teachers to cocurricular positions. On appeal to PERC it was ruled that the issue presented was not negotiable. The Superior Court in affirming the decision of PERC said in part:

> "Extracurricular school activities are traditionally an integral part of student life intended to enrich and augment the standard curriculum. It is safe to assume that every board of education in the state maintains such programs. Activities of this nature are part of a process designed not only to educate but to develop the student into a whole person. As such they are a significant part of the duty to furnish a thorough and efficient education. In this context such activity is, perhaps, more aptly labeled cocurricular rather than extracurricular. The contract between the parties, in apparent recognition of the educational quality of such ventures, designates them as 'co-curricular.'***

> "***Clearly, the decision as to which teacher is best qualified to undertake a specific kind of cocurricular student guidance and development must rest in the area of managerial prerogative.***
>
> "We therefore affirm that portion of the decision below which holds nonnegotiable the unilateral assignment of teachers to cocurricular positions.***" (at 482-484)

The Commissioner notes that respondent must accordingly comply with his assignment by the Board to the position of head wrestling coach or be deemed insubordinate.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

March 6, 1981

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

MOTION FOR SUMMARY JUDGMENT

OAL DKT. NO. EDU 6497-80

AGENCY DKT. NO. 503-10/80A

IN THE MATTER OF:

MICHAEL ROSS, SUPERINTENDENT OF SCHOOLS
OF THE BOARD OF EDUCATION
OF THE CITY OF JERSEY CITY

v.

BOARD OF EDUCATION OF THE CITY OF JERSEY CITY

Record Closed: December 23, 1980 Decided: January 19, 1981

Received by Agency: 1/21/81 Mailed to Parties: 1/23/81

APPEARANCES:

Arthur N. D'Italia, Esq.,
for Petitioner, Michael Ross, Superintendent of Schools

William Massa, Esq.,
for Respondent, Board of Education of the City of Jersey City

BEFORE **SYBIL R. MOSES**, ALJ:

This matter was brought before the Court as the result of a Petition filed pursuant to N.J.S.A. 18A:6-9, which vests the Commissioner of Education with jurisdiction to hear and determine all controversies and disputes arising under the school laws. The case was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

The Petition requested the Commissioner to declare the resolutions appointing Pablo Clausel to the position of Assistant Superintendent of Schools in charge of voca-

tional and career planning and Charles Epps, Sr. to the position of Assistant Superintendent of Schools for curriculum and instruction to be null and void; to direct the Respondent to comply with the provisions of N.J.S.A. 18A:17-16, which he argues requires any appointment of assistant superintendents of schools to be made only upon nomination of the superintendent; and to direct the Respondent to pay counsel fees and costs incurred by Petitioner in connection with this application.

The Board of Education answered by arguing that the statute in question, N.J.S.A. 18A:17-16, was permissive, not mandatory, since the power to appoint is vested solely in the Board of Education. The answer also argued that the superintendent of schools is estopped from urging the mandatory application of N.J.S.A. 18A:17-16, because prior assistant superintendents were appointed without his nomination or recommendation.

A prehearing conference was held in this matter on November 14, 1980. It was determined that the legal issues to be decided were as follows:

A. Whether or not N.J.S.A. 18A:17-16 requires that the superintendent of schools nominate assistant superintendents before they may be appointed by the Board of Education, or whether or not said statute is merely permissive?

B. Estoppel - the Board argues that it has always appointed superintendents of schools in the within fashion.

During the course of the prehearing conference the Court determined, upon recommendation of both counsel, to decide this matter in a summary fashion.

Both counsel agreed to stipulate to the following, which the Court finds to be true facts in this case:

1. Petitioner, Dr. Michael Ross, is, and at all relevant times, has been the Superintendent of Schools of the Board of Education of the City of Jersey City.

2. On July 16, 1980 the Respondent, Board of Education of the City of Jersey City, adopted resolutions appointing Pablo Clausel to the position of Assistant Superintendent of Schools in charge of vocation and career planning and Charles Epps, Sr. as Assistant Superintendent of Schools for curriculum and instruction.

3. Petitioner has objected to the appointments, but the Respondent Board has failed and refused to rescind the resolutions of appointment.

Petitioner argues that this case presents a question of unusual simplicity; whether or not the Board of Education may appoint assistant superintendents of schools where the appointees have not been nominated by the superintendent. It is uncontroverted that the Board of Education, on July 16, 1980, appointed two assistant superintendents, neither of whom had been nominated to the position by the Superintendent, Dr. Michael Ross. Dr. Ross certified the background circumstances of the case, referring to the annual monitoring report for the school year, 1979-1980, from the Hudson County Superintendent of Schools, which indicated many pervasive deficiencies in the district. Petitioner points out that, when he prepared a plan for administrative reorganization of the district in order to improve administrative response to the deficiencies noted in the annual monitoring report, he nominated certain individuals to serve in various positions in his plan. At its meeting on July 16, 1980, the Board failed to approve his reorganization plan and adopted resolutions appointing the two named individuals to positions as assistant superintendents of schools. Dr. Ross had not nominated either of these persons and objected to the action of the Board before they adopted it. Dr. Ross sought the assistance of the Hudson County Superintendent of Schools, as well as a Deputy Commissioner of Education, both of whom communicated with the Board of Education in regard to the appointments. Dr. Ross argues that, unless his motion is granted, the Jersey City school district will face the prosepct of a school year without effective delivery of educational services due to an inefficient administrative structure.

Petitioner further argues that the statute, N.J.S.A. 18A:17-16, expresses legislative intention in language which is absolutely clear and unambiguous. The statute provides:

> The board or boards of education of any school district or school districts having a superintendent of schools may, upon nomination of the superintendent, by a recorded roll call majority vote of the full membership, of the board or of each of such boards, appoint assistant superintendents of schools. They may be removed by a like vote of the members of the board or of each board employing them, subject to the provisions of chapter 28 of this title.

Petitioner argues that the only discretion reserved to the Board by the use of the term "may" is to refuse to appoint the nominee of the superintendent. He says that the words, "upon nomination of the superintendent", mean that the Board may not, on its own initiative, appoint an assistant superintendent who has not been nominated by the superintendent. The legislative intent is clear and wise, because, in order for a superin-

tendent of schools to be effective, his assistants must be people with whom he can work and in whom he has confidence. Petitioner relies on Valente v. Board of Education of the City of Hoboken, 50-51 S.L.D. 57, where the Commissioner of Education ruled that the predecessor statute of N.J.S.A. 18A:17-16 rendered illegal the appointment of an assistant superintendent without the previous nomination of the superintendent of schools.

Respondent does not dispute that the Board of Education appointed two assistant superintendents who were not nominated by the superintendent. Counsel explains that the two assistants who were named represent minority groups and that each of the appointees possesses the necessary credentials for the position.

Respondent urges the Court to accept the proposition that N.J.S.A. 18A:17-16 does not circumscribe or limit the power of the Board in appointing assistants, which right to appoint is not dependent on nomination or recommendation by the superintendent. He urges the Court not to rely on Valente v. Board of Education of the City of Hoboken, 50-51 S.L.D. 57, because since it was decided there have been many changes in the school laws, including affirmative action programs, major reinterpretations of the "thorough and efficient" clause, integration, bussing, etc. Counsel feels that an administrative law judge can provide a more independent and objective judgment than a hearing officer employed by the Department of Education.

Respondent also analogizes N.J.S.A. 18A:17-16 with N.J.S.A. 18A:4-32, which gives the Commissioner of Education authority to appoint assistant commissioners through the use of the word "shall." He says the powers granted to the Commissioner are similar to the powers granted to the Jersey City Board of Education, and are not contingent on any exclusive right of the superintendent to nominate. Respondent also argues that grammatical construction mandates a conclusion that the clause, "upon nomination of the superintendent", is not essential to the meaning of the statute because the clause is set off by commas. These commas mean it is non-restrictive, and thus the Board may appoint, whether or not the superintendent nominates.

Respondent further argues that this Superintendent has waived his right to challenge these appointments because he failed to challenge prior appointments to the positions of assistant superintendents, which were made without his nomination or recommendation. Therefore the doctrine of equitable estoppel must be applied, because the silence and lack of action of the superintendent in regard to prior appointments prevents him from objecting now.

Petitioner's reply brief requests the Court give full force and effect to every word, clause and sentence of the statute, especially the phrase, "upon nomination of the superintendent." Hoffman v. Hock, 8 N.J. 397, 406 (1952). He also urges the Court to rely on the agency's construction of the statute over a period of years without legislative interference, as an interpretation upon which the Court can place great weight. He states he has not waived his right to challenge the appointments which are the subject of this Petition, notwithstanding any lack of action in regard to prior appointments. Petitioner states there is nothing in the record before this judge in regard to prior appointments made without his nomination or that of his predecessors, but, even if such facts were established, it would not provide a basis for refusing to enter summary decision in favor of the Petitioner in regard to the appointments sub judice.

Respondent's reply points out that in the field of administrative law and procedure the doctrine of stare decisis does not have the same force as it does in the common law, and thus the Court does not have to rely on Valente, supra.

The Court admitted the following items into evidence for the purpose of the Motion for Summary Judgment.

Exhibit A - Two pages of the annual monitoring report for Jersey City Board of Education -May 30, 1980.

Exhibit B - Letter of Dr. Ross to Mr. Russell Carpenter, County Superintendent of Schools -July 21, 1980.

Exhibit C - Letter from Russell Carpenter, Hudson County Superintendent of Schools, to Mr. Silvestri, Secretary, Jersey City Board of Education, July 28, 1980.

Exhibit D - Letter of William Massa, attorney for Board of Education to Mr. Russell Carpenter, Hudson County Superintendent of Schools, August 14, 1980.

Exhibit E - Letter from Mr. Russell Carpenter, Hudson County Superintendent of Schools, to Mr. William Massa, August 19, 1980.

Exhibit F - Letter from Gustav Ruh, Deputy Commissioner of Education, to Mr. Silvestri, Board Secretary, Jersey City Board of Education, September 10, 1980.

Exhibit G - Resolution appointing Mr. Pablo Clausel to the position of Acting Assistant Superintendent of Schools in charge of vocational and career planning, July 16, 1980.

Exhibit H - Resolution appointing Dr. Charles Epps, Sr. to the position of Acting Assistant Superintendent of Schools for curriculum and instruction, July 16, 1980.

There is no question that a motion for summary judgment is appropriate in the instant case because there are no genuine issues as to material fact. Judson v. Peoples Bank and Trust Company of Westfield, 17 N.J. 67 (1954). See also N.J.A.C. 1:1-13.4(a).

The dispositive issue in this case is whether or not N.J.S.A. 18A:17-16 mandates that the superintendent of schools nominate assistant superintendents before they may be appointed by the Board of Education, or whether said statute is merely permissive. The Petitioner says it is mandatory; the Board says it is permissive. Also, the Court must determine if Petitioner is estopped from objecting to these appointments because of failure to act in the past.

The facts are clear. In June of 1980 the Hudson County Superintendent of Schools filed the annual monitoring report on the Jersey City Board of Education, which indicated various deficiencies in the district and that interim approval was pending. The Jersey City Superintendent of Schools filed a reorganization plan with the Board and nominated various persons to fill posts within that reorganization plan. The Board did not adopt the reorganization plan, but on July 16, 1980, appointed two assistant superintendents of schools, Messrs. Clausel and Epps. Dr. Ross objected to the appointments on three occasions, July 1, July 14 and July 16, 1980, and did not, at any time, nominate those two men. Dr. Ross requested help from the Hudson County Superintendent of Schools, as well as from a Deputy Commissioner of Education, State Department of Education. Both individuals wrote to the Board of Education, indicating that they felt N.J.S.A. 18A:17-16 is

mandatory and that the Board of Education could not appoint these assistants without nomination by the superintendent of schools. Both counsel agree that the Board has refused to rescind the resolutions of appointment of these assistant superintendents of schools.

Absent an explicit legislative pronouncement, this Court can only determine if a statute is mandatory or discretionary by means of statutory construction. Although the selection of a verb, Diodato v. Camden County Park Commission, 136 N.J. Super. 324, 327 (App. Div. 1975), and the use of punctuation, Raybestos-Manhattan, Inc. v. Glaser, 144 N.J. Super. 152, 172 (Ch. Div. 1976), aff'd 156 N.J. Super. 513 (App. Div. 1978), are important factors, they are not determinative. The legislative intent behind the enactment of a statute remains a crucial consideration for any judge. Where an examination of other considerations evinces a particular legislative intent, neither the choice of a verb nor the use of punctuation should be employed to defeat that purpose. Id.

The distinction between a mandatory and a discretionary provision is an important one. The failure to comply with a mandatory requirement will invalidate any action taken, but the action of a public officer will not be invalidated where he has failed to comply with a mere discretionary provision. Procedural requirements which are not related to the essense of an act are often interpreted as discretionary. See Kohler v. Barnes, 123 N.J. Super. 69, 82 (Law Div. 1973).

On its face, N.J.S.A. 18A:17-16 provides for the appointment of assistant superintendents by the Board of Education "upon the nomination of the superintendent." This judge construes those words to mean that the Legislature intended to provide a means of selection which was responsive to the interests of both the Board and the superintendent. The provision for nomination of assistants by the superintendent, before appointment by the Board, is integral to the accomplisment of that dual end. Therefore this Court finds the provision is mandatory, rather than permissive, and the Board's failure to comply with the entire statute would invalidate these appointments.

Although there are no cases specifically construing N.J.S.A. 18A:17-16, the Commissioner of Education has interpreted its predecessor statute, R.S. 18A:6-40, which provided that "(t)he Board may, on the nomination of the superintendent of schools, appoint assistant superintendents and shall fix their salaries", in Valente v. Board of Education of Hoboken, 50-51 S.L.D. 57. In Valente, the Commissioner decided that the

appointment of an assistant superintendent of schools by the Board of Education, without a previous nomination by the superintendent, was illegal. The Commissioner determined that the Legislature intended to restrict the Board's appointments to such persons who were nominated by the superintendent because of the superintendent's need to have an assistant upon whom he can rely, subject to the Board's power to make a final appointment. Since the method of selection was mandatory, the Commissioner determined that an appointment which bypassed this procedure was illegal.

> The language of the statute makes clear the intention of the legislature that the Board of Education appoint to the assistant superintendency only such persons as are nominated by the superintendent of schools. The legislature has acted wisely in so providing. A superintendent of schools has large responsibilities in conducting the affairs of the school system. Whenever it becomes necessary for him to have an assistant, good administrative procedure dictates that he be permitted wide latitude in selecting a person in whom he can repose full trust and confidence. The Board of Education has the final power to make the appointment, but cannot take the initiative in appointing any person other than one nominated by the superintendent. It is the opinion of the Commissioner that this method of selecting an assistant superintendent of schools is mandatory and cannot be circumvented. A school board cannot by its vote or order deprive an officer of power conferred upon him by statute. 50-51 S.L.D. at 58-59.

Although there are differences between Valente and this case, such as the fact that the Petitioner in Valente was a taxpayer, not the superintendent of schools, and the fact that Valente was decided 30 years ago, the logic of the Commissioner remains valid. The statute must be construed to implement the above stated legislative intent. This Court concludes that the language of N.J.S.A. 18A:17-16 is mandatory, in that the Board may appoint assistant superintendents of schools only upon nomination by the superintendent. The Board has the right to reject appointments and can pursue other remedies if it should come to pass that the superintendent of schools does not fulfill his obligations and nominate qualified persons.

The Court has also considered Respondent's argument that Petitioner is estopped from asserting this objection because of prior lack of action or silence. Estoppel precludes a party from asserting a position or repudiating an act done or a position taken where such a course would work an injustice to another who, having the right to do so, detrimentally relied upon it. Anske v. Borough of Palisades Park, 139 N.J. Super. 342, 348 (App. Div. 1976). Thus, the basis for estoppel is reasonable reliance on the conduct of

another to one's detriment. Silence may give rise to an estoppel, but only where there is a duty to speak. See Carlsen v. Masters, Mates & Pilots Pension Plan Trust, 80 N.J. 334, 341 (1979). The party raising the defense of estoppel must establish the requisite elements. Estoppel can not be invoked absent evidence of good faith or reasonable reliance to one's detriment. The Respondent here has not established good faith reliance or a resulting detriment. The Board asserts that the superintendent is precluded from challenging the legality of these particular appointments because he failed to object to prior appointments. However, the Board has not established that he ever was silent, or if he was, his silence reasonably led the Board to believe that the legality of future appointments would remain unchallenged forever. Cf. Keenan v. Board of Chosen Freeholders of Essex County, 106 N.J. Super. 312 (App. Div. 1969). Additionally, there is the question of whether or not reliance upon another's failure to challenge the legality of official action can ever be reasonable. This is analogous to reliance upon non-enforcement of the law, which cannot give rise to an affirmative defense of estoppel. See Diebold v. Township of Monroe, 110 N.J. Super. 287, 296 (Ch. Div. 1970), aff'd 114 N.J. Super. 502 (App. Div. 1971), certif. denied 59 N.J. 296 (1971).

Based on the foregoing analysis, the Court concludes that N.J.S.A. 18A:17-16 permits the Board to appoint or reject assistant superintendents of schools, only after the superintendent has nominated said persons. The statute is mandatory in that the Board may only appoint those persons who have been nominated by the superintendent. Although it is not mandatory that the Board appoint the superintendent's candidates, this does not imply, nor should an inference be drawn, that a Board may supplant the statutory procedure of nominations by the superintendent with its own nominations. The Court further concludes that this Board did not rely, to its detriment, on past silence of the superintendent in regard to prior appointments of assistant superintendents made without his nomination, approval or objection. The applicability and validity of Valente v. Board of Education of Hoboken, is not diminished because of its age or because the Petitioner was a taxpayer. The desire of the Board of Education to comply with affirmative action programs is commendable, but it may not supplant or supercede the mandatory provision, "upon nomination by the superintendent", in the statute. This is especially true in regard to this phrase, which has been interpreted as mandatory by the Commissioner of Education without any interference or overriding by the courts or Legislature.

Petitioner asks for counsel fees and costs incurred in filing of this Petition. Although he does not cite case law or Commissioner's decisions in support of said applica-

tion, the Board of Education does not address the issue at all. However, pursuant to N.J.A.C. 1:1-1.3(a), this judge does not find it unreasonable to order the Board of Education to pay those reasonable counsel fees and costs which have been incurred in the filing of the instant Petition, which was filed by Petitioner in order to carry out his mandatory statutory duties.

Therefore, it is **HEREBY ORDERED** that Petitioner's Motion for Summary Judgment in the instant matter is hereby **GRANTED**; and

It is **FURTHER ORDERED** that the resolutions appointing Pablo Clausel to the position of Assistant Superintendent of Schools in charge of vocation and career planning and Charles Epps, Sr. to the position of Assistant Superintendent of Schools for curriculum and instruction are hereby null and void; and

It is **FURTHER ORDERED** that Respondent Board of Education pay reasonable counsel fees and costs incurred by Petitioner in connection with the filing of this Petition.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, FRED G. BURKE,** who by law is empowered to make a final decision in this matter. However, if Fred G. Burke does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

OAL DKT. NO. EDU 6497-80

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

Jan. 19, 1981
DATE

Sybil R. Moses
SYBIL R. MOSES, ALJ

Receipt Acknowledged:

Jan. 21, 1981
DATE

Seymour Weis
DEPARTMENT OF EDUCATION

Mailed To Parties:

January 23, 1981
DATE

Ronald L. Parks/ss
FOR OFFICE OF ADMINISTRATIVE LAW

gvd

MICHAEL ROSS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law, Honorable Sybil R. Moses, ALJ.

The Commissioner observes that timely exceptions and reply exceptions were filed by the Board and petitioner respectively pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Board in its exceptions to the initial decision rendered by Judge Moses argues as follows:

1. Absent language indicating clear legislative intent, the provisions of N.J.S.A. 18A:17-16 may only be construed to be permissive rather than mandatory upon the Board with respect to the employment of assistant superintendents upon nomination by a superintendent.

2. The Commissioner is without authority to order the payment of counsel fees to petitioner. The Board maintains that absent such statutory authority, the award of counsel fees may only properly be granted by a court of competent jurisdiction.

In this regard the Board relies on the following prior rulings of the Commissioner and the courts. 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 Jersey City, 1974 S.L.D. 890, aff'd State Board 1975 S.L.D. 1074, aff'd N.J. Superior Court 1976 S.L.D. 1124; and Michael Perrella v. Board of Education of Jersey City, 51 N.J. 323 (1968)

Petitioner, in his reply to the Board's exceptions, rejects the arguments advanced therein. Petitioner maintains that the factual circumstances set forth in the record of this matter clearly reveal that the Board of which he is a non-voting member by statute (N.J.S.A. 18A:17-20) has sought to deprive him of his legislative prerogative as Superintendent, by denying him the right to have only those persons who were nominated by him

considered for employment as his assistant superintendents pursuant to the provisions of N.J.S.A. 18A:17-16. Petitioner argues that the Board willfully ignored statutory prescription and thereby prevented him from seeking to address pervasive administrative deficiencies noted in the Annual Monitoring Report filed with the Board by the Hudson County Superintendent of Schools.

Finally, petitioner argues that the provisions of N.J.S.A. 18A:17-21 require that he file an annual report with the Commissioner pertaining to such matters relating to the schools under his supervision. Petitioner maintains therefore that as a non-voting Board member, it would be an extraordinary and perverse interpretation of the above-cited statute which requires him to bring to the attention of the Commissioner, at his own personal expense, illegal actions of the Board which interfere with the powers and duties of his office. It is petitioner's contention that under the circumstances recited herein the Board must bear the cost of counsel fees which caused him to bring this action before the Commissioner.

The Commissioner has reviewed the respective arguments of the parties set forth in their exceptions to the initial decision. In the Commissioner's judgment the issue regarding the statutory authority vested in the Superintendent of Schools to place into nomination before the Board for its consideration the names of the assistant superintendents to assist him in the performance of his duties has been rendered stare decisis in Valente, ante. The Commissioner so holds.

In regard to the issue of the Board's responsibility for reasonable counsel fees incurred by petitioner in bringing this matter before the Commissioner in his capacity as chief administrative officer and member of the Board, the Commissioner concurs with the determination of Judge Moses herein that the Board must bear the cost of these fees. The Commissioner so holds.

Accordingly, the Commissioner concurs with the findings and determination set forth in the initial decision of this matter and adopts them as his own.

Summary Judgment is hereby granted and entered on behalf of petitioner.

COMMISSIONER OF EDUCATION

March 9, 1981

MICHAEL ROSS,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, March 9, 1981

For the Petitioner-Respondent, Chasen, Leyner, Holland & Tarrant (Arthur N. D'Italia, Esq., of Counsel)

For the Respondent-Appellant, William A. Massa, Esq.

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

Susan Wilson and P. Paul Ricci opposed in the matter.

October 7, 1981

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5263-80
AGENCY DKT. NO. 400-8/80A

IN THE MATTER OF:

J.B.A. AND A.M.A.,
INDIVIDUALLY AND AS
GUARDIANS AD LITEM OF A.H.A.,
Petitioners,
v.
BOARD OF EDUCATION OF THE
BOROUGH OF BERNARDSVILLE,
SOMERSET COUNTY,
Respondent.

Record Closed: December 23, 1980
Received by Agency: 1/27/81

Decided: January 23, 1981
Mailed to Parties: 1/28/81

APPEARANCES:

For Petitioner: **Richard J. Schachter,** Esq. (Schachter, Wohl, Cohn & Trombadore)

For Respondent: **Peter Burke,** Esq. (Young, Rose & Millspaugh)

BEFORE **ERIC G. ERRICKSON,** ALJ:

Petitioners appeal as arbitrary and unreasonable a March 1980 decision of the National Honor Society Faculty Selection Committee of Bernards High School not to

accept A.H.A. who was then a junior into membership in the Bernards Chapter of the National Honor Society (B.N.H.S.). They pray for an order of the Commissioner of Education directing that A.H.A. be installed as a B.N.H.S. member. The Bernardsville Board of Education (Board), having reveiwed the matter, supports the March 1980 decision of its B.N.H.S. selection committee not to admit A.H.A. into membership.

PROCEDURAL RECITATION:

The dispute was initially filed before Chancery Division of the Superior Court of New Jersey in July 1980. Thereafter, William A. Drier, J.S.C. on August 15, ordered the matter and the entire record thereof transferred to the jurisdiction of the Commissioner of Education who on August 8, 1980 forwarded the entire record for processing to the Office of Administrative Law, pursuant to N.J.S.A. 52:14F-1, et seq.

At a prehearing conference conducted at Trenton on September 8, Notices of Motion and Cross Motion were entered on the single issue of whether petitioners are entitled to a statement of reasons why A.H.A. was not elected as a junior to membership in the B.N.H.S. Briefs and Memoranda of Law on this issue were filed by respective counsel and oral argument was conducted at Green Brook on September 30, 1980.

An order was entered by the undersigned, over the objections of the Board, directing the Board to give petitioners the reasons why she had not been selected for N.H.S. membership. Therein, it was recognized that Judge Drier in transferring the matter to the Commissioner had directed the Board to collect the reasons in written form. In ordering that they be made available to petitioners , the following was stated by the undersigned:

> "*** [E]lemental fairness and human consideration and discipline against arbitrary or abusive exercise of broad discretionary power are inherent in the issue raised in the instant matter. If pupils are to receive the thorough and efficient education guaranteed by the Constitution and N.J.S.A. 18A:7A-1, et seq., all elements of the public schools must bend every effort to assist them to reach their full potential. Without so much as the knowledge of which of the three qualifying areas other than scholarship she was deemed to be deficient, A.H.A. cannot be expected to improve in those areas. Without a statement of what was considered lacking in leadership, service to the school and/or citizenship, she could neither seek to improve in those areas or attempt to rebut any reason she believed to be groundless.***

"Teachers and administrators in public schools are as subject as board members to the vagaries which affect decision making. While such discussions concerning N.H.S. candidacy are properly conducted in closed session because of their confidential nature, I **CONCLUDE** that the end result and the reasons for negative decisions must be made availabe on request to an unsuccessful candidate. The reasons should be reasonably explicit and understandable, thus enabling the candidate to take action to correct any perceived deficienty.

"The Board's arguments that an unsuccessful candidate has no compelling economic reason to know those reasons is a shortsighted view, since membership in N.H.S. is one factor considered by admissions counsellors. It is well recognized that preparation for entrance into and successful performance in colleges and universities has a pronounced effect on an individual's lifetime earning power.

"It has often been stated that the operation of public schools should be carried out in such a way as to avoid the very appearnace of impropriety. Herein, the excessive secrecy attached by the Board and its agents to the reasons for non-admission fails to comport with that stated principle. The giving of reasons must, of course, be handled with the same discretion and caution which attaches to personal recommendations provided for pupils to employers and others. The names and submissions of those who so provide are not discoverable by a prospective employee under the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. ss 1232g. To so require in the instant matter would indeed have a chilling effect on volunteer faculty members. The end result thereof could be refusal to participate as committee members. Petitioners, however, have candidly stated, through counsel at the oral argument, that they do not seek to know either how an individual committee member voted or the individual's motivation which prompted the vote. Within such framework, petitioner's request is not unreasonable.

Petitioner A.H.A. presents an impressive academic record together with numerous worthy and varied activities. Her interests in knowing the reasons for non-admission are sufficient to require that they be produced. The experience of schools which do provide such reasons has not resulted in the death knell of their chapters in N.H.S. Tiffany et al. v. Board of Education of Cinnaminson, et al. 1974 S.L.D. 87,91; William J. Moore, et al. v. Board of Education of Vineland, 1975 S.L.D. 290; D.W., et al. v. Board of Education of Pompton Lakes, 1977 S.L.D. 1240. Nor is there sufficient showing that the Board or its agents would be severely handicapped by extra duties of providing the reasons. On balance the advantages to the pupil who makes such request far outweigh any disadvantage which respondent will experience. Rather, the giving of reasons for non-election, as recommended by the National Honor Society Handbook at p. 27 and recently broached by the Bernards High School principal for consideration, will under this opinion strengthen rather than impair the process of justice, fairness, and confidence for pupils and parents served by the school and the B.N.H.S.

> "For the reasons set forth above, **IT IS ORDERED** that the Board and/or its agents transmit to petitioners, forthwith, the reasons for non-election of A.H.A. to the B.N.H.S., which reasons Judge Drier required compiled by his Order of August 15, 1980.
> **IT IS FURTHER ORDERED** that those reasons by anonymous as to individual teaching staff members and sufficiently explicit to inform A.H.A. of correctable deficiencies.***"

That substantive order, when appealed to the Commissioner, was affirmed for the reasons expressed therein.

Three days of plenary hearing were conducted at Somerville on November 5, 12 and 24, 1980. Respective counsel placed oral summations on the record on November 24, 1980. Thereafter, upon the receipt of orders of the Appellate Court panel consisting of Judges Seidman, Antell and Lane, Docket No. AM-307-80-TL, denying petitioner's motion to strike evidence and quashing a subpoena for further documents in the form of student records, the record was declared complete on December 23, 1980.

UNDISPUTED FACTS:

The contextual setting of the dispute is revealed by the following facts set forth in a Stipulation of Facts (Exhibit M) or otherwise uncontroverted within the record:

A.H.A. is now a seventeen (17) year old senior pupil at Bernards High School (B.H.S.) After attending a high school in Pennsylvania during her freshman year, and a California high school during the majority of her sophomore year, she enrolled in B.H.S. in the spring of 1979. As a junior, she was declared to have met the minimum academic eligibility of a grade point average of 3.25 required of juniors for consideration for membership in the B.N.H.S. She submitted the standard application to be considered on the basis of the remaining requirements of character, service and leadership (Exhibit G). The four named criteria are standard requirements as set forth in the National Honor Society Handbook published by the National Association of Secondary School Principals which sponsors the B.N.H.S. (Exhibit A) Admission to the B.N.H.S. is considered by the administration to be one of the highest honors that can be bestowed on a pupil. A.H.A. listed on her application form numerous activities in which she had engaged during her high school career. These included:

Grade 9: Junior Varsity and Varsity Basketball
9th Grade Biology Club Presentation Chairman
9th Grade Quiz Team

Grade 10: Varsity Basketball (Most Inspirational Award)
California Scholastic Federation
Foreign Exchange Club
Mike Curb Election Campaign (Lt. Governor)
Laura Toonby Memorial Fund
Somerset Riding School for Handicapped Children

Grade 11: Varsity Basketball
Chemistry Team (Interscholastic)
Varsity B Club
Quarterback of Powder Puff Football Team
Prom Committees
Teachers Aide in Church School

A.H.A. did not complete an optional portion of the N.H.S. application form which provides for additional comments.

Applications for B.N.H.S. membership were reviewed by a selection committee consisting of the principal and fifteen (15) other teaching staff members appointed by him. Prior to that review, every faculty member in the school was given opportunity to comment in writing on the qualifications of each applicant and make a recommendation. (Exhibit H) These comments were collected, collated and available to the selection committee which, after discussion of each individual's qualifications at a closed meeting, cast secret ballots. A two-thirds vote consisting of ten affirmative ballots was required for election into membership. Selection committee members did not review candidates' permanent records maintained in the guidance offices. Eight (8) selection committee members voted against the candidacy of A.H.A., thus she had insufficient votes to be installed. In keeping with policy, a second meeting was held several days later to reconsider, at the request of any committee member, the candidacy of any pupil who was not elected. Although A.H.A. was reconsidered, the result was that she lacked the requisite number of votes for membership. In keeping with past practice, all applications and materials considered by the selection committee were then destroyed. The names of successful candidates were announced over the school public address system.

When A.H.A.'s parents learned of her non-admission, they requested of the principal, the Superintendent and the Board the reasons. (Exhibits I,J) When none were given, petitioners instituted an Order to Show Cause proceeding before the Chancery Division of the Superior Court, Somerset County seeking an order compelling respondent to provide reasons. It was from this proceeding that Judge Drier ordered the matter transferred to the Commissioner of Education and ordered the Board to collect reasons why A.H.A. was not admitted to B.N.H.S.

The principal, during the first day the 1980-81 of school year, directed the selection committee members to signify in writing whether they had voted for or against A.H.A., and the reasons for any negative vote. Those reasons were entered into evidence over petitioners' objections that they were nebulous and failed to reveal the incidents for which A.H.A. was criticized therein. The reasons make reference to incidents which selection committee members stated reflected adversely on her character and leadership qualities. She was criticized by seven (7) selection committee members for unspecified instances of rudeness, disrespect and arrogance toward teachers and disregard of school rules. (Exhibit K)

TESTIMONY OF WITNESSES:

A.H.A.'s father testified that he and his wife were unable to understand or accept a selection process in which no one had to reveal the basis for rejection of a pupil whose candidacy could have been materially affected by subjective input of one or more selection committee members. He testified that, prior to his meeting with the Board on July 14, 1980, a member of the selection committee had, in confidence, told him that his daughter had been unfairly and disgracefully treated in the selection process in an attempt to retaliate against her mother who in their home had made reference on one occassion to grammatical errors in the school's English course of study. He testified that his informant had told him that the English department, whose chairman sits on the selection committee, had retaliated by making sure that A.H.A. was kept out of the B.N.H.S. A.H.A.'s parents testified that at no time had they ever been told by any teacher that A.H.A. had ever broken a rule or been rude, arrogant or disrespectful. In this regard, they testified that her guidance counselor had stated that A.H.A. could never be rude to anybody and that she was a very lucky girl since she qualified for entrance to any college in the country.

A.H.A.'s mother testified that her reaction to he news of her daughter's non-election was that she "***must have done something wrong; her credentials were so strong that it would only be because of something terrible that she had done.***" She testified that her extensive inquiries of teachers, principal, guidance counselor, and the Board revealed no such reason. She testified that, after a meeting with the Board, one member offered, in a telephone conversation, the opinion that a good student would be turned down only for a very good reason. She stated that she was very upset when that Board member, who had conferred with the principal, called her later on the same day and inquired how she would handle it if the reason was one involving character.

In regard to the reference to grammatical errors, A.H.A.'s mother testified that she had in a dinner table conversation about grammatical usage made the observation that "***it was rather difficult to be perfect and that in reading the English course of study, yes there had been a few grammatical errors.***" She testified further that at no time had she, outside the confines of her family, made such an observation to others. She also testified that when, after knowledge of her remark became known to the English teachers, post, she discussed pupil concerns over deadline dates with an English teacher, the teacher responded: "*** [I] s that another jab at the English Department?"

A.H.A. testified that when, in a private conversation, her Spanish teacher had shown her a grammatical mistake in the daily paper, she had stated: "***My mother read the English Course of Study and it had a mistake in it, a split infinitive or something***" She testified that, on a succeeding day, her English teacher, who appeared upset, came to her study hall and queried her about the remark. She testified that she told the English teacher that her mother had told her she had found a mistake but that it was not her intent, in commenting on it during what she believed be a private conversation, to make trouble. A.H.A. testified that, when her Spanish teacher thereafter asked why she had become so quiet in Spanish class, she responded that she was upset that she had revealed to another teacher what she had considered to be a private and privileged conversation. She testified that the Spanish teacher then assured her that there was nothing to worry about and that it was better to know about the errors if they existed.

A.H.A. testified that in the three high schools she has attended, she knows of no instance in which she was accused of being or was, in fact, rude, arrogant, disrespectful or in violation of school rules. When questioned why she did not apply for B.N.H.S. membership as a senior in the fall of 1980, she gave as reason the instant litigation and further testified as follows:

> "***I felt I'm the same person *** now that I was then. If they didn't want me then, I don't want to go through ***being rejected again. If these are the reasons, then I am the same person.***" (Tr. November 24, at p. 39)

Petitioners called as witnesses a neighbor, two (2) sisters of A.H.A. and the present vice president of the B.N.H.S. who variously testified that A.H.A. was forward in encouraging, assisting and advising other pupils in the learning process, that she had been chosen to take charge of classes in the absence of a teacher, that she was often selected to lead reviews for tests, that she had often volunteered for class committee duties and that she had since March been elected as vice president of the Senior Class and vice chairman of the Glee Club. They testified that on no occasion had they ever observed her to be rude, arrogant, disrespectful or in violation of school rules.

The principal, who was a member of the selection committee and present during the discussions of A.H.A.'s candidacy, testified that he knows of no instance when she was either accused by a faculty member or known to have broken a rule of conduct applicable to pupils.

FINDINGS OF FACT:

After careful study of the testimony of witnesses and documents in evidence, I FIND the following to be additional relevant facts to be considered with the uncontroverted facts previously set forth:

1. Despite the fact that there exists in the written criteria (Exhibits A,B) no basis for differing standards for admission of juniors and seniors to B.N.H.S., the selection committee applies more stringent standards to the admission of juniors.

2. The list of activities by A.H.A. is an impressive compendium of academic, extra curricular and community related involvement which typically qualify a pupil for N.H.S. membership in the areas of leadership, character and service. Service to school is exhibited by her participation on both athletic and academic intrascholastic and interscholastic teams, in the Foreign exchange club, on prom committees and on the Toonby Memorial Fund Committee. Service to the State and

community is exhibited by her involvement in the campaign for Lieutenant Governor, the riding school for handicapped pupils and teacher's aide in her church school. Evidence of good character is shown by her church school involvement, service on the memorial fund committee, service as a volunteer in the school for handicapped children and being elected most inspirational on her basketball team.

3. The reasons given by the members of the selection committee were indeed nebulous in that the charges of arrogance, rudeness, disrespect and deficiencies in character are not substantiated in a single instance by revelation of any event(s) in which A.H.A. exhibited these negative characteristics.

4. The selection process was affected is so far A.H.A. was concerned by an inordinate and unwarranted concern over the repetition of an innocuous remark of A.H.A.'s mother concerning grammatical error in the English course of study. The remark, repeated by A.H.A. within the confines of what she believed to be a private discussion with her Spanish teacher, caused sufficient concern to precipitate a confrontation by an English teacher who interrupted A.H.A. in her study hall. It later was the unfortunate and inappropriate subject of discussion at the selection committee's deliberation. While this conclusion is based in part on hearsay evidence, there is a sufficient residuum of competent evidence on which this finding is grounded. I FIND the testimony of A.H.A., her mother and her father to be convincing, that the remark was made, that it was repeated by A.H.A. to her Spanish teacher, that it was made known to an English teacher, that A.H.A. was inappropriately confronted in a scheduled study hall, and that the selection process was tainted by the discussion of the incident.

5. The record herein is totally devoid of so much as a scintilla of evidence that A.H.A. demonstrated in a single instance rudeness, arrogance, disrespect or poor character.

DISCUSSION AND DETERMINATION:

The Commissioner, asserting jurisdictional authority to determine disputes over admission to the National Honor Society in Tiffany, supra, stated:

> "***With respect to the Board's Motion to join the National Honor Society and the Cinnaminson Chapter of the National Honor Society as parties defendant to the action, the Commissioner holds that the local board of education is responsible for the administration and supervision of all extracurricular, as well as curricular, events and programs sponsored by the school, and may properly be held accountable for the conduct thereof. For this reason and for the reasons set forth in the earlier decision on Motion to dismiss, the Commissioner denies the Motions to dismiss.***" (at p.96)

I CONCLUDE that in the matter litigated herein, the Board is not exempted from responsibility for the total affairs of the B.N.H.S. including both the selection process and responding to charges of impropriety in respect to that process. As has been previously stated by the Commissioner in Nicholas P. Karamessinis v. Board of Education of the City of Wildwood, 1976 S.L.D. 473 at p. 478:

> "***The function of local boards of education is of such paramount importance in developing and implementing programs of education to serve the youth of our State and nation that they must be ever guided by the principle that '***it is of the very essence that justice avoid even the appearance of injustice***'. James v. State of New Jersey, 56 N.J. Super. 213, 218 (App. Div. 1959)***"

It was stated by the Commissioner in John J. Kane v. Board of Education of the City of Hoboken, Hudson County, 1975 S.L.D. 12, that:

> "***[T] he Commissioner will not substitute his judgment for that of a local board when it acts within the parameters of its authority. The Commissioner will, however, set aside an action taken by a board of education when it is affirmatively shown that the action was arbitrary, capricious, or unreasonable. See Eric Beckhusen et al. v. Board of Education of the City of Rahway et al., Union County, 1973 S.L.D. 167; James Mosselle v. Board of Education of the City of Newark, Essex County, 1973 S.L.D. 197 aff'd State Board of Education, January 9, 1974; Luther McLean v. Board of Education of the Borough of Glen Ridge et al., Essex County, 1973 S.L.D. 217, affirmed State Board of Education, March 6, 1974.***" (at p. 16)

The Board, at the hearing, when faced with a substantial amount of credible testimony elicited by petitioners establishing a prima facie case, failed to elicit

credible testimony or produce documentary evidence on which to base a conclusion that in a single instance A.H.A., as charged in the reasons for her non admittance, exhibited arrogance, rudeness, disrespect, disregard of school rules or poor character. Accordingly, I CONCLUDE that the Board has failed to present sufficient credible evidence on its behalf in defending against the proofs of allegations of impropriety. As was stated by the Commissioner in Preston K. Mears, et al. v. Board of Education of the Town of Boonton, 1968 S.L.D. 108 at 111:

> "***The Commissioner does not contemplate that in every instance of a board's action in the application of its policies and rules the board will expressly formulate a statement of its reasons for such action. To be sure, in many instances the reasons may clearly appear in the minutes of the board's deliberations or even, in some instances, in the language of a resolution. However, the Commissioner recognizes the practical problems confronting boards of education in creating a record of all its discussions and formulating a statement of its reasons for all of its decisions, as if to anticipate a need to defend itself in litigation such as that herein. The evidence of reasonable action is not always so formally generated. But in the absence of such evidence, the Commissioner cannot discharge his duty to examine the exercise of a board's discretion where, as here, it is challenged, unless at the hearing or in some other proper manner the board is willing to come forward with appropriate evidence that it acted with reason and not in an arbitrary, capricious, unreasonable, or discriminatory manner. Thus, while the burden of proof initially and in the ultimate sense rests with the petitioner in an action such as the instant matter, the Commissioner must be able to determine that some reasonable basis exists for the board's actions. Therefore, unless such basis appears to the Commissioner, the board's actions cannot be sustained.***" (Emphasis supplied)

The instant matter contrasts sharply with Tiffany, supra, Moore, supra, and D.W., supra wherein rational bases were found to substantiate non-admission to local honor society chapters. Absent a showing that there was a reasonable basis for the stated reasons for the negative votes cast against A.H.A. by the eight members who voted against her, I CONCLUDE, on the basis of a preponderance of credible evidence, that there was an abuse of discretion. This abuse was precipitated by the unfortunate, ill advised and unwarranted umbrage taken by certain members of the teaching staff against a reported comment by A.H.A.'s parent about grammatical error in the school's written English course of study. The decision, thus inappropriately tainted, was arbitrary, capicious, and must be set aside.

Petitioners are entitled to the relief they seek. Accordingly, the Board is **ORDERED** to install A.H.A. forthwith, upon issuance of a final decision by the Commissioner, as a member of the B.N.H.S. retroactive to the date of installation of other junior class members in March 1980. **IT IS FURTHER ORDERED** that the Board will, after further study of its N.H.S. selection process, establish procedures whereby any applicant who applies, is not selected for membership in the B.N.H.S., and thereafter requests the reasons for nonadmittance, shall be provided with reasonably explicit and understandable reasons. This order, it is noted, is in harmony with the following directive in the National Honor Society Handbook:

> "***Every effort should be made to explain the selection process and the reason(s) for non-election to dissatisfied students or parents. Misunderstandings can often be prevented by:
>
> . publicizing the election criteria and the process by which students are elected to membership.
>
> . providing due process to all potential members. One negative vote should not exclude a student from consideration.
>
> . striving to keep the election process as objective as possible.
>
> . implementing a back-up system to consider a student omitted by error from the initial consideration of canidates.
>
> . listening to appeals from students or parents who believe an error has been made. It is possible for a faculty council to reconsider or to check election results.
>
> The integrity of the Society's standards should always be upheld when hearings regarding non-election are held. It is only proper that a principal or advisor hear a request. It is equally important to recognize the potential damage of yielding to pressure tactics. The faculty council and principal should have every interest in being fair, and in being willing to rectify mistakes even as they are willing to stand by those prinicples they believe are correct.***" (Exhibit A at pp. 27-28)

Such revised procedure as herein ordered will afford opportunity for pupils to take corrective action, thus enhancing the effectiveness of the total education process.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, FRED G. BURKE,** who by law is empowered to make a final decision in this matter. However, if Fred G. Burke does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

January 23, 1981
DATE

Eric G. Errickson
ERIC G. ERRICKSON, ALJ

Receipt Acknowledged:

January 27, 1981
DATE

Seymour Weis
DEPARTMENT OF EDUCATION

Mailed To Parties:

January 28, 1981
DATE

Ronald L. Plata /sh
OFFICE OF ADMINISTRATIVE LAW

bm

J.B.A. AND A.M.A., individually and as guardians ad litem of A.H.A.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BERNARDSVILLE, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law.

The Commissioner observes that exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Respondent's (Board's) exceptions address the alleged failure on the part of Judge Errickson to include testimony in his initial decision which was not supportive of petitioners' position and his inclusion therein of "hearsay" testimony by J.B.A., one of the petitioners, obtained from an unnamed informant. The Board argues that such testimony should have been excluded from the hearing or, at the least, disregarded in its entirety. Such testimony, in the Board's view, constituted no more than a stated opinion that the alleged reasons advanced by the informant for A.H.A.'s nonadmission to the National Honor Society were, in fact, the reasons for such denial. The Board further contends that J.B.A. failed to demonstrate how the alleged "incidents" revealed to him by the unnamed informant were conveyed to the Bernards High School English Department nor how these incidents had such a profound effect upon the selection process in that the English teacher allegedly involved was not a member of the faculty selection committee.

The Board contends that the testimony of witnesses supports the conclusion that A.H.A. was treated no differently than other student applicants. The Board further contends that her nonadmission to the National Honor Society was a result of an "honest perception" of the selection committee, that she at the time lacked the requisite qualities of character as reflected in three incidents and that she was likewise perceived as having failed to demonstrate those qualities of leadership consistent with election in the junior year.

Based upon the foregoing exceptions taken to Judge Errickson's recitation of testimony, the Board urges a

finding of fact that the selection process at Bernards High School was unaffected in any way by bias toward A.M.A., A.H.A.'s mother, but was based purely upon the honest judgment that A.H.A. failed to demonstrate a sufficient degree of excellence in the areas of leadership and character. The Board further argues that petitioners failed to state a claim upon which relief can be granted and furthermore takes exception to Judge Errickson's finding that it failed to elicit "credible testimony or produce documentary evidence on which to base a conclusion that in a single instance A.H.A., as charged in the reasons for her nonadmittance, exhibited arrogance, rudeness, disrespect, disregard of school rules or poor character." (ante) The Board avers that Exhibit K, which sets forth the reasons for A.H.A.'s nonadmittance, constitutes sufficient credible evidence upon which Judge Errickson should have found an absence of arbitrary or capricious conduct in the selection process.

In the Board's view, no evidence was introduced upon which to base Judge Errickson's conclusion that the selection committee's determination was based upon umbrage taken by certain members of the teaching staff against the reported comment made by A.M.A. concerning grammatical errors in the English course of study. Accordingly, the Board contends that Judge Errickson's findings be reversed and the actions of the Bernards High School faculty be affirmed as being in all respects proper.

Petitioners' reply exceptions urge the acceptance of Judge Errickson's finding of fact. Petitioners assert that Judge Errickson, as the trier of fact in the matter, based his findings on what he deemed to be relevant and credible evidence. Petitioners contend that the introduction of evidence concerning the "unknown informant" arose during cross-examination of J.B.A. by counsel for the the Board. Petitioners further argue that Exhibit K, in which general reference is made to A.H.A.'s rude, arrogant behavior and disregard of rules of conduct applicable to all students, is as much hearsay as was the introduction of the revelations of the so-called "unnamed informant" particularly in light of Judge Errickson's ruling that the members of the National Honor Society Selection Committee were entitled to their anonymity. Petitioners assert that the hearsay evidence relative to the "unnamed informant" was supported by a residuum of competent evidence unlike the general and unsubstantiated allegations contained within Exhibit K.

Petitioners' exceptions further assert the difficulty of proving a negative, namely that A.H.A. was not rude, arrogant and disregarding of rules of conduct particularly in light of the failure of the Board to set forth a single specific incident of such behavior. Under the circumstances, argue petitioners, they were compelled to recount the only single incident of which they were aware that may have precipitated the problem and caused the charge of rudeness and arrogance to be leveled. Petitioners assert that the nature of the unsubstantiated reasons advanced made it necessary to produce character evidence concerning

A.H.A.'s lack of rudeness, arrogance and leadership qualities. Accordingly, petitioners argue, since Judge Errickson had the benefit of observing the witnesses and assessing their credibility, his finding of fact as to the evidence cited should be affirmed.

Petitioners, in assessing the relative merits of the hearsay evidenced introduced by the parties, contend that the testimony of the Principal, a member of the selection committee, was unsupported in the record by any specific instance of rudeness, arrogance, or disregard of school rules on the part of A.H.A., while the evidence elicited regarding the contention of the "unnamed informant" was supported by uncontested testimony.

Petitioners further argue that A.H.A.'s basic right to be treated fairly was violated by the bare assertion of generalized allegations of rudeness, arrogance and disregard of school rules. Having made such charges, assert petitioners, the Board was obliged to substantiate them, which it failed to do.

For the foregoing reasons, petitioners assert that the Commissioner should adopt the recommendations of Judge Errickson.

The Commissioner has carefully reviewed the entire record in the instant matter as well as the initial decision and the exceptions submitted by the parties. In weighing the relative merits of the hearsay evidence introduced by the parties, the Commissioner observes that N.J.A.C. 1:1-15.8 states as follows:

> "(a) Subject to the judge's discretion to exclude evidence under N.J.A.C. 1:1-15.2(a) or a valid claim of privilege, hearsay evidence shall be admissible in the trial of contested cases. Hearsay evidence which is admitted shall be accorded whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability.
>
> "(b) Notwithstanding the admissibility of hearsay evidence, some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or the appearance of arbitrariness."

It is clear herein that Judge Errickson deemed the hearsay evidence contained within his decision as being sufficiently supported by legally competent evidence to sustain his finding of fact. Having heard the testimony and having had

opportunity to observe the witnesses and assess their credibility and demeanor, Judge Errickson must be accorded a presumption of correctness in his findings relative to the respective merits of the evidence presented. The Commissioner so holds.

In rendering a determination relative to the actions of a local board of education and its agents, the Commissioner has long held as in Boult and Harris v. Board of Education of the City of Passaic, 1939-40 S.L.D. 7 (1946), aff'd State Board 15, 135 N.J.L. 329, (Sup. Ct. 1947), aff'd 136 N.J.L. 521 (E. & A. 1948) the following:

> "***[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.***"
>
> (at 13)

In the instant matter, the Commissioner observes that the actions of the Board and its administrative agents in refusing petitioners herein a simple statement of reasons for the nonadmission of A.H.A. to the National Honor Society and requiring them to seek relief respectively from the Superior Court and the Commissioner represent a clear violation of the directives of the National Honor Society which are cited by Judge Errickson in his initial decision, ante, and incorporated herein by reference. These directives unequivocally require that reasons for nonelection be provided to dissatisfied students and that due process be provided to all potential members so that appeals from students and parents who believe errors have been made may be heard.

Furthermore, the Commissioner views such recalcitrance on the part of the Board to be so violative of the principles of fundamental fairness and due process as to rise to the level of a shocking abuse of authority.

The Commissioner further observes that those reasons eventually provided by the Board were so lacking in the specificity required by Judge Errickson in his Decision on Motion as affirmed by the Commissioner, as to make it both impossible for petitioners to refute them or for A.H.A. to correct those alleged deficiencies of character. Having charged A.H.A. with rudeness, arrogance and disregard for school rules, the same principles of fundamental fairness placed a burden upon the Board to cite specific examples of such conduct, a burden which the Board utterly failed to meet.

Finally, the Commissioner is constrained to observe that the Board's reasons for failure to admit A.H.A. to the National Honor Society likewise included allegations of a lack of

demonstrated evidence of excellence in leadership qualities, although the record fails to indicate any but subjective judgment for determining how a student demonstrates such qualities in sufficient degree to warrant membership. In assessing the viability of this reason as presented to A.H.A. and her parents, the Commissioner further notes that the selection committee and the administration once again failed to provide any explanation of how the activities listed by A.H.A. were less demonstrative of the required qualities of leadership than those presented by other successful candidates. Even assuming arguendo that these qualities were at the time of the selection process lacking in sufficient degree, the Commissioner cannot at this late date fail to notice that since March 1980, in addition to her activities as listed on her National Honor Society application, A.H.A. has been elected vice president of the Senior Class, vice president of the Glee Club and, as introduced in unrefuted testimony in the record, is regularly chosen to take charge of classes in the absence of the teacher. The Commissioner regards these as being no mean accomplishments in light of the fact that A.H.A. entered Bernards High School in the middle of her sophomore year.

Accordingly, and for the reasons cited herein, the Commissioner affirms the findings of Judge Errickson and adopts them as his own. The Board is forthwith directed to install A.H.A. as a member of the Bernards High School National Honor Society retroactive to the date of the installation of other junior class members in March 1980. Any recording notation or comment as to the method whereby A.H.A. was admitted to such membership is explicitly forbidden to be made on any transcript or record maintained by Bernards High School or sent by it to any potential college admissions office or employer. Further, the Commissioner directs that the Board will, after further study of the National Honor Society selection process, establish procedures consistent with both the National Honor Society Handbook and this decision.

In reaching his conclusion in the matter controverted herein, the Commissioner is constrained to observe that it is not his desire or intention to substitute his judgment for that of local boards of education, administrators or teachers carrying out their responsibilities in the many selection processes in which they are continually engaged. When such actions are challenged as being arbitrary or capricious, however, the Commissioner cannot discharge the responsibility of his office without examining the prevailing factual pattern on a case by case basis.

COMMISSIONER OF EDUCATION

March 13, 1981

J.B.A. AND A.M.A., individually and as guardians ad litem of A.J.A.,	:	
PETITIONERS-RESPONDENTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BERNARDSVILLE, SOMERSET COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, March 13, and May 5, 1981

Decided by the State Board of Education, May 6, 1981

For the Petitioners-Respondents, Schachter, Wohl, Cohn & Trombadore (Richard J. Schachter, Esq., of Counsel)

For the Respondent-Appellant, Young, Rose & Millspaugh (Peter M. Burke, Esq., of Counsel)

The decision of the Commissioner dated March 13, 1981 is affirmed due to the tie vote of the State Board of Education.

For the record, the following is the recorded vote of the State Board Members in this matter.

Those voting to affirm the Commissioner's decision:

Susan N. Wilson
Jack Bagan
Mateo DeCardenas
Anne S. Dillman
Katherine Neuberger

Those voting to reverse the Commissioner's decision:

S. David Brandt
Ruth H. Mancuso
P. Paul Ricci
Sonia B. Ruby
Robert J. Wolfenbarger

December 2, 1981

Pending New Jersey Superior Court

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 0758-80
AGENCY DKT. NO. 30-2/80A

IN THE MATTER OF:

DORIS V. BUFF
v.
BOARD OF EDUCATION OF
NORTH BERGEN, HUDSON COUNTY

Record Closed: 12/12/80 Decided: 2/4/81

Received by Agency: 2/5/81 Mailed to Parties: 2/9/81

APPEARANCES:

William A. Cambria, Esq., for Petitioner
(Sauer, Boyle, Dwyer, Canellis & Cambria, attorneys)

Joseph J. Ryglicki, Esq., and **Robert J. Pompliano,** Esq.,
for Respondent (Pompliano & Ryglicki, attorneys)

BEFORE **JACK BERMAN,** ALJ:

On February 1, 1980, a Verified Petition was filed with the Division of Controversies and Disputes alleging that Respondent, a few days before Petitioner was to acquire tenure, improperly terminated her from teaching in violation of her teaching employment contract which required a 60-day written notice of intention to terminate. Additionally, Petitioner alleges that Respondent violated the Open Public Meetings Act,

N.J.S.A. 10:4-6 et seq. and her fourteenth amendment due process rights. Finally, Petitioner contends that the actions taken by the Respondent were arbitrary, capricious or unreasonable.

The Commissioner of Education obtains jurisdiction to hear and determine controversies from N.J.S.A. 18A:6-9.

This matter was transferred to the Office of Administrative Law as a contested case on February 8, 1980.

At a prehearing conference on May 9, 1980, the following issues were identified:

A. Whether the termination of Petitioner's employment by Respondent was in violation of the Tenure Statute?

B. Whether Respondent violated its contract with Petitioner in failing to give Petitioner 60 days notice in writing of termination?

C. Whether termination was done in violation of the Sunshine Law?

D. Whether Respondent's determination in terminating Petitioner's employment was arbitrary, capricious or unreasonable?

E. Whether Petitioner's due process rights were denied?

F. Was Respondent compelled to pass a formal resolution in terminating Petitioner's employment?

On October 14 and October 16, 1980, a hearing was held pursuant to N.J.S.A. 52:14F-1 et seq.

At the hearing, certain exhibits were received in evidence, which appear in the attached appendix .

The court also heard the testimony of the following witnesses:

Doris V. Buff, Petitioner
Dominick Morro, Board Member

John Sempier, President of the North Bergen Federation of Teachers and a teacher employed by Respondent.

At the hearing, the attorneys stipulated to the following:

The only notice Petitioner received of a meeting was for a meeting held on December 5, 1979. Petitioner received no further notice that her employment would be discussed at any other meeting.

Petitioner, a certified elementary teacher, had been teaching for Respondent since January 1977.

As recent as October 18, 1979, Respondent entered into a contract with Petitioner for her continued teaching services for the 1979-1980 school year. The contract (J-15) provided for a 60-day written notice of termination by either party.

On December 5, 1979, pursuant to the previously stipulated notice, Petitioner, her attorney and her union representative appeared before Respondent Board in closed session to discuss certain parental complaints. At the conclusion of the meeting, Petitioner was informed by the Board that if there was anything further, the Board would be in touch with her. It was clear to both Petitioner and her union representative that the matter was concluded at that meeting.

On December 20, 1979, with no notice to Petitioner, the Board, in closed session, voted 6-1 to terminate Petitioner's employment.

On December 21, 1979, Petitioner received a letter from the School Superintendent stating that the contract was terminated "effective immediately" and made provision for her to receive two months salary.

Petitioner theorizes that her abrupt termination resulted from political pressure exerted upon her by two members of Respondent Board and others for her to campaign for them and their causes.

Although she had in previous years acquiesced to their demands in order to preserve her teaching position which had been threatened, she refused to involve herself in the November 1979 campaign based on advice given her by a teachers' union representative. As a result, she contends, the Board, in reprisal, terminated her employment only a few working days before she was due to become tenured.

One of the Board members accused by Petitioner testified for Respondent. He attempted to refute her charge by stating that Petitioner in the past had volunteered her campaigning services to him. (However, as will be demonstrated later, the court was not impressed with the witness' demeanor or credibility. His recollections of many events was vague.)

The second Board member accused by Petitioner did not testify. Respondent's attorney represented to the court that that Board member "is not going to attend [court] and will not testify on behalf of the Board of Education."

Petitioner, since her termination, has received two months salary.

Commencing May 27 through June 1979, she was employed by Paternay Brothers in New York City and received a weekly salary of $208. Since September 1980, she has been elsewhere employed at an annual salary of $7,550. If she is reinstated, she requests that it occur in September 1981 in order to afford her an opportunity to fulfill her current employment commitment.

For March, April and part of May 1979, she has collected unemployment in the sum of $117 per week.

Petitioner's teacher evaluations of 11/30/77 (J-2), 4/19/78 (J-3) and 3/26/79 (J-4) are all commendable. Her evaluation of 12/11/79 (P-1), nine days before the Board took its questionable action to terminate her, is also commendable except for the category "utilizes effective teaching techniques," which was marked unsatisfactory.

Having reviewed the testimony and other evidence, and having observed the demeanor of the witnesses and assessed their credibility, this court **FINDS**:

1. Petitioner was employed by Respondent as a duly certified teaching staff member in Respondent's school system in 1977, having received an appropriate certificate from the State of New Jersey in 1974.

2. From January 1977 through June 1977, Petitioner taught second grade at Respondent's Kennedy School. During the 1977-1978 school year, she was assigned to the first grade at McKinley School. At the beginning of the 1978-1979 school year, she was assigned to the third grade at Respondent's

Horace Mann School. On November 1, 1978, she was transferred to Respondent's Franklin School, where she taught sixth grade.

3. For the 1979-1980 academic year, Petitioner was employed pursuant to a resolution of Respondent Board dated September 3, 1979 (J-6) at an annual salary of $14,100.

4. An employment contract dated October 18, 1979 was executed by the Petitioner and the Respondent (J-15). It contained a standard clause providing for termination by either party on 60 days notice.

5. On December 4, 1979, Petitioner was notified that Respondent Board wanted to meet with her on December 5. At the meeting, and with her attorney and union representative present, Petitioner responded to certain questions and concerns of the Respondent Board regarding parental complaints. At the conclusion of the meeting, Petitioner was informed that if there was anything further, the Board would be in touch with her. It was clear to both Petitioner and the North Bergen Federation president in attendance that the matter was concluded at that meeting. This meeting was not a hearing.

6. It was stipulated that the Board did not provide any further notice to Petitioner that her employment status would be considered or discussed at any subsequent Board meeting.

7. However, without notice to Petitioner, the Board did consider her employment status at a closed meeting on December 20, 1979 (J-10A).

8. On December 20, 1979, the Board held a regular meeting. During the meeting, the Board passed a resolution to discuss personnel matters in closed session after the meeting. At 9:10 p.m. (J-10), the Board adjourned and immediately thereafter went into closed session (J-10A). No notice either to the general public or to Petitioner was provided as to that meeting. During the closed session, the Board purported to adopt a resolution authorizing the Superintendent to terminate Petitioner's employment. This purported resolution was never proposed or adopted at an official public meeting of the Board.

9. The purported resolution passed at the regular meeting on December 20, 1979, authorizing the closed session immediately following the meeting, stated that the Board would make known any action taken at its next meeting. However, no notice of any action taken was given by the Board at its special meetings of December 26, 1979 (J-11), January 9, 1980 (J-12), and January 16, 1980 (J-13), or at its next regular meeting held on January 17, 1980 (J-14).

10. Two members of the Board had made demands that petitioner perform certain political activities, with the clear implication that her cooperation was required to retain her teaching position. In approximately October or November 1979, Petitioner rejected these demands.

11. Shortly thereafter, the Board requested that Petitioner meet with them on December 5, 1979 to discuss certain parental complaints.

12. After the Board's purported termination of Petitioner's employment on December 20, 1979, Respondent paid Petitioner's salary for the months of January and February 1980.

13. Petitioner had a contractual right to employment for an additional 60 days, during which time she would have obtained tenure.

14. Petitioner has not received any salary from Respondent since February 1980 to the present.

15. Petitioner obtained employment at Paternay Brothers in New York City and received $208 weekly from them from May 27 through June 30, 1979.

16. Since September 1980, Petitioner has been elsewhere employed at an annual salary of $7,550.

This court does accept and believe Petitioner's testimony that her employment was threatened by two Board members unless she involved herself in certain political campaigns. Respondent has failed to satisfactorily rebut Petitioner's testimony in this regard. The testimony of Board member Morro, one of the two Board members Petitioner accused, is suspect. His recollection of many events was vague such as ". . . me and dates ain't so good" [3T, 9]; "I think . . . I'm not sure" [3T, 10]; ". . . I think it was Franklin School or Lincoln School. One or the other" [3T, 13]; Q. "Mr. Clark? A. The name doesn't ring a bell" [3T,18]. After counsel identified that Mr. Clark was the principal of the Franklin School, the witness responded, "Oh, Peter Clark" [TR3, 18], "I don't remember" [TR3, 18]; "I can't answer that. I don't remember" [TR3, 18]; "I imagine they did" [TR3, 20]; "I think they do, Yes" [TR3, 20]; "I imagine so. It usually is" [TR3, 22]; "I do not know. I imagine when she was notified that she was terminated" [TR3, 22]. In all, the court was not at all impressed with the witness' credibility or demeanor. His attitude seemed to be quite flippant.

The other Board member likewise accused by Petitioner failed to testify at all. The failure of Respondent to produce this Board member raises an inference that

Respondent feared exposure of facts which would be unfavorable to it. State v. Clawans, 38 N.J. 162, 170 (1962); Yacker v. Weiner, 109 N.J. Super. 351, 361 (Ch. Div. 1970) aff'd 114 N.J. Super. 526 (App. Div. 1971); Hickman v. Pace, 82 N.J. Super. 483, 490 (App. Div. 1964); O'Neil v. Bilotta, 18 N.J. Super. 82, 86 (App. Div.) aff'd 10 N.J. 308 (1952).

The manner that the Board chose to terminate its contract with Petitioner was shocking and illegal. Respondent failed to render any explanation to the court of its reason for violating the 60-day notice of termination provision in the contract with only a few working days remaining for Petitioner to achieve her tenure. In the words of Justice Jacobs in his dissenting opinion in Canfield v. Board of Education of Pine Hill Borough, 51 N.J. 400, 402 (1968), "The Board's abrupt conduct violated not only the elemental decencies of the relationship but the very terms of its contractual undertakings."

He further explained that:

> Tenure is designed to aid in the establishment of a competent and efficient school system by affording to teachers a reasonable measure of security after a reasonably fixed probationary period. With this goal in mind, the provisions of the Tenure Act should be construed and administered fairly and sensibly rather than harshly. See Bd. of Ed. of Manchester Tp., Ocean County v. Raubenger, 78 N.J. Super. 90 (App. Div. 1963). Here the Board had extensive and timely opportunity to determine the teacher's qualifications and performance . . . .

Id. at 402-03.

However, the majority of the court disagreed with Justice Jacob's holding in his dissent and also with the holding of the majority of the Appellate Division by deferring to Superior Court Judge Gaulkin's dissenting opinion which appears in Canfield v. Board of Education of Pine Hill Borough, 97 N.J. Super. 483 (App. Div. 1967). Judge Gaulkin opined that contracts do not establish tenure. Tenure, he stated, "is statutory and arises only by passage of the time fixed by the statute, and the discharge of an employee before the passage of the required time bars tenure, even if the discharge is in breach of an employment contract which, if not breached, would have extended to a date which would have given tenure. Cf. Zimmerman v. Board of Education of City of Newark, 38 N.J. 65, 73-74 (1962)." 97 N.J. Super. at 490. He further stated that "I contend that the contract was properly cancelled (subject to plaintiff's right to 60 days' salary) when the notice of cancellation was given but, even if the contract did not become legally terminated until 60 days after the notice of dismissal, the notice itself barred tenure." Id. at 491.

Subsequent to Canfield, however, the United States Supreme Court decided the cases of Perry v. Sindermann, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972) and Board of Regents v. Roth, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). These cases introduced concepts of entitlement and procedural due process which were not considered in Canfield. Once these constitutional concepts are applied to the facts in Canfield and the facts here, Canfield can no longer survive as viable precedent.

In Sindermann, supra, and Roth, supra, the United States Supreme Court recognized that a contractual entitlement to employment would constitute a "property" interest which could not be removed without a hearing. Petitioner Buff had a contractual right to employment for an additional 60 days, during which time she would have obtained tenure. In Nicoletta v. North Jersey District Water Supply Commission, 77 N.J. 145 (1978), the New Jersey Supreme Court recognized the principles of due process as delineated in Sindermann, supra, and Roth, supra. As the Court said at 154-155:

> The 'property' interest contemplated by the Fourteenth Amendment may take many forms over and above the ownership of tangible property. See Fuentes v. Shevin, 407 U.S. 67, 86, 92 S. Ct. 1983, 1997, 32 L. Ed. 2d 556, 573 (1972); see generally Reich, The New Property, 73 Yale L.J. 733 (1964). But in this context the key concept is 'entitlement' such as involved in statutory eligibility for welfare benefits, Goldberg v. Kelly, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970); tenure employment, Slochower v. Board of Higher Educ., 350 U.S. 551, 76 S. Ct. 637, 100 L. Ed. 692 (1956); contractual right to employment, Wieman v. Updegraff, 344 U.S. 183, 73 S. Ct. 215, 97 L. Ed. 216 (1952); a clearly implied promise of continued employment, Connell v. Higginbotham, 403 U.S. 207, 91 S. Ct. 1772, 29 L. Ed. 2d 418 (1972), or the like. The chief ingredient of this kind of 'property' interest such as to quicken the right to protection by procedural due process is a 'legitimate claim of entitlement.' Board of Regents v. Roth, supra, 408 U.S. at 577, 92 S. Ct. at 2709, 33 L. Ed. 2d at 561. [emphasis supplied.]

This is consistent with the holding of the Supreme Court in Roth, supra, in which the Court said:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims. [33 L.Ed. 2d at 561; emphasis supplied.]

See also Connell v. Higginbotham, 403 U.S. 207, 91 S.Ct. 1772, 29 L.Ed. 2d 418 (1971), in which the Court proscribed dismissal from public employment without a hearing required by due process for a teacher who, although without tenure or a formal contract, had a clearly implied promise of continued employment.

In this matter, Petitioner Buff had completed three full years of employment; she needed only to return to work in January 1980, to obtain tenure. As of December 20, 1979, she was working under a contract which entitled her, at the very least, to 60 additional days of employment. Thus, on December 20, 1979, Petitioner Buff possessed a contractual entitlement to 60 additional days of employment. This is substantially more than "mere expectation" and even greater than the implied promise of continued employment in Connell. It is a contractual right to employment. See Wieman v. Updegraff, 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216 (1952). Significantly, Petitioner Buff would have obtained tenure during this period.

It is true that there have been a number of decisions by the Commissioner of Education upholding termination of employees under the 60-day notice provisions of contracts, even in the face of challenges under Roth and Sindermann. All of these cases, however, are clearly distinguishable. In Kondak v. Board of Education of the Township of Bernards, 1978 S.L.D. 955 (decided December 22, 1978), Petitioner received more than 60 days notice. However, when his termination was effective at the end of the notice period, he still had insufficient time to acquire tenure. In Kubas v. Board of Education of the City of Linden, 1980 S.L.D. _____ (decided March 7, 1980), the Petitioner was terminated pursuant to a 60-day clause on March 30, 1977. Although she had sufficient time in service to obtain tenure, she did not receive her standard teaching certificate, an absolute prerequisite to tenure, until three months after her termination.

Similarly, in Arzberger v. Board of Education of the Township of Neptune, 1976 S.L.D. 835 (decided September 24, 1976) aff'd State Board of Education 1977 S.L.D. 1271, aff'd Appellate Division, 1977 S.L.D. 1271, the Board properly exercised a 30-day termination clause, stating their reasons for doing so, well in advance of the time Petitioner would have obtained tenure. When her termination was effective, she still had less than three years of employment. Finally, in Breen v. Board of Education of the Borough of Caldwell -West Caldwell, 1979 S.L.D. _____ (decided August 10, 1979), the Board invoked a 60-day termination clause in June when the Petitioner would not have obtained tenure until September.

None of these cases considers the circumstance of the right to tenure accruing during the notice period. However, another decision of the Commissioner indicates what would occur in such a situation.

In K'Burg v. Board of Education of the Township of Lower Alloways Creek, 1973 S.L.D. 636 (decided December 12, 1973), Petitioner was employed as a kindergarten teacher for four years, commencing in September 1968. However, her employment was under an emergency certificate rather than the standard certificate required for tenure. On March 14, 1973, the Board notified Petitioner that her employment would be terminated as of June 30, 1973.

Subsequent to the notice, but prior to the effective date of termination, in April 1973, she obtained her standard certificate. The Commissioner ruled that Petitioner obtained tenure in April 1973, upon receipt of her standard certificate. Accordingly, the termination notice was rendered ineffective, and the Commissioner ordered Petitioner reinstated with back pay.

Similarly, in this case, Petitioner Buff would have obtained the required service time to obtain tenure during the notice period. The action of the Board in acting to terminate her immediately denied to her a contractual entitlement to tenure. Under the precedents of Roth and Sindermann, the Board should have been required to grant her a full-scale hearing prior to termination.

This the Board did not do, at least not in conformity with law. In the first instance, the Board did not comply with the provisions of the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq. Petitioner appeared with her attorney before the Board pursuant to notice on December 5, 1979. A discussion took place regarding certain parental complaints concerning her job performance; everyone agreed that the matter was concluded. The Board member who testified concurred that the Board would be in further contact with her if anything else were to occur.

The parties stipulated that Petitioner did not receive any notice that her employment status would be discussed at the December 20, 1979 meeting of the Board. It appears that certain matters, specifically evaluations of Petitioner's performance during her term of employment, were discussed by the Board on December 20, although these matters had not been discussed at the earlier meeting. Since Petitioner received neither

direct notice that her employment status was to be discussed nor general notice that the Board had her status under continuing review, Petitioner was deprived of her rights under the Open Public Meetings Act.

A similar situation occurred in Schwartz v. Board of Education of the Borough of Ridgefield, 1980 S.L.D. _____ (decided March 31, 1980). In that matter, the Petitioner was not notified that his employment status was to be discussed by the Board. The Commissioner ruled that the action of the Board violated the Open Public Meetings Act, and the Petitioner was ordered reinstated with back pay.

In Polillo v. Deane, 74 N.J. 562 (1977), the Supreme Court ruled that strict adherence to the requirements of the Open Public Meetings Act is required. Even substantial compliance is insufficient, and good faith or lack of wrongful motivation will not excuse violation of the act. In this regard, the December 20, 1979 meeting was a regular meeting of the Board; no notice of an additional special meeting to be held on that date had been given. The resolution passed at the regular meeting to hold a closed session thereafter was insufficient to satisfy the notice requirements of the Open Public Meetings Act N.J.S.A. 10:4-9. See Jenkins v. Newark Board of Education, 166 N.J. Super. 357 (Law Div. 1979), aff'd 166 N.J. Super. 300 (App. Div. 1979). Accordingly, when the regular meeting of December 20, 1979 was adjourned at 9:10 p.m. that evening, no further meeting or action of the Board was permitted. See Dunn v. Mayor and Council of Laurel Springs, 163 N.J. Super. 32 (App. Div. 1978).

Further, the Open Public Meetings Act resolution adopted at the regular meeting on December 20, 1979 (J-10), includes a provision that the results of the decision in closed session would be made known at the next meeting of the Board. However, a review of the minutes of the next four meetings of the Board —— the special meetings of December 26, 1979 (J-11), January 9, 1980 (J-12), and January 16, 1980 (J-13), and the regular meeting of January 17, 1980 (J-14) —— reveals that no notice was given at any time of any action taken during the closed session on December 20, 1979. Since it has already been shown that official action must be taken at a public meeting, this failure to act on the record at the following special or regular meeting of the Board constitutes a violation of both the Open Public Meetings Act and the Education Law.

Accordingly, it is **CONCLUDED** that the Board's action is invalid.

The minutes of the private session of the Board held on December 20, 1979 (J-10A), indicate that the Board purported to adopt a resolution authorizing the Superintendent of Schools to terminate the employment of Petitioner. This purported resolution was never considered or adopted by the Board in public session. No public notice of the adoption of the purported resolution was ever given, despite the statement to the contrary contained in the Open Public Meetings Act resolution adopted by the Board at its public meeting on December 20, 1979.

In Feigen v. Board of Education of the Township of Livingston, 1976 S.L.D. 886 (decided November 3, 1976), the Commissioner set aside the action of a Board seeking to merge two elementary schools into a single zone for school attendance purposes. That decision states:

> . . . private and final action by a local board of education has been consistently declared ultra vires by the Commissioner and the courts. . . .

Id. at 890.

This decision is based upon the statutory requirement contained in N.J.S.A. 18A:10-6 — that official Board action must be taken in public sessions. In Cullum v. Board of Education of the Township of North Bergen, 15 N.J. 285 (1954), the Supreme Court set aside the Board action to appoint a Superintendent of Schools when the matter had been predetermined in private session. Even though the Board attempted to act in public session following their private determination, the Court set aside the action as a sham. The Court said:

> The Legislature has unmistakably and wisely provided that meetings of boards of education shall be public (R.S. 18:5-47) [now N.J.S.A. 18A:10-6]; 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 way precludes advance meeting during which there is free and full discussion, wholly tentative in nature; it does, however, justly preclude private final action such as that taken by the majority in the instant matter. [15 N.J. at 294; emphasis supplied.]

A recent Commissioner's decision on this question involved facts similar to the present case. Bickford v. Board of Education of the Borough of Elmwood Park, 1978 S.L.D. 855 (decided November 15, 1978). The Petitioner in that case had been employed as a teacher from March 16, 1973 through June 30, 1973. In April, Petitioner was advised

that his contract would not be renewed; however, on May 11, 1973, the Board adopted a resolution offering a contract to Petitioner. Petitioner accepted the offer of employment on May 25, 1973.

Thereafter, the Board determined at its work session of July 2, 1973, to terminate Petitioner's employment. By letter dated July 3, 1973, Petitioner was notified by the Superintendent that he would not be employed for the following school year.

The Commissioner determined that a contract existed between the Petitioner and the Board and that the Board never took action at any public session to either terminate Petitioner's employment or invoke the 60-day termination clause, which was routinely included in the contracts of nontenured teachers.

Notwithstanding the fact that the Board had made a determination at its July 2, 1973 work session to terminate Petitioner's employment, the Commissioner ruled as follows:

> The Board herein, having entered into a contractual relationship with petitioner for his services as a teacher for the 1973-1974 school year, took no official action at a duly constituted official public meeting to attempt to withdraw its offer. Nor did it invoke the termination clause of that contract.

Id. at 857 (emphasis added).

The Commissioner ruled that the Petitioner was entitled to compensation for salary lost during the contractual year involved. Since Bickford still had insufficient time in service to obtain tenure, reinstatement was not appropriate. The only deprivation suffered was loss of the one-year contract. This was fully remedied by the award of compensation for the year.

The Respondent herein argues pursuant to N.J.S.A. 10:4-13 that the public may be excluded only if an appropriate resolution is adopted. However, Respondent states that "the Open Public Meetings Act does not require a public body to provide adequate notice of a closed session if the appropriate resolution is passed, Atty. Gen. F.O. 1976 No. 39." Post-hearing brief on behalf of Respondent at page 1. Respondent cites Cole v. Woodcliff Lake Board of Education, 155 N.J. Super. 398 (Law Div. 1978) as authority as follows:

> Furthermore the language of the act does not require that the public body first notify the affected individual of its intention to act and secure from that person a consent for it to act in private session. The onus is placed on the employees to make such a written request of the body to hold a public discussion.
>
> ...Plaintiff in this case must have been aware of the fact that her contract with the board was due to expire soon and that a question of her securing tenure as secretary with the board was imminent. [at page 405.]

However Respondent's reliance on Cole, supra, is misplaced. Cole is a trial level decision. The Appellate Division has stated clearly in Rice v. Union City Regional High School Board of Education, 155 N.J. Super. 64 (App. Div. 1977) and Oliveri v. Carlstadt, East Rutherford Board of Education, 160 N.J. Super. 131 (App. Div. 1978) that a public employee has the right to advance notice when his or her employment status is to be discussed.

Also in Cole the Board adopted its resolution in public session. In no way does Cole authorize adoption of a resolution in private session. Nor does N.J.S.A. 10:14-12 (b)(8) permit the resolution to be adopted in private session. That statute merely permits a public body to exclude the public from that portion of a meeting at which the public body discusses personnel matters. The requirement of N.J.S.A. 18A:10-6 that all acts of Boards of Education take place in public session remains intact. Indeed, it would be illogical to contend that the Open Public Meetings Act, which has as its principal aim to open meetings of public bodies to the public, overrides N.J.S.A. 18A:10-6 and permits resolutions to be enacted in private session.

In the present case, the Board has never taken any formal action at any official public meeting to invoke the 60-day termination clause in Petitioner's contact. Accordingly, the purported resolution of December 20, 1979 (J-10A) and the purported termination of December 21, 1979 (J-7) are void.

Since no such action was taken, Mrs. Buff's contract was never terminated. It follows that she has attained tenure and is entitled to reinstatement with full back pay. Respondent contends that a teaching staff member who is illegally dismissed is entitled to no greater remedy than that specifically prescribed by the statute and cites N.J.S.A. 18A:6-30.1 which states:

> When the dismissal of any teaching staff member before the expiration of his contract with the board of education shall be decided, upon appeal, to have been without good cause, he shall be entitled to compensation for the full term of the contract, but it shall be optional with the board whether or not he shall continue to perform his duties for the unexpired term of the contract.

However, the statute does not apply since Petitioner has obtained tenure as of January 1980. In any event, reinstatement to employment when termination is improper is a proper remedy and occurs frequently. See Meyer v. Board of Education of Sayreville, 1972 S.L.D. 673 (decided April 12, 1972); Moroze v. Board of Education of Essex County Vocational School District, 1975 S.L.D. 1103 (decided June 26, 1975); Stein v. North Bergen Board of Education, 1975 S.L.D. 524 (decided July 7, 1975), appeal dismissed 1975 S.L.D. 531.

Additionally, the Supreme Court has ruled that a teaching staff member denied reappointment is entitled to a statement of reasons for his or her nonretention. Donaldson v. Board of Education of North Wildwood, 65 N.J. 236 (1974). The Court took this action for several important reasons of public policy. Included among these reasons was that:

> . . . perhaps the very requirement that reasons be stated would . . . serve as a significant discipline on the board itself against arbitrary or abusive exercise of its broad discretionary powers. [Id. at 245.]

The Court stated that there are certain restraints on the discretionary powers of a board in making personnel decisions. The Court noted that:

> . . . a local board may not refuse to rehire a teacher because of his membership in a labor union or his exercise of constitutional rights. [Id. at 242; emphasis supplied.]

See also English v. College of Medicine and Dentistry of New Jersey, 73 N.J. 20 (1977), in which the Court noted:

> The only limitations (other than contractual or statutory) upon the right to discharge public employees are founded on constitutionally protected interests — such as freedom of speech.

Id. at 23.

The failure of the Board to provide any reason or make any finding regarding Petitioner's termination adds to the impression of arbitrary action.

Under all the circumstances as just enunciated, it is **CONCLUDED:**

1. Respondent's action of terminating Petitioner's employment was arbitrary, capricious and unreasonable.

2. Respondent violated its contract with Petitioner in failing to give Petitioner 60 days notice in writing.

3. The purported termination was done in violation of the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq. and the Education Law, N.J.S.A. 18A:10-6.

4. Respondent violated Petitioner's due process rights. Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed. 2d 570 (1972) and Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed. 2d 548 (1972).

5. The Respondent Board failed to pass a formal resolution terminating Petitioner's employment.

6. Since the Board's action was void, it follows that the Petitioner attained tenure as of January 1980.

It is, therefore, **ORDERED** that Respondent reinstate Petitioner effective September 1981;

And it is further **ORDERED** that Respondent pay to Petitioner all back pay with all rights and benefits from March 1980 until her reinstatement in September 1981 less in mitigation thereof all sums earned and to be earned by Petitioner by way of employment in accordance with FINDINGS OF FACTS 12, and 14-16 of this opinion. Unemployment compensation received by petitioner is not to be included. Respondent shall not benefit from its wrongdoing.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, FRED G. BURKE,** who by law is empowered to make a final decision in this matter. However, if Fred G. Burke does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

February 4, 1981
DATE

for **JACK BERMAN**, ALJ

Receipt Acknowledged:

February 5, 1981
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

February 9, 1981
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

gyd

EXHIBITS

JOINT EXHIBITS

J-1	Teaching Certificate of Petitioner
J-2	Copy of Teacher Evaluation 11/30/77 of Petitioner
J-3	Teacher Evaluation form 4/19/78 of Petitioner
J-4	Teacher Evaluation form 3/26/79 of Petitioner
J-5	Letter to Petitioner from Superintendent of Schools 8/21/79, letter of assignment
J-6	Resolution of Respondent 9/3/79 - setting annual salary of teaching staff members including Petitioner
J-7	Letter to Petitioner from Superintendent of Schools North Bergen 12/21/79, terminating Petitioner's employment
J-8	Minutes of Respondent Board of Education 12/5/79 - open meeting
J-8(a)	Minutes of Respondent Board of Education 12/5/79 - closed session
J-9	Minutes of Respondent Board of Education 12/19/79 - open meeting
J-9(a)	Minutes of Respondent Board of Education 12/19/79 - closed session
J-10	Minutes of Respondent Board of Education 12/20/79 - regular meeting
J-10(a)	Minutes of Respondent Board of Education 12/20/79 - closed session
J-11	Minutes of Respondent Board of Education 12/26/79 - Public meeting
J-11(a)	Minutes of Respondent Board of Education 12/26/79 - closed session
J-12	Minutes of special meeting Respondent Board of Education 1/9/80
J-13	Minutes of special meeting Respondent Board of Education 1/16/80
J-14	Minutes of regular Respondent Board of Education meeting 1/17/80
J-15	Petitioner's employment 10/18/79 (covering period 9/1/79 - 6/30/80)

PETITIONER'S EXHIBITS

P-1	Petitioner's evaluation 12/11/79
P-2	Petitioner's responsive statement to P-1

OAL DKT. NO. EDU 0758-80

RESPONDENT'S EXHIBITS

A-1	Memo to Buff from Clark 10/19/79
R-2	Memo to Buff from Clark 10/23/79

DORIS V. BUFF,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BERGEN, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law.

The Commissioner observes that no exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

Petitioner shall be reinstated by the Board effective September 1981 with recognition of her tenure status and back pay and emoluments for the period from the date of her termination by the Board to the date of her reinstatement mitigated by pay already received for the months of January and February 1980 and any substitute employment.

It is so directed.

COMMISSIONER OF EDUCATION

March 19, 1981

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3312-80
AGENCY DKT. NO. 231-5/80A

IN THE MATTER OF:

ANDREW HORUN,
Petitioner,
v.
BOARD OF EDUCATION OF THE WATCHUNG HILLS REGIONAL HIGH SCHOOL DISTRICT, SOMERSET COUNTY,
Respondent.

Record Closed: December 30, 1980
Received by Agency: 2/9/81

Decided: February 6, 1981
Mailed to Parties: 2/11/81

APPEARANCES:

For Petitioner: **Stephen E. Klausner**, Esq. (Klausner & Hunter)

For Respondent: **William S. Jeremiah**, Esq. (Buttermore, Mullen & Jeremiah)

BEFORE **ERIC G. ERRICKSON**, ALJ:

STATEMENT OF CASE:

Petitioner, a tenured teaching staff member employed by the Watchung Hills Regional Board of Education (Board), appeals on the basis of his seniority rights from an

action of the Board during April 1980 abolishing his full time guidance counselor position and establishing and assigning him to part time guidance and part time mathematics teaching positions for the ensuing school year. The Board, conversely, asserts that its reassignment of petitioner was a legal exercise of its statutory discretionary authority to staff its schools.

PROCEDURAL RECITATION:

The matter was filed before the Commissioner of Education who, pursuant to the provisions of N.J.S.A. 52:14F-1 et seq, transmitted it as a contested case to the Office of Administrative Law. At a prehearing conference on September 10, both parties gave Notice of Motion for Summary Judgment. After a stipulation of facts had been entered by the parties, Briefs were filed completing the record on December 30, 1980.

FACTUAL CONTEXT:

There is no dispute over the relevant facts, all of which are stipulated as follows:

Petitioner is tenured having been employed continuously by the Board since 1969. Until the 1980-81 school year, he was assigned as a full time guidance counselor except for the 1974-75 school year when, by agreement, he taught two (2) classes of mathematics and spent the remainder of his time as a guidance counselor. Petitioner has, at all times since 1969, been fully certified to serve as a guidance counselor and as a mathematics teacher.

On April 14, 1980, respondent adopted a resolution abolishing one (1) of its full time guidance counselor positions, created in its stead a half-time guidance position, and reassigned petitioner as a half-time guidance counselor and half-time mathematics teacher for the ensuing 1980-81 school year. Petitioner, who has greater length of seniority as a guidance counselor than the Board's three (3) remaining full time guidance counselors, formally objected to his reassignment and requested that the Board assign him as a full-time guidance counselor.

DISCUSSION AND CONCLUSIONS:

Petitioner's employment as a guidance counselor from 1969 through June 1980 established his seniority in that category. **I CONCLUDE** that since he had taught for only one (1) year as a part-time mathematics teacher, he had gained seniority only in the category of guidance counselor. This conclusion is grounded on the provisions of the following statute and rules of the State Board of Education:

> 18A:28-13. Establishment of standards of seniority by commissioner
>
> "The commissioner in establishing such standards shall classify insofar as practicable the fields or categories of administrative, supervisory, teaching or other educational services and the fields or categories of school nursing services which are being performed in the school districts of this state and may, in his discretion, determine seniority upon the basis of years of service and experience within such fields or categories of service as well as in the school system as a whole, or both."
>
> N.J.A.C. 6:3.10:
>
> "(a)***
>
> "(b) Seniority, pursuant to N.J.S.A. 18A:28-9 et seq., shall be determined according to the number of academic or calendar years of employment, or fraction thereof, as the case may be, in the school district in specific categories as hereinafter provided.***"

The certificate of secondary teacher with an endorsement of teacher of mathematics would not qualify petitioner to serve as a guidance counselor N.J.A.C. 6:11-12.13. Accordingly, he had to possess and did possess the specific student personnel services certificate which qualified him to serve as a guidance counselor. Such certificate and employment as a guidance counselor established the fact that he did not gain seniority as a secondary teacher but as a guidance counselor pursuant to N.J.A.C. 6:3-1.10k which states:

> "The following shall be deemed to be specific categories but not necessarily numbered in order of precedence:
>
> "1. ***
>
> "27. Secondary. The word 'secondary' shall include grades 9-12 in all high schools, grades 7-8 junior high schools, and grades 7-8 in elementary schools having departmental instruction. Any person holding a secondary certificate shall have seniority in all subjects

> or fields covered by his certificate, except those subjects or fields for which a special certificate has or shall be required by the State Board of Education. However, if a person has held employment in the school district in any special subject or field endorsed on his secondary certificate, such special subject or field shall, for the purposes of these regulations, be regarded as any other subject or field endorsed upon his certificate; (Emphasis supplied.)***
>
> "30. Additional categories of specific certificates issued by the State Board of Examiners and listed in the State Board rules dealing with Teacher Certification.

Since pupil personnel services is not an endorsement on a secondary teaching certificate, I **CONCLUDE** that petitioner gained both tenure and seniority as a guidance counselor which is in a category separate and apart from that of secondary teacher.

Respondent Board argues that petitioner was not dismissed but was, under the Board's managerial prerogatives, subject to transfer at any time within the scope of his certification. In this regard, the Board cites the holding of the Superior Court, Appellate Division in Jeannette Williams v. Board of Education of Plainfield, Dkt. A-2102-79A, decided November 6, 1980. Therein, the Court affirmed a State Board of Education determination that Williams, who was tenured and held seniority in the category of secondary principal, was subject, under the Board's managerial prerogative, to reassignment as an elementary principal, a position which is listed in N.J.A.C. 6:3-1.10(h) as a separate category.

The factual basis revealed in Williams, supra, however, is importantly distinguishable from the factual context of the instant dispute. Both elementary and secondary principals currently are entitled to serve under the certificate of "principal." Petitioner herein cannot legally serve as a teacher under the same certificate required for a guidance counselor. In Williams, where there was no reduction in force, the Board's action was merely a transfer from a secondary to a elementary principalship. Petitioner, herein, was reassigned as a direct result of a reduction in force in the Board's guidance staff. His particular full time guidance position was abolished and a half-time guidance position established in its stead.

The wording of the State Board of Education's rule set forth in N.J.A.C. 6:3-1.10(h) is directly on point and is controlling:

> "(h) Whenever any person's particular employment shall be abolished in a category, he shall be given that employment in the same category to which he is entitled by seniority. If he shall have insufficient seniority for employment in the same category, he shall revert to the category in which he held employment prior to his employment in the same category, and shall be placed and remain upon the preferred eligible list of the category from which he reverted until a vacancy shall occur in such category to which his seniority entitled him." (Emphasis supplied.)

When interpreting the meaning of statutes or the rules of administrative agencies such as the State Board of Education, one may not assume or apply an unrevealed intention of the promulgating body. It is well settled that the interpretation of both statutes and the rules of an administrative agency must be consistent with the ordinary meaning of the language employed therein. As the Court stated in Essex County Welfare Board v. Klein, 149 N.J. Super. 241 at 247 (App. Div. 1977):

> "***It is, of course, axiomatic that a rule of an administrative agency is subject to the same canons of construction and the same constitutional imperatives as is a statute. See, e.g., Hoeganaes Corp. v. Dir. of Div. of Tax., 145 N.J. Super. 352, 359 (App. Div. 1976); In re Plainfield-Union Water Co., 57 N.J. Super. 158, 177 (App. Div. 1959).***"

Similiarly, the following was aptly stated 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 p. 106)

The State Board in N.J.A.C. 6:3-1.10(h) clearly stated 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***." Petitioner, by reason of his greater number of years of seniority as a guidance counselor, had entitlement to reassignment in the same category to one of the three (3) remaining full-time guidance counselor positions. I so **CONCLUDE.** In view of these plain words in the State Board's policy, **I FIND** inapplicable the extensive citations of case law and those arguments by the Board contending that petitioner would have protection in his guidance counselor position only in the event of a reduction in force resulting in his dismissal.

The above **CONCLUSIONS** are fully supported by the Commissioner's recent holding in Madeline Childs v. Board of Education of the Township of Union, 1980 S.L.D. _____ (decided September 29, 1980). Therein, the Commissioner determined that, "*** the position of guidance counselor represents a service category***" in which Childs had attained tenure and from which she could not be transferred without her consent, or as result of a reduction in force or a tenure hearing. See also the holding in Richard Gincel v. Board of Education of the Township of Edison, 1980 S.L.D. _____ (decided August 11, 1980; aff'd. State Board November 5, 1980). Therein the Commissioner ruled improper the Edison Board's unilateral transfer of Gincel to a teaching position without proper consideration of his seniority rights to a principalship. A similar holding is found in James J. Flanagan v. Board of Education of the City of Camden, 1980 S.L.D. _____ (decided November 6, 1980) in which the Commissioner set aside the Camden Board's action, following a reduction in force, unilaterally transferring Flanagan from the category of supervisor to the category of teacher without consideration and recognition of his seniority rights to an alternate supervisory position.

After carefully reviewing all of the arguments of law set forth in the respective Briefs in light of existing applicable statutes, rules of the State Board of Education and decisional law, I further **CONCLUDE** that petitioner is entitled to summary judgment and the relief sought in the Petition of Appeal.

DETERMINATION:

In consideration of the above stated conclusions, **IT IS ORDERED** that respondent's Motion for Summary Judgment be and is **DENIED** and that petitioner's Motion for Summary Judgment be and is **GRANTED**. **IT IS FURTHER ORDERED** that the Board shall, upon issuance of a final decision in the matter, reinstate petitioner, forthwith, to a

full-time guidance counselor position to which he is entitled by reason of tenure and seniority.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, FRED G. BURKE,** who by law is empowered to make a final decision in this matter. However, if Fred G. Burke does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

February 6, 1981 — Eric G. Errickson
DATE — **ERIC G. ERRICKSON**, ALJ

Receipt Acknowledged:

February 9, 1981 — Seymour Weiss
DATE — DEPARTMENT OF EDUCATION

Mailed To Parties:

February 11, 1981 — Ronald L. Parke/bl
DATE — OFFICE OF ADMINISTRATIVE LAW

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ANDREW HORUN,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE WATCHUNG HILLS REGIONAL HIGH SCHOOL DISTRICT, SOMERSET COUNTY,	:	
RESPONDENT.	:	

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law.

The Commissioner observes that exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Respondent (Board) excepts to the conclusion by the Honorable Eric G. Errickson, ALJ of petitioner's entitlement to a full-time guidance counselor position. The Board contends that Judge Errickson is in error in reaching his conclusion in the present matter and argues further that the Commissioner erred in the similar matters of Lynch v. Highland Park Board of Education, 1980 S.L.D. _____ (decided March 7, 1980) and Reeves v. Westwood Regional School District, 1980 S.L.D. _____ (decided June 30, 1980).

Petitioner refutes the Board's agruments, alleging that no higher judicial authority has reversed, amended or modified the aforementioned cases. The Commissioner concurs with petitioner's refutation of the Board's arguments.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

The Board's Motion for Summary Judgment is denied, petitioner's Motion for Summary Judgment is granted. The Board shall accordingly reinstate petitioner to a full-time guidance position by entitlement of tenure and seniority.

It is so directed.

COMMISSIONER OF EDUCATION

March 26, 1981

Pending State Board

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3072-80
AGENCY DKT. NO. 205-4/80A

IN THE MATTER OF:

REGINA L. HUTCHINSON,
Petitioner
v.
BOARD OF EDUCATION OF GREENWICH TOWNSHIP, GLOUCESTER COUNTY,
Respondent.

Record Closed: December 23, 1980
Received by Agency: 2/6/81

Decided: February 3, 1981
Mailed to Parties: 2/10/81

APPEARANCES:

For the Petitioner, **Richard F. Berkey**, Esq.

For the Respondent, Hannold, Caulfield, Marshall & McDonnell (**Martin F. Caulfield**, Esq., of Counsel)

BEFORE **AUGUST E. THOMAS**, ALJ:

Petitioner is a teacher who asserts that the Board of Education of Greenwich Township (Board) has denied her proper placement on the salary guide beginning in the 1973-74 school year, and that she is currently being compensated improperly according to the terms of the adopted salary guide. The Board denies that petitioner has been compensated improperly; and asserts, in its defense, the six year statute of limitations as a bar to her claim.

This matter was transferred to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. There are no facts in dispute; consequently, this matter has been submitted for Summary Decision on the Briefs of counsel.

On September 1, 1972, petitioner received her master's degree in student personnel services from Glassboro State College. (Exhibits A, B) In January 1973, petitioner informed the Superintendent that she had completed the course work entitling her to placement on the salary guide at the MA +15 level. The Board denied her placement on the MA +15 level because some of her credits were earned before she received her master's degree. Petitioner contends that after the completion of courses sufficient for placement on the MA +30 level, the Board placed her on the MA +15 level on February 1, 1979. Petitioner did not concur with this calculation and so informed the Superintendent.

In the Summer of 1979, petitioner completed another three credit graduate level course thereby giving her 32 credits beyond her master's degree. However, the Board has further denied her placement on the MA +30 salary level. (Petition of Appeal)

Wherefore, petitioner demands the difference between the salary she received and that she claims she should have received at the MA +15 level, from September 1, 1973, through February 1, 1979. She further demands salary from February 1, 1979, through July 30, 1980 at the MA +30 level.

At issue is whether or not graduate credits, otherwise appropriate, are countable toward advanced placement on the salary guide if earned prior to receipt of an advanced degree. Further issues raised in respondent's defenses are the applicability of the six-year statute of limitations and laches.

The applicability of graduate credits used for higher placement on a salary guide if received before the award of an advanced degree is stare decisis. In McAllen v. Board of Education of the Borough of North Arlington, 1975 S.L.D. 90, 91, the Commissioner stated:

> The Board adopted policies which provide for additional compensation for those teaching staff members having a master's degree plus ten, twenty, or thirty credits. Nowhere in the Board's adopted policies is there found a requirement

> that graduate credits can only be considered for salary placement on the master's degree plus ten, twenty or thirty credits levels after the acquisition of the master's degree. (Emphasis in text)

The North Arlington Board of Education was directed to place petitioner McAllen on the master's degree plus 30 credits salary guide at the step corresponding to his number of years' experience and, further, to compensate him retroactively to the point at which his petition arose. The State Board of Education affirmed the decision of the Commissioner. 1975 S.L.D. 92.

Relying on McAllen, an identical determination was reached by the Commissioner in Mary Siebold v. Board of Education of the Borough of Oakland, 1980 S.L.D. _____, decided June 2, 1980, where he affirmed the determination of an administrative law judge who held that graduate credits earned prior to the receipt of an advanced degree are countable towards higher placement on the salary guide.

Thus, the instant matter has been decided in that respect. Here, the Board does not even assert that it had a policy, as was the case in McAllen and Siebold. Consequently, it is settled that all of petitioner's graduate credits, otherwise acceptable for salary purposes, are countable whether earned before or after her receipt of her master's degree. To be determined, post, is her eligibility when her service is weighed against the six-year statute of limitations and the equitable doctrine of laches.

In considering the applicability of the six-year statute of limitations it is noticed that the instant Petition of Appeal was filed on April 9, 1980. The pertinent portion of the statute reads as follows:

> Every action at law...for recovery upon a contractual claim or liability, express or implied,...shall be commenced within 6 years next after the cause of any such action shall have accrued. (N.J.S.A. 2A:14-1)

And when did her cause of action accrue? I hold it reasonable to set the date of accrual of petitioner's cause of action as June 30, 1974. The rationale in establishing this date is as follows: The record shows that petitioner met with the Superintendent in January 1973 concerning her placement on the salary guide and that she had several later conferences with the Superintendent dealing with her request. (Petitioner's Affidavit) The record does not disclose if the request was for immediate advancement on the guide or if the

advancement was requested beginning September 1973. (Petitioner's Brief supports the latter construction and no Board policies, evidence, or statement has been submitted to counter this view.) Consequently, it seems reasonable to hold that petitioner could have expected the difference in the salary she sought up to the end of the 1973-74 school year which was June 30, 1974. This despite the fact that the desired raise was not included in her bi-monthly paycheck.

Counting backwards six years from April 9, 1980, the date on which she filed her Petition of Appeal, simple arithmetic shows that her appeal is not untimely. Specifically, six years prior to April 9, 1980 is April 9, 1974, the school year in which her cause of action accrued. It has been earlier determined that petitioner's cause of action occurred even later, on June 30, 1974.

Thus, **I CONCLUDE** that in view of the six year statute of limitations, petitioner's cause of action accrued on June 30, 1974 and that she is eligible for retroactive salary payments, according to the salary guides then in existence, from September 1974 through June 30, 1979 on the MA +15 salary level. Further, petitioner is eligible for salary at the MA +30 level beginning September 1, 1979 through June 30, 1980.

The Board's final argument of laches is set aside. Although respondent claims prejudice, no proof of prejudice has been submitted. The Commissioner, in David J. Fiol v. Board of Education of the Borough of Woodcliff Lake, 1979 S.L.D. (decided May 4, 1979) held that the Board of Education was not prejudiced because:

> This is not a case wherein a decision in favor of Petitioner will result in the payment of two salaries for one position by the Board as the result of Petitioner's delay. (See William Gleason v. Board of Education of the City of Bayonne, 1938 S.L.D. 138). It is a case in which it is alleged that a statutory entitlement to placement on or movement within an adopted salary schedule was ignored. As the Commissioner said in Edna Aeschbach v. Board of Education of the Town of Secaucus, Hudson County, 1938 S.L.D. 598, 604 (1934).
>
> ****I do not understand that mere delay in bringing a suit will deprive a party of his remedy, unless such neglect has so prejudiced the other party by loss of testimony or means of proof or changed relations that it would be unjust to now permit him to exercise his right. Tyman vs. Warren, 53 N.J. Eq. 313****. (Emphasis in text).

Further,

> ****"If, however, upon the other hand, it clearly appears that lapse of time has not in fact changed the conditions and relative positions of the parties, and they are not materially impaired, and there are peculiar circumstances entitled to consideration as excusing the delay, the Court will not deny the appropriate relief, although a strict and unqualified application of the rule of limitations would seem to require it. Every case is governed chiefly by its own circumstances." Wilson v. Wilson 41 R. 459. Quoted in 4 Pomeroy's Equity Jurisprudence, page 3423.****

Based on the foregoing evidence, the operative facts and the decisions of the Commissioner and the courts, **I CONCLUDE** that no prejudice attaches to the Board in the instant matter.

Petitioner's prayer for relief is granted as set forth above and the Board is **ORDERED** to pay her the difference between the salary she received and the salary she should have received according to these terms.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, FRED G. BURKE,** who by law is empowered to make a final decision in this matter. However, if Fred G. Burke does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

3 February 81
DATE

August E. Thomas
AUGUST E. THOMAS, ALJ

Receipt Acknowledged:

February 6, 1981
DATE

Seymour Lee
DEPARTMENT OF EDUCATION

Mailed To Parties:

February 10, 1981
DATE

Gerald A. Porter/ss
OFFICE OF ADMINISTRATIVE LAW

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DOCUMENTS IN EVIDENCE

Exhibit A Petitioner's Master of Arts degree

Exhibit B Petitioner's Certificate, Student Personnel Services

Exhibit C Petitioner's letter to the Superintendent (August 29, 1979)

OAL DKT. NO. EDU 3072-80

REGINA L. HUTCHINSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF GREENWICH, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law.

The Commissioner observes that exceptions were filed by the Board pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Respondent excepts to the portion of the decision in this matter by the Honorable August E. Thomas, ALJ fixing the date of accrual of petitioner's course of action as June 30, 1974. The Commissioner agrees although for reasons other than those expressed.

Judge Thomas set aside the Board's argument of laches and granted petitioner's prayer for relief of retroactive recompense of salary. The Commissioner cannot agree.

In the opinion of the Commissioner, petitioner is barred by the doctrine of laches to that portion of salary adjustment applicable to the period prior to the filing of the Petition.

As was said in Marjorie A. Lavin v. Board of Education of the Borough of Hackensack, Superior Court, Appellate Division, A-2875-79, March 9, 1981:

> "***The long period between petitioner's employment and the commencement of this action before the Commissioner satisfies us that retroactive relief should be barred on the ground of laches.
>
> "Where the facts were known to Lavin, ignorance of the statute applicable thereto and consequent ignorance of her rights under the statute will not excuse her delay in petitioning for the military credit increment. See Kohler v. Barnes, 123 N.J. Super. 69 (Law Div. 1973). The delay under the circumstances is unreasonable and unexcused, and to the detriment of the local Board. As stated in Giorno, supra, '[m]unicipal governments must provide for operating expenses on a current annual 'cash basis', N.J.S.A. 40A:4-3, except for unforseen, pressing needs, N.J.S.A. 40A:4-46; or as otherwise permitted by law. See also N.J.S.A. 40A:4-57, Essex Cty. Bd. of Taxation v. Newark, 139 N.J. Super. 264, 273-274 (App. Div. 1976), mod. 73 N.J. 69 (1977).' 170 N.J. Super. at 166-167.***" (at p. 10)

See also Union Township Teachers Association v. Board of Education of the Township of Union, Superior Court, Appellate Division, A-3065-79, March 9, 1981.

Accordingly, the decision of the Court calling for retroactive recompense is set aside. It is deemed appropriate that prospective applications of salary credit at the MA+30 level be allowed from the filing of the Petition on April 9, 1980.

It is so directed.

Gustav W. Lueb

ACTING COMMISSIONER OF EDUCATION

March 23, 1981

DATE OF MAILING 3/26/81

REGINA L. HUTCHINSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF GREENWICH, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law.

The Commissioner observes that exceptions were filed by the Board pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Respondent excepts to the portion of the decision in this matter by the Honorable August E. Thomas, ALJ fixing the date of accrual of petitioner's course of action as June 30, 1974. The Commissioner agrees although for reasons other than those expressed.

Judge Thomas set aside the Board's argument of laches and granted petitioner's prayer for relief of retroactive recompense of salary. The Commissioner cannot agree.

In the opinion of the Commissioner, petitioner is barred by the doctrine of laches to that portion of salary adjustment applicable to the period prior to the filing of the Petition.

As was said in Marjorie A. Lavin v. Board of Education of the Borough of Hackensack, Superior Court, Appellate Division, A-2875-79, March 9, 1981:

> "***The long period between petitioner's employment and the commencement of this action before the Commissioner satisfies us that retroactive relief should be barred on the ground of laches.
>
> "Where the facts were known to Lavin, ignorance of the statute applicable thereto and consequent ignorance of her rights under the statute will not excuse her delay in petitioning for the military credit increment. See Kohler v. Barnes, 123 N.J. Super.

> 69 (Law Div. 1973). The delay under the circumstances is unreasonable and unexcused, and to the detriment of the local Board. As stated in Giorno, supra, '[m]unicipal governments must provide for operating expenses on a current annual 'cash basis', N.J.S.A. 40A:4-3, except for unforseen, pressing needs, N.J.S.A. 40A:4-46; or as otherwise permitted by law. See also N.J.S.A. 40A:4-57, Essex Cty. Bd. of Taxation v. Newark, 139 N.J. Super. 264, 273-274 (App. Div. 1976), mod. 73 N.J. 69 (1977).' 170 N.J. Super. at 166-167.***" (at p. 10)

See also Union Township Teachers Association v. Board of Education of the Township of Union, Superior Court, Appellate Division, A-3065-79, March 9, 1981.

Accordingly, the decision of the Court calling for retroactive recompense is set aside. It is deemed appropriate that prospective applications of salary credit at the MA+30 level be allowed from the filing of the Petition on April 9, 1980.

It is so directed.

COMMISSIONER OF EDUCATION

March 23, 1981

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6671-80
AGENCY DKT. NO. 474-9/80A

IN THE MATTER OF:

ROBERT WOLDIN,
Petitioner,
v.
BOARD OF EDUCATION
OF THE TOWNSHIP
OF BERNARDS,
Respondent.

Record Closed: January 8, 1981
Received by Agency: 2/11/81

Decided: February 9, 1981
Mailed to Parties: 2/17/81

APPEARANCES:

For Petitioner: **Jack Wysoker**, Esq. (Mandel, Wysoker, Sherman, Glassner & Weingartner)

For Respondent: **Michael E. Rodgers**, Esq. (Lucid, Jabbour, Pinto & Rodgers)

BEFORE **ERIC G. ERRICKSON**, ALJ:

STATEMENT OF CASE:

Petitioner, a tenured teaching staff member employed since 1965 by the Bernards Township Board of Education (Board), alleges that the Board, during June 1980, illegally transferred him from his full time guidance counselor position to a teaching position for the ensuing 1980-81 school year. The Board, conversely, asserts that its reassignment of petitioner was a legal exercise of its statutory discretionary authority to staff its schools.

PROCEDURAL RECITATION:

The pleadings were filed before the Commissioner of Education who, pursuant to the provisions of N.J.S.A. 52:14F-1 et seq, transmitted it on October 27, 1980 as a contested case to the Office of Administrative Law. Petitioner, on November 4, 1980, filed Notice of Motion for Summary Judgment together with supporting Letter Memorandum. At a prehearing conference on November 25, 1980, a briefing schedule was established. Thereafter, respondent filed Cross Motion for Summary Judgment. Respondent's Brief and Petitioner's Reply Memorandum were filed completing the record on January 8, 1980. No relevant facts are in dispute. Accordingly, the matter is ripe for summary decision.

FACTUAL CONTEXT:

There is no dispute over the following relevant facts, all of which are established by admissions in the pleadings:

Petitioner is a tenured teaching staff member having been employed continuously by the Board since 1965. Until the 1973-74 school year, he was assigned as a full time classroom teacher. Thereafter, until the beginning of the 1980-81 school year, he was assigned as a guidance counselor. During June 1980, the Board transferred petitioner, at no reduction in salary, to the position of classroom teacher effective September 1980. The Board neither abolished nor filled the guidance counselor position which petitioner had held. Petitioner, on September 23, 1980, filed the within Petition of Appeal.

Petitioner with seven (7) years of service as a guidance counselor had been employed as a guidance counselor for a longer period than the Board's three (3) remaining full time guidance counselors, whose employment as counselors at the beginning of the 1980-81 school year ranged from less than one (1) year to five (5) years.

DISCUSSION AND CONCLUSIONS:

A review of the respective service of petitioner and the Board's presently employed guidance counselors causes me to **CONCLUDE** that petitioner's employment for

seven (7) years as a guidance counselor from 1974 through June 1980 established greater length of seniority in that category than any of the guidance counselors whom the Board now employs. This conclusion is grounded on the provisions of the following statute and State Board of Education rules:

> 18A:28-13. Establishment of standards of seniority by commissioner
>
> "The commissioner in establishing such standards shall classify insofar as practicable the fields or categories of administrative, supervisory, teaching or other educational services and the fields or categories of school nursing services which are being performed in the school districts of this state and may, in his discretion, determine seniority upon the basis of years of service and experience within such fields or categories of service as well as in the school system as a whole, or both."

N.J.A.C. 6:3.10:

> "(a)***
>
> "(b) Seniority, pursuant to N.J.S.A. 18A:28-9 et seq, shall be determined according to the number of academic or calendar years of employment, or fraction thereof, as the case may be, in the school district in specific categories as hereinafter provided.***

Petitioner's certificate as an elementary teacher did not qualify him to serve as a guidance counselor. I **CONCLUDE** that he also had to possess and did possess an appropriate certificate issued by the State Board of Examiners which qualified him to serve as a guidance counselor. N.J.A.C. 6:3-1.10k states:

> "The following shall be deemed to be specific categories but not necessarily numbered in order of precedence:
>
> "1. *** "28.Elementary. The word 'elementary' shall include Kindergarten, grades 1-6 and grades 7-8 with or without departmental instruction, including grades 7-8 in junior high schools;
>
> "29. ***
>
> "30. Additional categories of specific certificates issued by the State Board of Examiners and listed in the State Board rules dealing with Teacher Certification."

Since the student personnel services certificate required of a guidance counselor is a separate certificate and not an endorsement on a elementary teaching certificate, I CONCLUDE that petitioner gained both tenure and seniority first as an elementary teacher and later as a guidance counselor in a category separate and apart from that of elementary teacher. N.J.A.C. 6:11-12.13

Respondent Board argues that since petitioner was not dismissed, he was subject, under the Board's managerial prerogative, to transfer at any time within the scope of his certification. The Board contends that petitioner's particular strengths and weaknesses cause him to be more effective as an elementary teacher. In support of its action, the Board cites the holding of the Superior Court, Appellate Division, in Jeanette Williams v. Board of Education of Plainfield, Dkt. A-2101-79A, decided November 6, 1980. Therein, the Appellate Court affirmed a State Board of Education determination that Williams, a tenured high school principal holding seniority in the category of secondary principal, was subject, so long as there was no reduction in salary, to reassignment by her Board as an elementary principal, a position covered by N.J.A.C. 6:3-1.10(b)(9), as a separate category. Similarly cited by the Board was the State Board of Education's opinion in Frank Morra v. Board of Education of Jackson Township, 1979 S.L.D. _____ (decided November 11, 1979) wherein the State Board held that a high school principal was subject to reassignment as an elementary school principal regardless of his seniority as a high school principal.

Williams, supra, and Morra, supra, however, are importantly distinguishable from the factual context of the instant dispute. Both elementary and secondary principals currently are entitled to serve in either of those positions under the certificate of "principal." Petitioner, by contrast, cannot legally serve as an elementary teacher under the same certificate he was required to hold as a guidance counselor. It is further distinguishable since Morra and Williams were not reassigned as the result of a reduction in force. Petitioner, herein, it must be recognized, was not reassigned as the result of the usual reduction in force since the Board took no action to abolish his guidance counselor position. However, since the Board did not fill that position, the result was the same as it would have been had the position been formally abolished. I CONCLUDE that the action of the Board resulted in the abolishment of petitioner's particular employment in the category of guidance counselor within the intendment of N.J.A.C. 6:3-1.10(h).

The wording of the State Board of Education's rule set forth in N.J.A.C. 6:3-1.10(h) is precisely on point:

> "Whenever any person's particular employment shall be abolished in a category, he shall be given that employment in the same category to which he is entitled by seniority. If he shall have insufficient seniority for employment in the same category, he shall revert to the cateogry in which he held employment prior to his employment in the same category, and shall be placed and remain upon the preferred eligible list of the category from which he reverted until a vacancy shall occur in such category to which his seniority entitled him." (Emphasis supplied.)

One may not assume or apply an unrevealed intention of the promulgating body when interpreting the meaning of statutes or the rules of administrative agencies such as the State Board of Education. The interpretation of both statutes and the rules of an administrative agency must be construed in a manner consistent with the ordinary meaning of the language employed therein. As was stated in Essex County Welfare Board v.Klein, 149 N.J. Super. 241 at 247:

> "***It is, of course, axiomatic that a rule of an administrative agency is subject to the same canons of construction and the same constitutional imperatives as is a statute. See, e.g., Hoeganaes Corp. v. Dir. of Div. of Tax., 145 N.J. Super. 352, 359 (App. Div. 1976); In re Plainfield-Union Water Co., 57 N.J. Super. 158, 177 (App. Div. 1959).***"

Similarly applicable are the words of 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)***" (at p. 106)

When the State Board promulgated N.J.A.C. 6:3-1.10(h) it clearly stated 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***." Petitioner's particular employment in the category of guidance counselor was abolished

regardless of the fact that the Board has neither abolished nor filled his former guidance counselor position. **I CONCLUDE** that petitioner had entitlement to reassignment in the same category to one of the Board's remaining guidance counselor positions. In consideration of the plain words affording him protection under the State Board's policy, I **FURTHER CONCLUDE** that the Board's additional citations of case law are inapplicable. Nor am I able to find validity in the Board's contention that petitioner would have protection in his guidance counselor position only in the event of a reduction in force resulting in his dismissal.

Strong support is found for the above conclusions in the words of the Commissioner in his recent holding in Madeline Childs v. Board of Education of the Township of Union, 1980 S.L.D. _____ (decided September 29, 1980). Therein, the Commissioner, in determining that a tenured guidance counselor could not be unilaterally reassigned as a classroom teacher without consideration of her seniority rights, stated:

> "***The Commissioner determines that the position of guidance counselor represents a service category in which petitioner can acquire tenure and from which a transfer cannot be made without the affected individual's consent, a reduction in force or a tenure hearing. The contention that it is, perforce, a position of higher level in the educational hierarchy than that of classroom teacher is a distinction without a difference and cannot be sustained.
>
> The Commissioner in rendering this decision relies upon his determination in Richard Stegemann v. Board of Education of the Township of Union, 1980 S.L.D. _____ (decided March 27, 1980), aff'd State Board July 2, 1980 wherein he held that transfer of a cooperative industrial education coordinator to the position of teacher of industrial arts represented a violation of petitioner's tenure rights.***"

A similar conclusion was reached by the Commissioner in James J. Flanagan v. Board of Education of the City of Camden, 1980 S.L.D. _____ (decided November 6, 1980). Therein, the Commissioner set aside the Camden Board's action following a reduction in force transferring Flanagan without his consent from the position of supervisor to the category of teacher without consideration of his seniority rights to an alternate supervisory position. See also in this regard Richard Gincel v. Board of Education of the Township of Edison, 1980 S.L.D. _____ (decided August 11, 1980, aff'd State Board November 5, 1980), in which the Commissioner ruled invalid the Edison Board's transfer of Gincel to a teaching position without consideration of his seniority

rights to a principalship. See also the holdings in Mary Ann Popovich v. Board of Education of the Borough of Wharton, 1975 S.L.D. 737; Patricia Lynch v. Board of Education of Highland Park, 1980 S.L.D. _____ (decided March 7, 1980).

Particularly relevant to the instant matter is the Commissioner's reversal of the Administrative Law Judge's Initial Decision in Dorothy Reeves v. Board of Education of the Westwood Regional School District, Bergen County, 1980 S.L.D. _____ (decided August 2, 1980). Therein, when rejecting the argument that seniority protection does not exist unless a staff member is subject to dismissal, the Commissioner stated:

> "***Whereas petitioner, as stipulated, holds greater seniority in the category of speech correctionist and whereas the Commissioner attaches strong significance to the clear wording in N.J.A.C. 6:3-1.10 wherein is stated '***he shall be given that employment in the same category to which he is entitled by seniority,' the Commissioner finds that the Board erred in retaining third party respondent in the position of speech correctionist and reverting petitioner involuntarily to her prior category of employment as a teacher of the handicapped.
>
> "The Board is directed to place petitioner in the position of speech correctionist for the 1980-81 school year. Third party respondent shall be placed on a seniority list in accordance with his years of service."

The Board, contending that the Commissioner's decisions in Lynch, supra, Reeves, supra and Childs, supra are in error, cites the following dicta from the State Board decision in Williams, supra:

> "The law thus protects the rank or status of a tenured professional employee. It also prevents the employing board from reducing the compensation of such an employee except by proceedings under N.J.S.A. 18A:6-10 et seq. But for these two limitations, which may be said to give job security and financial security, the board of education has plenary authority, by a majority vote of the whole board, to transfer its professional personnel in good faith for the best interests of the school system."

The Board's reliance is on dicta relevant to a case in which the factual context was distinguishable. That reliance fails to take note of the explicit wording of provisions in the State Board's own rules. N.J.A.C. 6:3-1.10. It is well established that statutes and

administrative rules promulgated pursuant to the authority of those statutes must be read in pari materia. I **CONCLUDE** that the Board's reliance on the dicta in Williams, to the exclusion of the clear wording of the State Board rules on seniority, is misplaced.

I **FURTHER CONCLUDE**, after careful consideration of all facts, arguments of law, the applicable statutes and State Board rules, and relevant decisional law, that petitioner, by reason of his tenure and seniority rights, is entitled to relief in the form of reinstatement to a full time guidance position.

DETERMINATION:

In consideration of the above conclusions, the Board's Motion for Summary Judgment is **DENIED**. Summary decision is entered on behalf of petitioner. The Board is **ORDERED** to reinstate petitioner to a full time guidance counselor position, such reinstatement to be made, forthwith, upon issuance of a final decision in this matter.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, FRED G. BURKE,** who by law is empowered to make a final decision in this matter. However, if Fred G. Burke does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

OAL DKT. NO. EDU 6671-80

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

February 9, 1981
DATE

Eric G. Errickson
ERIC G. ERRICKSON, ALJ

Receipt Acknowledged:

February 11, 1981
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

February 17, 1981
DATE

Ronald L. Parker/ef
OFFICE OF ADMINISTRATIVE LAW

ij

ROBERT WOLDIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BERNARDS, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law.

The Commissioner observes that no exceptions were filed in a timely fashion by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b, and c.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

The Board shall reinstate petitioner to a full-time guidance counselor position.

It is so directed.

COMMISSIONER OF EDUCATION

March 26, 1981

Pending State Board

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3566-80
AGENCY DKT. NO. 265-5/80A

IN THE MATTER OF:

CHARLES V. KWIATKOSKI,
Petitioner
v.
BOARD OF EDUCATION OF THE WATCHUNG HILLS REGIONAL HIGH SCHOOL, SOMERSET COUNTY,
Respondent.

Record Closed: January 16, 1981
Received by Agency: 2/19/81

Decided: February 11, 1981
Mailed to Parties: 2/19/81

APPEARANCES:

For Petitioner: **Stephen E. Klausner,** Esq. (Klausner & Hunter)

For Respondent: **William S. Jeremiah,** Esq. (Buttermore, Mullen & Jeremiah)

BEFORE **ERIC G. ERRICKSON,** ALJ:

STATEMENT OF CASE:

Petitioner, a veteran with three (3) years and ten (10) months of military service, is a teaching staff member who has been continuously employed since September 1966 by the Watchung Hills Board of Education. He petitions the Commissioner for an order directing the Board to credit him with and compensate him retroactively for one (1) year and ten (10) months of additional military service beyond the two (2) years

recognized by the Board when it placed him on its salary scale at the time of his initial employment in 1966. The Board, conversely, contends that it is not legally obligated to compensate petitioner for additional years of military service.

PROCEDURAL RECITATION:

The matter was filed on May 22, 1980 before the Commissioner of Education. A timely Answer was filed. Thereafter, the Commissioner of Education, pursuant to N.J.S.A. 52:14F-1 et seq. transferred the matter as a contested case to the Office of Administrative Law. Respondent Board gave Notice of Motion for Summary Judgment on June 30, 1980. Relevant facts were stipulated at a prehearing conference on September 10, 1980 to be those facts set forth in Respondent's Brief in Support of Summary Judgment. It was further agreed that the disputed matter would move to determination as a question of law in the form of the pleadings, Cross-Motions for Summary Judgment and Briefs of counsel. The case record was declared complete on January 16, 1981 following receipt of the Board's Letter Supplement to its Brief in Support of Motion to Dismiss and notice from petitioner that no further papers would be filed. There being no relevant facts in dispute, the matter is ripe for summary decision.

FACTUAL CONTEXT OF THE DISPUTE:

The following facts are stipulated:

Petitioner, prior to his honorable discharge, served in the United States Navy from February 3, 1948 through December 29, 1951. When employed by the Board in 1966, he was granted credit in placement on the salary guide for two (2) years of military experience and for eight (8) years of prior teaching experience. The Board's salary guide, as the result of negotiations, was modified during the early 1970's to provide for "senior service" increments to be paid to teachers with ten (10) years of service in the district beginning their 17th and 20th years of teaching. Petitioner, after completing ten (10) years in the district, began receiving senior service increments in 1976-77. Thereafter, effective the 1976-77 school year, a longevity provision gave teaching staff members with fourteen (14) years experience and four (4) years in the district an additional salary increment. Having met those criteria, petitioner began receiving the longevity increment during 1976-77.

DISCUSSION AND CONCLUSIONS:

It is noted, at the outset, that petitioner claims entitlement retroactively for an additional one (1) year and ten (10) months of credit on the Board's salary guide. The claim for military credit for a period of less than a full year of military service may not be granted. This principle was rendered stare decisis in case law by the ruling of the State Board of Education in Marjorie A. Lavin v. Board of Education of the Borough of Hackensack, wherein the following was stated:

> "***The Commissioner held that two years and nine months of military service should be deemed the equivalent of three years of such service for the purpose of determining the salary credit due Petitioner, and he awarded the amount of $20,575 to Petitioner for salary claims going back to 1968.
>
> The State Board reverses the Commissioner's decision on three grounds: (1) that Petitioner is entitled to military service credit for only two years of such service; (2) that her claim for back salary due Petitioner for any period beyond the six years prior to the date that the petition herein was filed is barred by the statute of limitations (N.J.S.A. 2A:14-1); and (3) that proper application of the equitable doctrines of laches and estoppel bar the entire claim except for the years beginning with 1978-79.
>
> N.J.S.A. 18A:29-11 provides that every staff member who served in the Armed Forces '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 a public school system, with a limitation not here material. The statute makes no provision for credit for part of a year; it speaks only of 'years' of employment credit, not of days, weeks or months. The Commissioner cited no precedent or other authority for his view that military service of six months or more should be construed as one year of salary credit, while less than six months should not be recognized. If the rule giving credit for 'years' of military service is to be modified, the Legislature should amend the law.***"

I CONCLUDE that petitioner's claim to a credit for a period greater than one (1) year must fail for the reasons succinctly stated by the State Board in Lavin, supra. The remaining claim of petitioner to one (1) extra year of service credit on the Board's salary scale is addressed, post.

Petitioner had been continuously employed by the Board for fourteen (14) years since September 1966 before he filed his Petition of Appeal during May 1980. It is stipulated that petitioner had three (3) years and ten (10) months of active military

service between 1948 and 1951. It is also stipulated that the Board credited petitioner with only two (2) years of military service when fixing his salary for 1966-67 and for subsequent school years until he reached the maxima provided by the Board's salary policy. The Board raises as one of its defenses in support of its Motion for Summary Judgment, the provisions set forth in the six (6) year statute of limitations, N.J.S.A. 2A:14-1. The statute of reference in the education laws granting credit for military service is as follows:

> 18A:29-11. Credit for military services
>
> "Every member who, after July 1, 1940, has served or hereafter shall serve, in the active military or naval service of the United States or of this state *** 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.***"

Petitioner, in support of his Motion, cites cases in which the Commissioner held that persons, who had been employed by boards of education which did not grant salary recognizing up to four (4) years of military service, were legally entitled to recover salary for their years of employment. Among these were Howard J. Whidden v. Board of Education of the City of Paterson, 1976 S.L.D. 356, modified by New Jersey Superior Court Appellate Division, 1977 S.L.D. 1312; Louis Alfonsetti et al. v. Board of Education of the Township of Lakwood, 1975 S.L.D. 197; Michael J. Watsula v. Board of Education of the Township of Plumstead, 1977 S.L.D. 692.

The facts in Alfonsetti, supra, Whidden, supra and Watsula, supra, in each of which relief was ordered in the form of additional salary for their military service, are importantly distinguishable from the factual context of the instant matter. Neither Alfonsetti, Watsula nor Whidden had been employed by their boards of education for a period greater than six (6) years prior to filing their claims for salary relief.

N.J.S.A. 2A:14-1, as amended by the Laws of 1961, reads in pertinent part as follows:

> "Every action at law *** for recovery upon a contractual claim or liability, express or implied, not under seal *** shall be

> commenced within 6 years next after the cause of any such action shall have accrued.***"

In its December 5, 1979 decision, the State Board of Education, grounding its decision on N.J.S.A. 2A:14-1, reversed the Commissioner's holding in Basil F. Castner v. Board of Education of the Township of Plumstead. Therein, the Commissioner had held that Castner was entitled to salary for military service as the result of his employment which had begun 19 years before filing his petition of appeal. The State Board, relying also on Miller v. Board of Chosen Freeholders of Hudson County, 10 N.J. 398 (1952), reversed the Commissioner on grounds that the action was brought in excess of six (6) years after Castner's salary was first fixed in contract.

The Courts, when applying the six (6) year statute of limitations, have enunciated the following principles:

> "***This statute, as any statute of limitations, is designed to stimulate litigants to pursue their causes of action diligently and to spare the courts from litigation of stale claims. They penalize dilatoriness and serve as measure of repose. Farrell v. Votator Div. of Chemetron Corp., 62 N.J. 111, 115 (1973). The Legislature, however, has never sought to define or specify when a cause of action shall be deemed to have accrued within the meaning of the statute and consequently this has been left entirely to judicial interpretation and administration. Rosenau v. New Brunswick, 51 N.J. 130, 137 (1968); Fernandi v. Strully, 35 N.J. 431, 449 (1961).***" (Burd v. New Jersey Telephone Company, 149 N.J. Super. at p. 30, aff'd 76 N.J. 284)

> "***The reasons for a statutory limitation on actions must be examined in confronting the issue whether in this case the statutory period should be relaxed to permit the late filing of the unfair practices claim. It is acknowledged generally that the primary purpose behind the statutes of limitation is to compel the exercise of a right of action within a reasonable time so that the opposing party has a fair opportunity to defend***." (77 N.J. Kaczmarek v. New Jersey Turnpike Authority, 77 N.J. 329 at 337)

> "***It may also be unjust, however, to compel a person to defend a law suit long after the alleged injury has occurred, when memories have faded, witnesses have died and evidence has been lost. After all, statutes of limitations are statutes of repose and the principal consideration underlying their enactment is one of fairness to the defendent.***" (Lopez v. Swyer, 62 N.J. 267 at p. 274)

The Appellate Division of the New Jersey Superior Court, on October 31, 1978, in an unpublished decision, addressed the issue of whether failure to bring an action within six (6) years to recover salary from a Board of Education for noncompliance with N.J.S.A. 18A:29-11 barred the relief sought pursuant to N.J.S.A. 2A:14-1, supra. Therein, the Appellate Court stated in Howard E. Greenwald v. Board of Education of the City of Camden, Dkt. No. A-1051-77:

> "***The court below rejected plaintiff's contention and held that since the claim was made 30 years after he commenced working, it was barred by the statute of limitations, N.J.S.A. 2A:14-1.
>
> "We agree. Like the trial judge, we deem the case of Miller v. Board of Chosen Freeholders, Hudson County, 10 N.J. 398 (1952) to be controlling. In this case, as in Miller, the primary issue is the construction and application of N.J.S.A. 2A:14-1, the six-year statute of limitations.***" (at p. 3)
>
> "(The New Jersey Supreme Court in Miller, supra) rejected plaintiffs' contention that their action was founded upon a statutory direction and therefore not within the six-year statute of limitations. Its ultimate holding was that in form and substance the suit was for compensation for services rendered, an action based on contract, and therefore subject to the statute of limitations.***" (at p. 4)
>
> "***His right is to compensation founded in contract. Consequently, his cause of action is barred by the statute of limitations.***" (at p. 5)

Petitioner, in the instant matter, argues that N.J.S.A. 2A:14-1 is inapplicable by reason of his contract with the Board being under seal. In so arguing, he contends that the Board as a corporate body, is compelled by statute to adopt a seal and act under that seal when conducting such business as employing and compensating teachers. Petitioner, however, fails to produce evidence that the Board was under obligation to, or that it at anytime did affix its seal to contracts into which it entered with petitioner. Absent proof within the record that the parties were obligated by statute to, intended to, or in fact did enter into a contract under seal, **I CONCLUDE** that this argument of petitioner is without merit. Nor do I find, upon a careful reading of the statute, that N.J.S.A. 2A:14-4, the sixteen (16) year statute of limitations, has application, as petitioner suggests, to the subject matter herein.

Petitioner further argues that the running of time was renewed annually by the Board's payment for part of his years of military credit. This argument is rejected on

grounds that the Board at no time made part payment for the additional one year and ten months of military service to which petitioner lays claim in this proceeding.

I CONCLUDE that Castner, supra, Miller, supra, and Greenwald, supra are controlling over the facts revealed in the instant matter. Petitioner's employment, which was based on contract, began with the Board over fourteen (14) years before he filed his Petition of Appeal. This period exceeds the six (6) years specified by the applicable six (6) year statute of limitation for filing of an action where adjustment of contract salary is sought.

I CONCLUDE that petitioner is barred by the provisions of N.J.S.A. 2A:14-1 from the relief to which he lays claim. Castner, supra; Greenwald, supra; Miller, supra; Raymond Meisenbacher v. Board of Education of the City of Elizabeth, Union County, 1980 S.L.D. ____ (decided March 10, 1980). The remaining arguments advanced by counsel need not to be addressed due to the controlling principles enunciated in these cases and in Lavin, supra.

DETERMINATION:

It is **ORDERED** that Petitioner's Motion for Summary Judgment be and is **DENIED.** Summary Decision is entered in favor of the Board. The Petition is, accordingly, **DISMISSED.**

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, FRED G. BURKE,** who by law is empowered to make a final decision in this matter. However, if Fred G. Burke does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

OAL DKT. NO. EDU 3566-80

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

February 11, 1981
DATE

Eric G. Errickson
ERIC G. ERRICKSON, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

February 19, 1981
DATE

Ronald L. Parker
OFFICE OF ADMINISTRATIVE LAW

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CHARLES V. KWIATKOSKI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE WATCHUNG HILLS REGIONAL HIGH SCHOOL DISTRICT, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law, Eric G. Errickson, ALJ.

The Commissioner observes that petitioner filed exceptions to the initial decision and that both parties filed reply exceptions pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Petitioner in his exceptions to the initial decision relies on the following points of argument set forth in his brief which was originally filed before Judge Errickson and commented upon in his initial decision of this matter:

"***

ARGUMENT

POINT I

***"

(Petitioner's Brief, at p. 1)

Both petitioner and respondent rely on several prior decisions of the Commissioner and the courts to support their respective positions in regard to petitioner's exceptions and replies filed thereto in the instant matter which are incorporated by reference herein.

The Commissioner is constrained to observe that the legal arguments raised by petitioner before Judge Errickson which ultimately were considered in the initial decision of this matter have since been ruled upon by the New Jersey Superior Court, Appellate Division on March 9, 1981.

The specific cases of reference are Lavin v. Board of Education of Hackensack, Dkt. No. A-2875-79; Castner v. Board of Education of Plumsted, Dkt. No. A-1691-79; Union Township Teachers Association v. Union Township Board of Education, Dkt. No. A-3065-79.

In the Commissioner's judgment, the above-cited determinations of the Court have applicability herein with respect to the arguments raised by petitioner in Points I, IIA, III and IV, ante.

In this regard the Commissioner finds and determines the following:

1. Petitioner is barred by the statute of limitations (N.J.S.A. 2A:14-1) and laches from claiming retroactive placement and salary compensation for those years of employment prior to the filing of a formal Petition of Appeal.

2. The Board's defense of equitable estoppel is without merit in the instant matter by virtue of the overriding mandatory statutory provisions of N.J.S.A. 18A:29-11 invoked herein.

3. The one year and ten months of military credit adjustment sought by petitioner herein is sufficient in duration to be adjudged as equivalent to two academic years of employment credit for which petitioner is deemed to be eligible under the provisions of N.J.S.A. 18A:29-11 as construed by the Court in Lavin and Union Township, supra.

Such credit is prospective in application to the Board's salary guide for those years subsequent to the filing of the instant Petition of Appeal in this matter. (May 30, 1980)

With respect to the determinations rendered above, the Commissioner has relied on the pertinent language of the Court decisions in Lavin and Union Township, supra:

> "***Enforcement of the statute of limitations in the instant case is consistent with the legislative goal behind such statutes: '...to stimulate litigants to pursue their causes of actions diligently and to spare courts from the litigation of stale claims.' Danilla v. Leatherby Insurance Company , 168 N.J. Super. 515, 518 (App. Div. 1979). Except in cases of severe hardship, such statutes should be strictly interpreted in order to foster a more stable society. Ibid. In the instant case in particular the allowance of petitioner's claim would subvert the desired societal order: '...municipal governments must operate on a current "cash basis"', and thus 'it is important to encourage the prompt assertion and resolution of a claim for transferred service credits, preferably before employment begins.' Kloss, supra, 170 N.J. Super. at 160; accord, Giorno v. Township of South Brunswick, 170 N.J. Super. 162, 166-167 (App. Div. 1979).
>
> "***The State Board relying on Kloss and Giorno invoked the equitable doctrines of laches and estoppel in denying any retroactive adjustment based on the military credit. We are of the view that Lavin is not barred by estoppel. We distinguish Kloss and Giorno by reference to the difference in the statute that provided the basis therein, N.J.S.A. 40A:9-5, and the statute that provided the basis in the present case,

> N.J.S.A. 18A:29-11. In those cases the transfer rights accorded by N.J.S.A. 40A:9-5 were in effect made negotiable under another provision, N.J.S.A. 40A:9-10.1. Thus, even though the parties as in Kloss, were not aware of those statutes, the court held in part that 'the likelihood that defendant [Township] relied to some extent on the seeming finality of the negotiated agreements...' permitted the application of equitable estoppel. 170 N.J. Super. at 159. Here the statute [N.J.S.A. 18A:29-11] is mandatory and its provisions must be superimposed where it applies in a particular case, any teaching contract to the contrary notwithstanding. For this reason we cannot say that Lavin is attempting to repudiate a prior agreement.
>
> "Lavin, however, is barred by the doctrine of laches as to that portion of the military credit adjustment applicable to the period prior to September 1978. The long period between petitioner's employment and the commencement of this action before the Commissioner satisfies us that retroactive relief should be barred on the ground of laches.***
>
> "On the facts in this case it is appropriate to allow prospective application of the military credit as of September 1978, a point in time coinciding with the school year.***"
> (Slip Opinion, at pp. 9-11)

In Lavin, the Court also addressed the issue of less than full years of military service as it applies to equivalent years of employment credit:

> "***The import of the statute, therefore, is to treat military service as if it were teaching experience. As noted by petitioner, the only way teaching experience can be rewarded is via placement on the salary schedule, which, under the statutory scheme, is based upon units of whole years. N.J.S.A. 18A:29-7. No provision exists for partial years of experience or fractional employment increments. Thus military service can be credited for a whole year or for none at all.

> "The State Board incorrectly read the statute as giving credit 'for "years" of military service.' If that were true, its position would be stronger, the implication being that only whole years of military service could be credited.***
>
> "Given the intent of N.J.S.A. 18A:29-11 to equalize employment credit and military service, the task becomes one of deciding how much military service is the equivalent of an academic year. Petitioner urges, and we agree, that the only way to achieve equivalence is to determine whether the military service was long enough to be a certain number of academic years if spent teaching rather than serving in the military.***" (Id., at pp. 13-15)

The Commissioner observes that the Court in its ruling in Union Township, supra, again addressed the issue of fractional years of military service as it translates into equivalent employment credit. Specifically, the Court held therein as follows:

> "***The import of the statute, therefore, is to treat military service as if it were teaching experience. As noted by petitioner, the only way teaching experience can be rewarded is via placement on the salary schedule, which, under the statutory scheme, is based upon units of whole years. N.J.S.A. 18A:29-7. No provision exists for partial years of experience or fractional employment increments. Thus military service can be credited for a whole year or for none at all.
>
> "The statute places no time adjective in front of military service; rather, it refers to 'years of employment credit' (emphasis added) to be computed from the military service, however long it might be, implying that the military service must be molded into or made the equivalent of whole years of employment credit.
>
> "Some difficulty is presented in determining precisely what a 'year of employment credit' is. Under a literal reading of the pertinent definitional sections, 'a year of employment' is 'employment by a [full time teaching staff] member for one academic year in any

publicly owned and operated college, school or institution of learning for one academic year in this or any other state or territory of the United States.' [Emphasis added.] In turn, 'academic year' is defined as 'the period between the opening day of school in the district after the general summer vacation, or 10 days thereafter, and the next succeeding summer vacation.' N.J.S.A. 18A:29-6.

"An academic year then, under that definition, generally approximates ten months of actual teaching time. Thus, it might be argued that to accomplish the statutory requirements of equivalency of N.J.S.A. 18A:29-11 using the literal definition set forth in N.J.S.A. 18A:29-6, the military time expressed in months should be divided by 10, the number of months in an academic year. We believe this could produce a result not intended by the statute. A person with three and one-third years or 40 months military service would, under such a construction, be entitled to four years of employment credit. Viewing the two month summer period as a vacation somewhat similar to military leave, although concededly longer in duration, and given the intent of N.J.S.A. 18A:29-11 to equalize employment time and military time, we are of the view that 'equivalent years of employment credit' as stated in the statute should be used in an annualized or calendar year context rather than an academic year context. Thus, using the same example as above, the three and one-third years of military service would give three years of employment credit as a teaching staff member, (except as hereinafter adjusted) a result we conceive the Legislature intended.

"Since no provision exists for partial years of experience or fractional employment increments, the military service must be credited for a whole year or not at all. A solution is suggested in these cases by recourse to the administrative practice, which the petitioner represents is followed generally throughout the State, a representation undisputed by either the State Board or the N.J.S.B.A. Under this practice a teacher who is paid for ten months, even though the actual teaching time is somewhat less, is

given entitlement to adjustment on the salary schedule in instances where the teacher has taught for at least five months or one-half of an academic school year. It would be entirely reasonable, as the Commissioner so found, to apply a closely similar procedure with respect to military service time. Thus in a situation where a teaching staff member had a fractional year's credit of six months or more of military service time, he or she would be credited with a whole year of employment credit in addition to any other whole years credit that he or she might have.[2]

"We therefore conclude that the Commissioner's method of computing a credit for fractional years of military service to be founded on equitable and reasonable underpinnings and we approve it.

"[2]It could be validly argued that a fractional year of military service time amounting to five months would represent one-half of an academic year and therefore entitle the staff member to a full year of employment credit. We do not decide that question since the number of months of military service credit under appeal is six months and not five months.***"
(Slip Opinion at pp. 13-16)

Finally, the Commissioner observes that petitioner in his exceptions attempts to invoke the provisions of N.J.S.A. 2A:14-24 in seeking retroactive employment credit for the period of military service controverted herein. The Commissioner finds petitioner's exceptions without merit in this regard for the reasons set forth in the initial decision and also by virtue of the decisions rendered by the court in Lavin and Union Township, supra.

Accordingly, except for the fact that petitioner is eligible for two years of prospective employment credit for one year and ten months of prior military service, under the terms hereinbefore set forth, the Commissioner concurs with the initial decision rendered in this matter and adopts it as his own.

In all other respects the instant Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

April 3, 1981

JOHN MAZZOCCA,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF ATLANTIC CITY, ATLANTIC COUNTY,	:	
RESPONDENT.	:	
	:	

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

For the Respondent, Jeffrey L. Gold, Esq.

Petitioner was employed by the Atlantic City Board of Education, hereinafter "Board," as an industrial arts teacher at a regular meeting of the Board on July 1, 1977. His salary for ten months was determined at that time to be $14,168 based on his holding a master's degree plus 15 credits, with five years of prior teaching experience, plus two years' credit for military service, or Step 8 on the negotiated salary schedule for 1977-78.

On April 13, 1978, petitioner was informed by the Superintendent of Schools that he had erroneously been given credit for attaining the masters + 15 level since, in fact, he had earned the extra credits prior to obtaining his master's degree. Therefore, he should have been placed on the masters scale, Step 8 at $13,556 rather than on the masters + 15 scale, Step 8 at $14,168.

Because the error was an administrative one, the Superintendent informed petitioner that the Board would honor his 1977-78 contract in full but, however, would offer him a 1978-79 contract at Step 9 of the master's scale unless petitioner "***fully earned 15 graduate credits subsequent to the granting of [his] master's degree and presented these credits to this office by August 31, 1978.***" (April 13, 1978 Letter)

Petitioner alleges that a portion of his salary for 1978-79 was wrongfully withheld and prays for an order requiring the Board to pay him such money as is due, together with interest and counsel fees. The Board denies that it has wronged petitioner in any way and seeks dismissal of the appeal.

On March 30, 1979 a conference of counsel was held in the Division of Controversies and Disputes at which it was agreed

to seek summary judgment of the Commissioner on the issue of whether or not it was legal and proper for the Board not to remunerate petitioner for the school year 1978-79 and thereafter for the 15 graduate credits obtained prior to receiving a master's degree.

A Joint Stipulation of Facts was prepared by counsel for both parties and received by the Division of Controversies and Disputes on August 23, 1979. The stipulations agreed upon were:

1. The additional credits that petitioner wishes to be compensated for were earned prior to his obtaining his highest educational degree.

2. Petitioner was hired for the 1977-78 school year at the masters + 15 step.

3. Petitioner was paid at that level for the entire 1977-78 school year.

4. Petitioner was notified in April 1978 that the Board, although continuing to pay him at the same level for the 1977-78 school year, would not be paying him for the level of degree plus 15 or more credits for the 1978-79 school year. The reasons stated for this correction were that it had been discovered that he did not earn 15 credits subsequent to obtaining the master's degree.

5. For the school year 1978-79, petitioner accepted his contract which did not include credit for any of the educational credits earned prior to obtaining a master's degree but still maintained that he was entitled to be paid for those 15 credits previously earned.

6. Petitioner met with an Assistant Superintendent before he was hired but no discussion took place concerning credits being excluded. Prior to September 1977 and after the meeting with the Assistant Superintendent, petitioner was told by the Superintendent that he would lose one year of military credit and was further told that he would be paid at the masters + 26 level. The Superintendent made this statement believing that petitioner had 15 credits earned after the masters.

7. Petitioner is not a tenured teacher.

8. At no time did petitioner attempt to hide the fact that his 15 credits now in dispute were earned before obtaining a master's degree. All of his records submitted clearly show that these credits were obtained prior to the master's degree.

9. There is no duplication of courses in any of petitioner's credits.

10. All credits are acceptable graduate credits.

11. Certain witnesses to be called by the Board would testify that it was their understanding that the Board would not pay for credits earned prior to obtaining a master's degree.

12. The Superintendent believes that he informed petitioner that only credits earned after a degree were compensable. Petitioner denies that he was ever told the above by anyone prior to April 1979.

13. The Board minutes of June 9, 1969; September 13, 1976; May 9, August 15, September 12, and November 14, 1977; June 21, August 7 and September 11, 1978; and April 9, 1979 are stipulated into evidence.

The Commissioner has carefully reviewed the stipulated facts, briefs and exhibits filed by counsel and the relevant points of law.

The Commissioner can find no evidence that the Board or its agents attempted to deceive petitioner at any time in regard to its salary policy. Both the Assistant Superintendent and the Superintendent indicated that candidates for teaching positions were routinely informed of Board policy requiring that credits to be applied to salary levels be earned after the degree (bachelor's or master's) is attained. The sincerity and credibility of these individuals appear to the Commissioner to be unassailable. Documents, verifiably evidential and stipulated as true in fact, support their position.

The Commissioner concludes from the above evidence that the Board did indeed make an unintentional clerical error when it placed petitioner on Step 8 of the masters + 15 scale. Under N.J.S.A. 18A:29-9, however, there is no question of illegality since the statute involved permits a local board of education to negotiate the initial salary paid a teaching staff member. This applies even in a case such as this where a salary is mistakenly determined in good faith through inadvertent miscalculation.

Nor can a board of education withdraw an erroneous salary commitment to a teaching staff member once the salary becomes official. The Commissioner addressed this in Harris v. Board of Education of Pemberton Township, 1939-49 S.L.D. 164 as follows:

> "***A board of education may rescind at any meeting a resolution which it passed during the course of the meeting and, accordingly, persons do not acquire rights until the final action has been taken on such resolution prior to adjournment.***"

> "***An acquired right through the adoption of a resolution by a board of education cannot be invalidated by a rescinding of the resolution at a subsequent meeting.***" (at 165-166)

The Commissioner further concludes that the Board acted prudently, responsibly, and within statutory provisions when it corrected the nontenured petitioner's salary for 1978-79 to comply with the step and level to which his experience and professional standing entitled him. Harry A. Romeo v. Board of Education of the Township of Madison, 1973 S.L.D. 102 While petitioner was in no way responsible for the unfortunate error in his initial salary and was legally entitled to the remuneration called for in his initial contract, the mistake cannot be continued beyond the life of the contract or the period of one school year. N.J.S.A. 18A:6-10

In Galop v. Board of Education of the Township of Hanover, 1975 S.L.D. 358, aff'd State Board of Education 366, the Commissioner said:

> "***Petitioner has no residual entitlement to such a favored position beyond the end of her *** contract and is to be paid *** thereafter, as provided by her proper step and level on the Board's negotiated salary guide and authorized by the Board's official action.***" (at 364-365)

On the basis of these conclusions, the Board's request for summary judgment in support of its decisions is granted. Conversely petitioner's appeal for summary judgment ordering the Board to pay him the money it withheld in 1978-79, and thereafter, is denied.

Petitioner's appeal for interest and counsel fees is rendered moot by the action above, but would have been denied regardless, since there is no statutory provision for awarding counsel fees, or for the payment of interest and costs of litigation in civil suits involving boards of education. Jack Noorigian v. Jersey City Board of Education, 1972 S.L.D. 266, rev'd in part State Board 1973 S.L.D. 777

The Petition of Appeal is dismissed with prejudice.

COMMISSIONER OF EDUCATION

April 8, 1981

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5816-80

(EDU 4502-80 - Remanded)

AGENCY DKT. NO. 328-7/80A

and

OAL DKT. NO. EDU 5433-80

AGENCY DKT. NO. 418-8/80A

Consolidated

IN THE MATTER OF:

BOARD OF EDUCATION OF THE CITY OF CORBIN CITY,

Petitioner-Respondent

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF GALLOWAY, ATLANTIC COUNTY,

Respondent-Petitioner.

Record Closed: February 10, 1981

Received by Agency: 2/26/81

Decided: February 25, 1981

Mailed to Parties: 3/2/81

APPEARANCES:

Philip Shore, Esq., for Petitioner-Respondent Corbin City Board of Education (Golden, Shore, Zahn & Richmond)

Howard Kupperman, Esq., for Respondent-Petitioner Galloway Board of Education (Lashman & Kupperman)

BEFORE **LILLARD E. LAW,** ALJ:

This matter having originally been opened before the Commissioner of Education by the filing of a formal Petition of Appeal by the Board of Education of Corbin

City (Corbin Board) alleging that the Board of Education of the Township of Galloway (Galloway Board) ignored the statutory mandates pursuant to N.J.S.A. 18A:46-22, N.J.S.A. 18A:38-21 and 22, when it served notice of its intention to remove seven (7) special education pupils from a sending-receiving relationship. The Galloway Board denied the allegations and asserted that it had not entered into a sending-receiving relationship with the Corbin Board.

The Commissioner transferred the matter to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

On July 25, 1980, oral argument was heard on Corbin Board's Notice of Motion for Emergency Relief and Temporary Restraints. Thereafter, on August 13, 1980, the undersigned issued a Final Decision on Motion and Order granting the Corbin Board the relief sought.

On August 5, 1980, the Commissioner was in receipt of a Verified Petition of Appeal filed by the Galloway Board requesting permission to withdraw seven (7) pupils from the Corbin City Board's John S. Helmbold Education Center.

The Commissioner, on September 10, 1980, remanded the Final Decision on Motion and Order to the Office of Administrative Law for plenary hearing on the substantive issues contained within the original Petition filed by the Corbin Board. Subsequently, on January 13, 1981, a hearing in these matters was conducted at the Absecon Municipal Court, Absecon, New Jersey.

Prior to opening the record, the parties engaged in conference to which they agreed to the issues to be argued and heard and reached a tentative settlement as to the final disposition of the matters in controversy. Upon opening the record, the undersigned, sua sponte, ordered that the two matters be consolidated, to which the parties agreed.

With regard to the issues of the existence of a sending-receiving relationship between the Corbin Board and the Galloway Board, the parties agreed to the following:

STATEMENT OF FACTS

The Corbin City Board of Education operates facilities known as the John S. Helmbold Education Center (Education Center), which are facilities for severely handicapped children who are between three (3) and twenty-one (21) years of age. The Education Center has been in existence for the past twelve (12) years. The students attend the school on an unstratified basis; that is, there is no typical kindergarten to twelfth grade system.

At the Education Center, the Corbin Board has implemented an educational program and has built and developed facilities which have been and presently are approved on a yearly basis by the Commissioner of Education. The Education Center employs a highly skilled staff, including but not limited to, a child study team, five speech pathologists, an audiologist, consultants in pediatric neurology, pediatric optometry, communications disorders and special education. It also employs a school nurse and a physician who is also a specialist in developmental medicine. The staff serves a school population of approximately 250 children.

The Corbin Board is engaged in sending-receiving relationships with approximately thirty-five school districts to provide educational services to special education pupils from the counties of Ocean, Atlantic, Cape May, Cumberland, Gloucester and Burlington. These sending-receiving relationships exist under conditions identical to those which characterize the sending-receiving relationship between the Corbin Board and the Galloway Board, the parties herein.

The sending-receiving relationship between the Corbin Board and the Galloway Board is a longstanding one, having begun with the 1969-1970 school year.

The one writing evidencing the sending-receiving relationship between the Corbin Board and the Galloway Board is a document executed on an annual basis and entitled, "Tuition Agreement".

The aforementioned writing refers to the Galloway Board and the Corbin Board as the sending district and the receiving district, respectively.

The aforementioned writing sets forth tuition rates in compliance with N.J.A.C. 6:20-3.1 et seq. which are the rules and regulations promulgated by the New Jersey State Board of Education for establishing tuition rates between sending and receiving districts.

STATEMENT OF LAW

The finding of a sending-receiving relationship need not be premised upon a writing or written document. A tuition agreement, or other writing, however, may be evidence of the existence of a sending-receiving relationship. A sending-receiving relationship is most often based upon the consensual acts of the parties as authorized by N.J.S.A. 18A:38-8 et seq. and analogous statutory provisions governing education for the handicapped, to wit: 18A:46-14b and 18A:46-22. These statutes, read in pari materia, recognize that the consensual acts of the parties may create a sending-receiving relationship and provide that approval of the Commissioner of Education is required in order to alter or terminate the relationship. No such specific statutory authority requires approval of the Commissioner of Education before entering into a sending-receiving relationship.

The following cases are cited for the propositions that a sending-receiving relationship may exist without benefit of a writing; that a written tuition agreement is written evidence of a sending-receiving relationship; that a tuition payment relationship, without benefit of a writing, may create a sending-receiving relationship; and that the acts of the parties may form the basis for a sending-receiving relationship. A brief statement explaining for what proposition each case is cited is included, although the principle may not have been the ultimate decision of the particular case, but merely recognized in reaching the ultimate decision.

In the Matter of the Termination of the Sending-Receiving Relationship between the Boards of Education of Middletown Township and Borough of Keansburg, 1964 S.L.D. 1962; affirmed State Board, 1966 S.L.D. 252; affirmed Appellate Division, 1966 S.L.D. 253. It was recognized that no writing is required for a sending-receiving relationship to exist. The sending-receiving relationship here was "a long and amicable one," for which no writing existed. It was recognized that the law contemplates that sending-receiving relationships require stability and that, therefore, approval of the Commissioner of Education is required to sever the relationship.

In the Matter of the Termination of the Sending-Receiving Relationship between the Boards of Education of the Township of Lakewood and the Township of Manchester, 1966 S.L.D. 12. This case recognized that a relationship of sending and receiving students on a tuition basis constituted a sending-receiving relationship which required approval of the Commissioner of Education in order to terminate it.

Board of Education of the Township of Haddon v. Board of Education of the Borough of Collingswood, 1966 S.L.D. 207. A relationship on a tuition basis had existed since 1905 and the relationship, though not evidenced by a writing, constituted a sending-receiving relationship.

Board of Education of City of Asbury Park v. Board of Education of the Borough of Belmar and Board of Education of the Borough of Manasquan, 1966 S.L.D. 275. Though no writing existed, a sending-receiving relationship existed, the alteration of which required approval of the Commissioner of Education.

Board of Education of South Belmar v. Board of Education of Asbury Park and Board of Education of Manasquan, 1969 S.L.D. 156; affirmed State Board, 1970 S.L.D. 461. This case contains an explicit statement that a sending-receiving relationship may exist without the benefit of a writing.

In the Matter of the Application of the Board of Education of the Borough of South River for the Termination of the Sending-Receiving Relationship with the School District of Spotswood, 1970 S.L.D. 428; remanded State Board, 1971 S.L.D. 659; on remand, 1972 S.L.D. 286; affirmed State Board, 1972 S.L.D. 290. The State Board recognized that absent a writing, a sending-receiving relationship may exist where students are received as "tuition pupils".

In the Matter of the Application of the Board of Education of Vineland for the Termination of the Sending-Receiving Relationship with the School Districts of Newfield, Pittsgrove, Weymouth and Buena Regional, 1971 S.L.D. 156. This case also stands for the proposition that a longstanding relationship on a tuition basis constitutes a sending-receiving relationship.

In the Matter of the Application of the Upper Freehold Regional Board of Education for the Termination of the Sending-Receiving Relationship with the Board of

Education of the Township of Washington, 1972 S.L.D. 627; later Commissioner's decision, 1975 S.L.D. 856. A sending-receiving relationship existed here for forty-five (45) years though there had been no writing to evidence it.

Morris School District v. Board of Education of the Tonwship of Harding and Board of Education of the Borough of Madison, 1974 S.L.D. 457; affirmed State Board, 1974 S.L.D. 487; affirmed Appellate Division 1975 S.L.D. 1107. Citing Board of Education of the Borough of Harworth v. Board of Education of the Borough of Dumont, 1950-51 S.L.D. 42, it was recognized that a sending-receiving relationship could exist whether or not a writing evidenced it. In either case, approval of the Commissioner of Education is required to alter or terminate the relationship.

In the Matter of the Application of the Board of Education of the Township of Liberty for the termination of the Sending-Receiving Relationship with the Board of Education of the Town of Belvedere, 1975 S.L.D. 431. It was recognized that a sending-receiving relationship existed without a writing between 1925-1958. (Subsequently, the relationship was memorialized in writing.)

In the Matter of the Application of the Phillipsburg Board of Education for the Termination of the Sending-Receiving Relationship with the Boards of Education of the Borough of Alpha, the Township of Greenwich, the Township of Lopatcong, the Township of Pohatcong and the Town of Bloomsbury, 1976 S.L.D. 176. The sending-receiving relationship herein dated back to the 19th Century and continued without a written document.

In the Matter of the Application of the Board of Education of the East Windsor Regional School District for the Termination of the Sending-Receiving Relationship with the School District of the Township of Cranbury and the Application of the Board of Education of the Township of Cranbury to Establish a Sending-Receiving Relationship with the Board of Education of the Township of Lawrence, 1978 S.L.D. 502. The Commissioner reiterated that a sending-relationship existed between East Windsor and Cranbury absent a writing.

In the Matter of the Application of the Board of Education of the Termination of the Sending-Receiving Relationship with the School District of the Borough of Roosevelt, 1978 S.L.D. 508. It was recognized that with or without a contractual

agreement evidencing a sending-receiving relationship, approval of the Commissioner of Education is required to sever the relationship.

Board of Education of the City of Asbury Park v. Board of Education of the Boroughs of Belmar and Manasquan, 1979 S.L.D. (Commissioner's Decision, June 11, 1979). This case involved a longstanding dispute between the parties (see previous cases involving these parties enumerated herein). Though there was no writing to evidence it, a sending-receiving relationship existed.

Thus, **I FIND** and **DETERMINE** that a sending-receiving relationship exists between the Corbin Board and the Galloway Board with respect to those pupils sent from the Galloway Board School District to the Corbin City Board's John S. Helmbold Education Center.

The issue now to be resolved is whether good and sufficient reason has been shown by the Galloway Board to terminate its sending-receiving relationship of seven (7) special education pupils from the Corbin Board's John S. Helmbold Education Center.

The Galloway Board admits that it has, for the past twelve (12) years, engaged in a sending-receiving relationship for certain of its classified handicapped pupils with the Corbin Board. It asserts, however, that it is now prepared to provide a proper, legal, thorough and efficient educational program to the seven (7) classified pupils enrolled in the Corbin Board's John S. Helmbold Education Center. It asserts that through the recommendation of its own Child Study Team (CST), it has enlarged, expanded and modified its facilities to properly educate the seven (7) classified pupils involved in the herein matters. It asserts, moreover, that the parents of each pupil has agreed, consented and encouraged the Galloway Board to withdraw from the sending-receiving relationship in order that their respective children may be educated in the local facilities. The Galloway Board further contends that the United States Department of Education has requested that it withdraw the seven (7) classified pupils and provide the appropriate educational program at the local level which, it asserts, it is prepared to do. The Galloway Board finally argues that, notwithstanding its investment in facilities, transfer and employ of additional teaching staff members and purchase of specialzed educational materials, economics may result from the withdrawal.

It is noted on the record that the Corbin Board did not oppose the Galloway Board's application to terminate the sending-receiving relationship of the seven (7) classified pupils who had withdrawn from the Corbin Board's John S. Helmbold Education Center. The Corbin Board also joined the Galloway Board's request that prior orders of this Court and the Commissioner be voided without penalty or sanction.

Having carefully reviewed the entire record with regard to Galloway Board's application to terminate its sending-receiving relationship with the Corbin Board, **I FIND** that:

1. The evidence adduced in this matter leads to a firm conclusion that the Galloway Board is prepared to provide a thorough and efficient education program to its seven (7) classified pupils.

2. The Galloway Board has enlarged, expanded and modified its facilities to provide a thorough and efficient educational program to said pupils.

3. The Galloway Board has arranged its teaching staff members, through transfers, and employed additional staff members for the instructional program of said pupils.

4. The Galloway Board has the consent of, and has been encouraged by, the parents of the classified pupils to provide the educational program at the local level.

5. The Galloway Board's CST has recommended that the pupils be withdrawn from the John S. Helmbold Education Center and provided an educational program at the local level.

6. The United States Department of Education has recommended to the Galloway Board that the educational opportunities for the said classified pupils be conducted at the local level.

I CONCLUDE, therefore, that good and sufficient reason has been established by the Galloway Township Board of Education for the severance of its sending-receiving relationship with the Corbin City Board of Education.

Accordingly, **IT IS ORDERED** that the sending-receiving relationship between the Corbin City Board of Education and the Galloway Township Board for the seven (7) classified handicapped pupils is hereby terminated as of August 5, 1980, the date the Commissioner was in receipt of the Galloway Board's application to terminate said sending-receiving relationship.

IT IS FURTHER ORDERED that the temporary restraints, issued by this Court and the Commissioner, are hereby vacated and rescinded as of August 5, 1980.

The remaining issue to be determined is the transportation costs incurred by the Corbin Board during the pendency of the herein litigation.

The Corbin City Superintendent of Schools testified that the Corbin Board incurred transportation costs for the seven (7) pupils in question. He stated that although the seven (7) pupils did not make use of the transportation, the Corbin Board provided pupil transportation commencing September 3, 1980 and continued to provide such transportation until December 23, 1980 at a total cost to the Corbin Board of $5,664. (P-1)

Accordingly, **IT IS ORDERED** that the Corbin Board make application to the New Jersey Department of Education, Division of Pupil Transportation for reimbursement of its pupil transportation costs pursuant to N.J.S.A. 18A:39-1 et seq.; N.J.S.A. 18A:46-33 and N.J.S.A. 18A:7A-1 et seq.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, FRED G. BURKE,** who by law is empowered to make a final decision in this matter. However, if Fred G. Burke does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

OAL DKT. NOS. EDU 5816-80 & 5433-80

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

25 February 1981
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

26 February 1981
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

March 2/1981
DATE

Ronald L. Parker/ef
OFFICE OF ADMINISTRATIVE LAW

ms

BOARD OF EDUCATION OF CORBIN CITY,	:	
PETITIONER-RESPONDENT,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF GALLOWAY, ATLANTIC COUNTY,	:	DECISION
RESPONDENT-PETITIONER,	:	
	:	

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law, Lillard E. Law, ALJ. No exceptions to the initial decision were filed by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b, and c.

Initially, the Commissioner observes that the controversy herein is governed by the provisions of N.J.S.A. 18A:46-1 et seq. rather than those of N.J.S.A. 18A:38-1 et seq. The Commissioner so holds.

In this regard, the applicable statutory provisions in Chapter 46, Article 5 pertaining to the sending-receiving relationships between school districts for the education of handicapped pupils read as follows:

> "The commissioner may, in his discretion, with the approval of the State board:
>
> a. Require any board of education, having the necessary facilities to provide the services required to be provided by this chapter, to receive pupils requiring such services from other districts; or
>
> b. Require any board of education not having the necessary facilities to provide the facilities and services required to be provided pursuant to N.J.S. 18A:46-15b and to receive pupils requiring such services from other districts." (N.J.S.A. 18A:46-20)
>
> "Any board of education, jointure commission, state operated facility or private school which receives pupils from a sending district under this chapter shall determine a tuition

> rate to be paid by the sending board of education, but in no case shall the tuition rate in a nonpublic school exceed the maximum day class cost of education per pupil of children in similar special education classes in New Jersey public schools as determined according to a formula prescribed by the commissioner with the approval of the state board." (N.J.S.A. 18A:46-21)
>
> "Any board of education which has entered or hereafter shall enter its handicapped pupils in the schools of a receiving district may not withdraw such pupils for the purpose of entering them in the schools of another district unless good and sufficient reason exist for such a change and unless an application therefor is made and approved by the commissioner. Either the receiving or sending board of education, if dissatisfied with the determination of the commissioner on any such application, may appeal to the state board, and, in its discretion, that body may affirm, reverse, or modify his determination." (N.J.S.A. 18A:46-22)

Additionally, the regulations promulgated by the State Board regarding the special requirements to be followed with respect to the promotion and transfer of handicapped pupils read as follows:

> ***
>
> "(c) In a formal sending-receiving relationship, the receiving school becomes responsible for classification and the individualized education program. A formal sending-receiving relationship is one in which a local school district with a secondary school program has agreed contractually to provide a secondary school education for the general pupil population of an elementary school district.
>
> "(d) In other than formal sending-receiving relationships, contractual agreement shall be made between school districts regarding educationally handicapped pupils which specifies responsibility for providing special instructional services and child study team services." (N.J.A.C. 6:28-2.8)

In the instant matter the Commissioner takes notice that the Galloway Board pursuant to the provisions of N.J.S.A. 18A:46-22 is not required to seek approval of the Commissioner to

withdraw seven of its handicapped pupils from the Education Center. This is so because these pupils will be provided an educational program in Galloway Township, their resident school district, rather than another school district.

The Commissioner further observes that Galloway Township's withdrawal of seven handicapped pupils has not resulted in a complete withdrawal of all handicapped pupils attending the Education Center. (P-1)

Moreover, the Commissioner finds and determines from the record of this matter that, while the parties did enter into a "Tuition Agreement" which sets forth a per pupil tuition rate for certain categories of handicapped pupils, such agreement cannot be considered to fall within the definition of a formal sending-receiving relationship (N.J.A.C. 6:28-2.8(c), ante) nor does it comply with the mandated requirements of N.J.A.C. 6:28-2.8(d), ante, regarding other than formal sending-receiving relationships.

In arriving at the above findings and determination, the Commissioner is constrained to observe that local boards of education, through basic child study teams, are required to develop an individualized education program (IEP) for each educationally handicapped pupil (N.J.A.C. 6:28-1.8(a)) annually or more often, if necessary (N.J.A.C. 6:28-1.8 (8)(f)). The child study team is further required to explain how the placement of an educationally handicapped pupil is the least restrictive environment appropriate to the needs of said pupil. (N.J.A.C. 6:28-1.8(d)(5)(ii))

In the Commissioner's judgment, the requirements in the regulations set forth above, with respect to the development and reevaluation of an IEP for an educationally handicapped pupil, would not trigger the provisions of N.J.S.A. 18A:46-22 in the event that it became necessary for an educationally handicapped pupil to be transferred from one receiving district to another district by virtue of a change in the IEP.

In summary, the Commissioner finds and determines as follows:

1. The Galloway Township Board of Education was within its legal authority pursuant to N.J.S.A. 18A:46-22 to withdraw seven of its educationally handicapped pupils from the Education Center and return them to the Galloway Township Public Schools.

2. The "Tuition Agreement" in effect between the parties for the 1980-81 school year does not satisfy the provisions of N.J.A.C. 6:28-2.8(d) so as to constitute a valid contractual agreement. The parties are hereby directed to comply with the above-cited regulation with respect to the remaining educationally handicapped pupils, if any, attending the Education Center from the Galloway Township School District.

3. The Corbin City School District may make application to the New Jersey Department of Education, Division of Pupil Transportation, for reimbursement of its pupil transportation costs incurred for the seven pupils in question for the period September 3 to December 23, 1980.

Accordingly, for the reasons specifically set forth by the Commissioner herein, the relief sought by the Galloway Board is hereby granted.

COMMISSIONER OF EDUCATION

April 13, 1981

BOARD OF EDUCATION OF CORBIN CITY,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF GALLOWAY, ATLANTIC COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, April 13, 1981

For the Petitioner-Appellant, Golden, Shore, Zahn & Richmond (Philip H. Shore, Esq., of Counsel)

For the Respondent-Respondent, Howard Kupperman, Esq.

The Galloway Board of Education has for many years been sending certain of its handicapped pupils to the Education Center operated by the Corbin Board for severely handicapped children. Galloway has paid tutition to Corbin for those pupils pursuant to a writing entitled "Tuition Agreement", which is executed on an annual basis and sets forth the tuition rates.

On August 5, 1980 Galloway filed with the Commissioner a petition to withdraw seven of its pupils from the Corbin Education Center. The Administrative Law Judge held that a sending-receiving relationship existed between the two boards, founded upon consensual acts of the parties and the written Tuition Agreement between them and, therefore, pursuant to both N.J.S.A. 18A:38-11 and N.J.S.A. 18A:46-22, Galloway could not withdraw its pupils unless good and sufficient reason existed for such a change and an application therefor was made to and approved by the Commissioner. The Judge further found that good and sufficient reason was established in that Galloway had expanded and modified its facilities for education of the handicapped and was now prepared to provide a thorough and efficient educational program for the seven classified pupils whom it wanted to withdraw from Corbin. He accordingly ordered the sending-receiving relationship for those seven children terminated as of the date the petition was filed.

The Commissioner affirmed as to granting the relief sought by Galloway. He ruled, however, that the relationship between the Boards here was governed by Chapter 46 of Title 18A rather than Chapter 38; that Galloway was not required to seek approval for the withdrawal, because it could now provide a

suitable educational program in its own district for the pupils in question; and that the Tuition Agreement between the Boards did not suffice to comply with N.J.A.C. 6:28-2.8(d), which provides:

> "(d) In other than formal sending-receiving relationships, contractual agreement shall be made between school districts regarding educationally handicapped pupils which specifies responsibility for providing special instructional services and child study team services."

In our view, the Commissioner correctly held that the matter was governed by N.J.S.A. 18A:46-22, which specifically states:

> "Any board of education which has entered or hereafter shall enter its handicapped pupils in the schools of a receiving district may not withdraw such pupils for the purpose of entering them in the schools of another district unless good and sufficient reason exists for such a change and unless an application therefor is made and approved by the commissioner."

The Commissioner also correctly concluded that a sending district need not receive the Commissioner's approval prior to withdrawing its handicapped pupils from a receiving district and returning them to their resident district where they will be provided an appropriate educational program.

Furthermore we also believe that the Commissioner was right in ruling that the annual Tuition Agreement used by the sending and receiving Boards does not comply with N.J.A.C. 6:28-2.8(d) and that a more complete written contract should be adopted. However, this does not suggest that a sending-receiving relationship does not exist because of the failure to exactly comply with the requirements of N.J.A.C. 6:28-2.8(d). Here an agreement plainly existed as evidenced by the acts of the parties which provided sufficient indicia of the parties' intention concerning the agreement. Remaining districts sending handicapped pupils to the within receiving district and using the same Tuition Agreement are strongly urged, nevertheless, to comply with the precise terms of N.J.A.C. 6:28-2.8(a) since by this decision they are put on notice that their past practice does not comply with N.J.A.C. 6:28-2.8(d).

S. David Brandt opposed in the matter.

September 2, 1981

Pending New Jersey Superior Court

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3523-80
AGENCY DKT. NO. 266-5/80A

IN THE MATTER OF:

LAWRENCE VON BEIDEL,
Petitioner,
v.
BOARD OF EDUCATION
OF THE WATCHUNG HILLS
REGIONAL SCHOOL DISTRICT,
Respondent.

Record Closed: January 23, 1981
Received by Agency: 3/3/81

Decided: March 2, 1981
Mailed to Parties: 3/5/81

APPEARANCES:

For Petitioner: **Stephen E. Klausner,** Esq. (Klausner & Hunter)

For Respondent: **William S. Jeremiah,** Esq. (Buttermore, Mullen & Jeremiah)

BEFORE **ERIC G. ERRICKSON,** ALJ:

STATEMENT OF CASE:

Petitioner, a tenured teaching staff member employed by the Watchung Hills Regional Board of Education (Board), petitions the Commissioner of Education for an

order directing the Board to compensate him for one additional year of military service with payments retroactive to the first year of his employment by the Board in 1962. The Board, conversely, contends that petitioner has no legal entitlement to retroactive salary.

PROCEDURAL RECITATION:

The Petition of Appeal and a timely Answer were filed with the Commissioner on May 28, 1980 and June 9, 1980. After the matter had been transferred to the Office of Administrative Law for processing as a contested case pursuant to N.J.S.A. 52:14F-1 et seq., a prehearing conference was conducted at the Office of Administrative Law, Trenton, New Jersey, on September 10, 1980. Respondent had previously given Notice of Motion for Summary Judgment with supporting Brief. Subsequent thereto, a Cross-Motion for Summary Judgment and supporting Brief were filed by petitioner. There being no relevant facts in dispute, the matter is ripe for summary decision in the form of the pleadings, stipulated facts, Briefs and Memoranda of counsel.

RELEVANT FACTS:

Counsel, at a prehearing conference on September 10, 1980, agreed to stipulate that the relevant facts are those set forth in Respondent's Brief submitted in July 1980. The facts are as follows:

Petitioner had completed three (3) years of service in the United States Navy and eight (8) years of teaching prior to his employment by the Board in 1962. The Board by placing petitioner on the tenth (10) step of its salary guide in 1962, recognized two (2) of his three (3) years of military service and eight (8) years of teaching experience. Later, agreements were negotiated by the Board and its teaching staff majority representative providing for longevity and senior service increments. Effective the 1970-71 year, teachers with ten (10) years of service in the district received a senior service increment beginning with their seventeenth (17) year of teaching. Petitioner received his senior service increment in 1972-73, the year after completing ten years of service in the district. Three (3) years later, a second senior service increment was paid. Effective 1976-77, a longevity increment was awarded teachers with 14 years of teaching experience, four (4) of which were required to be in the district. Petitioner was paid the longevity increment during 1976-77, the first year it was effective. If petitioner had been credited with three (3) years of military service, he would neither have been eligible

earlier for senior service or longevity increment nor have been eligible for additional payments thereafter.

DISCUSSION AND CONCLUSIONS:

N.J.S.A. 18A:29-11, enacted into law in 1954, provides in pertinent part 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.***"

Respondent argues, inter alia, that petitioner is barred from the relief he seeks by the six (6) year statute of limitations, N.J.S.A. 2A:14-1, which, as amended by the Laws of 1961, reads in pertinent part as follows:

> "Every action at law *** for recovery upon a contractual claim or liability, express or implied, not under seal *** shall be commenced within 6 years next after the cause of any such action shall have accrued.***"

Petitioner, conversely, contends, inter alia, that his employment with the Board was not contractual and that, even if it was, it was a contract under seal which is excluded from the six (6) year statute of limitations by the wording of N.J.S.A. 2A:14-1, supra. Petitioner relies on case law interpretations in Howard J. Whidden v. Board of Education of the City of Paterson, 1976 S.L.D. 356, modified by New Jersey Superior Court Appellate Division, 1977 S.L.D. 1312; Louis Alfonsetti et al. v. Board of Education of the Township of Lakewood, 1975 S.L.D. 197; and Michael J. Watsula v. Board of Education of the Township of Plumstead, 1977 S.L.D. 692. In each of these cases, it was held that the petitioners were entitled to retroactive salary payment for failure of the respondent Boards to compensate them pursuant to the provisions of N.J.S.A. 18A:29-11, supra.

The facts in Alfonsetti, supra, Whidden, supra, and Watsula, supra, however, are importantly distinguishable from the factual context of the instant matter since Alfonsetti, Watsula and Whidden had not been employed by their boards of education for a

period greater than six (6) years prior to filing their claims for salary relief. Petitioner, herein, by contrast, had been employed for approximately eighteen (18) years prior to bringing this action.

The Courts, when applying the six (6) year statute of limitations, have enunciated the following principles:

> "***This statute, as any statute of limitations, is designed to stimulate litigants to pursue their causes of action diligently and to spare the courts from litigation of stale claims. They penalize dilatoriness and serve as measure of repose. Farrell v. Votator Div. of Chemetron Corp., 62 N.J. 111, 115 (1973). The Legislature, however, has never sought to define or specify when a cause of action shall be deemed to have accrued within the meaning of the statute and consequently this has been left entirely to judicial interpretation and administration. Rosenau v. New Brunswick, 51 N.J. 130, 137 (1968); Fernandi v. Strully, 35 N.J. 431, 449 (1961). ***" (Burd v. New Jersey Telephone Company, 149 N.J. Super. at p. 30, aff'd 76 N.J. 284)

On December 5, 1979, the State Board of Education, relying on the provisions of N.J.S.A. 2A:14-1, reversed the Commissioner's holding in Basil F. Castner v. Board of Education of the Township of Plumstead. Therein, the Commissioner had held that Castner was entitled to salary for military service as the result of his employment which had begun 19 years before filing his petition of appeal. In reaching its decision, the State Board relied also on Miller v. Board of Chosen Freeholders of Hudson County, 10 N.J. 398 (1952), wherein the Court held that Castner was barred from relief because his action was brought in excess of six (6) years after his salary had first been fixed in contract. The State Board stated in Castner:

> "***The Petitioner here is seeking to obtain additional pay to which military service entitled him between the years 1958 and 1969. This claim was not asserted, however, until 1977 - eight years after the last alleged underpayment and 18 years after accrual of the initial cause of action.***
>
> "Although the instant proceeding has initially been brought before the Commissioner pursuant to N.J.S.A. 18A:6-9, the substance of the claim is still a suit by a public employee to recover compensation - a matter cognizable in a court of law. Thus, this case constitutes an 'action at law' within the meaning of N.J.S.A. 2A:14-1. Biddle v. Board of Education of Jersey City, 1939-49 S.L.D. 51 (State Bd. of Ed.); Sousa v. Board of Education of Rahway, 1970 S.L.D. 140.

"The central question we now face is whether the fact that military service credit is prescribed by a statute removes the instant claim from the foregoing statute of limitations. In our view, the New Jersey Supreme Court has already decided the question in the negative.

"In Miller v. Board of Chosen Freeholders of Hudson County, 10 N.J. 398 (1952), two jail guards, employees of Hudson County, brought actions for compensation allegedly due under a statute increasing their salaries. In each case the suit was commenced more than six years after the cause of action had accrued. The Appellate Division held that the defense of the statute of limitations was not available to the County because the Plaintiffs' claims were based upon a statutory direction and therefore were not barred. The Supreme Court reversed. The opinion of Justice Burling noted that 'a statute of limitations is one of repose', which does not extinguish a right but does operate on the remedy. After an exhaustive review of the law on the subject, the Court reached the following conclusion (10 N.J. at page 415):

> '. . . the claim of the plaintiffs in the present case rested not in statute but upon the contractual status of their intestates as employees of the county, the substance of their action was one for compensation for services rendered raising the implied contract to pay the reasonable value thereof as established by statute. . .'

"Elaborating the proposition that public employment is a contractual relationship between the public employer and the employee, the Court further stated (p. 409):

> 'In actions such as these, the substantive right stems from the rendition of the services; the statutory rate of pay is the measure by which the true value of the service performed is proved, and this is the more apparent by virtue of the fact that these legislative enactments make no provision for their enforcement, a clear legislative recognition of the availability of ordinary legal remedies. The only conclusion to be reached, therefore, is that the six-year statute of limitation, R.S. 2:24-1, supra, clearly applies to such actions and was a valid defense in this case . . .' (Emphasis in text)

"The Supreme Court's decision in the Miller case was cited with approval by the same Court in State v. Atlantic City Electric Co., 23 N.J. 259, 270 (1957), where the Court reiterated that the running of the statute of limitations is suspended 'only when the liability is dependent solely upon statutory provisions.' In public employment cases, liability of the governmental body is not dependent solely upon statutory provisions; it depends upon the rendition of services by the employee, as the Court said in Miller; the statute regarding military service credit measures in part the

> compensation to be paid but does not change the basic nature of a claim for underpayment.***
>
> "[W]e believe that in fairness a Board of Education should be protected from the assertion of stale monetary claims which an employee has failed to prosecute within the period of limitations deemed reasonable by the legislature.***" (1980 S.L.D. ___ (decided January 21, 1980))

The Appellate Division of the Superior Court in Howard E. Greenwald v. Board of Education of the City of Camden, Dkt. No. A-1051-77 (1978) reached a similar conclusion in a case involving a teacher's contract. Therein, the Court stated the following:

> "***The court below rejected plaintiff's contention and held that since the claim was made 30 years after he commenced working, it was barred by the statute of limitations, N.J.S.A. 2A:14-1.
>
> "We agree. Like the trial judge, we deem the case of Miller v. Board of Chosen Freeholders, Hudson County, 10 N.J. 398 (1952) to be controlling. In this case, as in Miller, the primary issue is the construction and application of N.J.S.A. 2A:14-1, the six-year statute of limitations.***" (at p. 3)
>
> "(The New Jersey Supreme Court in Miller, supra) rejected plaintiffs' contention that their action was founded upon a statutory direction and therefore not within the six-year statute of limitations. Its ultimate holding was that in form and substance the suit was for compensation for services rendered, an action based on contract, and therefore subject to the statute of limitations.***" (at p. 4)
>
> "***His right is to compensation founded in contract. Consequently, his cause of action is barred by the statute of limitations.***" (at p. 5)

In consideration of the clear language of the Court in Greenwald, supra, and in the State Board's decision in Castner, supra, **I CONCLUDE** that N.J.S.A. 2A:14-1 is relevant to the factual context in the instant matter. **I ALSO CONCLUDE** that petitioner's arguments in his Brief, regarding N.J.S.A. 2A:14-4, the sixteen (16) year statute of limitations, have no relevance or merit. In any event, it must be noted that this Petition of Appeal was filed more than sixteen (16)years after he was first employed by the Board. Even if N.J.S.A. 2A:14-4 were applicable, the provisions thereof would not afford protection to petitioner.

I CONCLUDE that the facts of this case are squarely on point with those in Castner, supra. Given this precedent in education law, it must be further CONCLUDED that the principles enunciated in Greenwald, supra, Miller, supra, and Castner, supra are controlling.

Petitioner argues that his contract with the Board, when he was employed in 1962, was "under seal" and thus excluded from the provisions of N.J.S.A. 2A:14-1. This argument must fail in the total absence of proof that he and the Board intended to or did in fact affix their seals to that contract. The fact that the Board must adopt a seal by statutory mandate does not, ipso facto, place under seal all of its acts and/or salary contract documents as petitioner mistakenly suggests. I so CONCLUDE.

Petitioner's further argument is similiarly in error wherein he contends that the Board's payment for one (1) year of credit time automatically tolled annually the running of time as regards the statute of limitations. It is clear that at no time during the past eighteen (18) years did the Board make partial payment for the second year of credit for military service to which petitioner, in this action, lays claim. Accordingly, I CONCLUDE that the running of time was never tolled by a payment by the Board of petitioner's claim.

DETERMINATION:

Having reached the conclusions previously set forth, it is DETERMINED that petitioner, by reason of N.J.S.A. 2A:14-1 is barred from the relief sought in the form of an order directing the Board to compensate him retroactively for an additional year of military service credit. Castner, supra; Greenwald, supra; Miller, supra; Raymond Meisenbacher v. Board of Education of the City of Elizabeth, Union County, 1980 S.L.D. ____ (decided March 10, 1980). Accordingly, IT IS ORDERED that Petitioner's Motion for Summary Judgment be and is DENIED. Summary Decision is entered in favor of the Board. The Petition is DISMISSED.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, FRED G. BURKE,** who by law is empowered to make a final decision in this matter. However, if Fred G. Burke does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

OAL DKT. NO. EDU 3523-80

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

March 2, 1981
DATE

Eric G. Errickson
ERIC G. ERRICKSON, ALJ

Receipt Acknowledged:

March 3, 1981
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

March 5/1981
DATE

Ronald L. Parker/ss
OFFICE OF ADMINISTRATIVE LAW

bm

LAWRENCE VON BEIDEL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE WATCHUNG HILLS REGIONAL SCHOOL DISTRICT,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law.

The Commissioner observes that no exceptions were filed in a timely fashion by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Commissioner is constrained to observe that the legal arguments raised by petitioner before Judge Errickson which ultimately were considered in the initial decision of this matter have since been ruled upon by the New Jersey Superior Court, Appellate Division, on March 9, 1981.

The specific cases of reference are Lavin v. Board of Education of Hackensack, Dkt. No. A-2875-79; Castner v. Board of Education of Plumsted, Dkt. No. A-1691-79; Union Township Teachers' Association v. Union Township Board of Education, Dkt. No. A-3065-79.

Petitioner is barred by the statute of limitations (N.J.S.A. 2A:14-1) and laches from claiming retroactive placement and salary compensation for those years of employment prior to the filing of a formal Petition of Appeal.

However, the one year of military credit adjustment sought by petitioner herein is prospective in application to the Board's salary guide for those years subsequent to the filing of the instant Petition of Appeal in this matter. (May 30, 1980)

The Commissioner determines that petitioner, having previously reached maximum on the salary scale and having been awarded both a senior service and longevity increment, is not entitled to any retroactive relief. Lavin, supra; Castner, supra; Union Township, supra

Accordingly, except for the fact that petitioner is eligible for one year of prospective employment credit for prior

military service, the Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

In all other respects the instant Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

April 20, 1981

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1232-80
AGENCY REF. NO. 43-2/80A

IN THE MATTER OF:

THE TENURE HEARING OF NOVIS W. SAUNDERS,
SCHOOL DISTRICT OF THE CITY OF ELIZABETH

Record Closed: February 25, 1981 Decided: March 9, 1981
Received by Agency: 3/10/81 Mailed to Parties: 3/13/81

APPEARANCES:

Raymond D. O'Brien, Esq., (O'Brien, Liotta & Mandel, attorneys)
for Petitioner, School District of the City of Elizabeth

Sheldon H. Pincus, Esq., (Goldberg & Simon, attorneys)
for Respondent, Novis W. Saunders

BEFORE **WARD R. YOUNG**, ALJ:

Certified tenure charges of unbecoming conduct were filed on February 13, 1980 with the Commissioner of Education by the Board of Education of the City of Elizabeth against Novis W. Saunders. The matter was transmitted to the Office of Administrative Law on March 4, 1980 as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

Prehearing conferences were held on April 15, 1980 and October 14, 1980, and the parties agreed at the latter to the following issues:

1) Was the conduct of respondent, as alleged by petitioner, sufficient to warrant dismissal or a reduction in salary?

2) Does a teacher's plea of guilty to criminal information alleging the receipt of insurance benefits fraudulently obtained and the utilization of the U.S. Mails in violation of U.S.C. 18-371 constitute, per se, ground for dismissal of a tenured teacher for unbecoming conduct or other just cause?

An Order was entered on July 3, 1980 denying respondent's motion to dismiss on allegations of procedural defects in the certification process.

Another Order was entered on September 10, 1980 denying respondent's motion for the restoration of salary and emoluments of employment that were withheld from her while under suspension from February 7, 1980 through June 5, 1980. The motion was based on her contention that her suspension, without pay, was ultra vires due to the de novo action of the Board on June 5 when it recertified the initial charges of February 7 and certified additional charges.

The Board filed a motion on February 4, 1981 for summary decision of dismissal of the respondent from her tenured teaching position and employment pursuant to N.J.S.A. 2C:51-2, which repealed N.J.S.A. 2A:135-9.

The parties submitted timely briefs and the record was closed on the motion upon receipt of responding briefs from the parties on February 25, 1981.

The matter is ripe for decision based on the pleadings, relevant undisputed facts and conclusions of law.

The facts are as follows:

1. U.S. Attorney Robert J. Del Tufo filed an Information with the United States District Court, District of New Jersey, on January 18, 1980, wherein

Novis W. Saunders was charged with committing certain criminal offenses against the United States in violation U.S.C. 18:1341 and 371. The matter was docketed by the District Court as Cr. 80-15, and the Information is incorporated herein.

2. Defendant Saunders appeared in person at the District Court on March 25, 1980 and entered a plea of guilty.

3. The finding and judgment of the court was that "Defendant has been convicted as charged of the offense(s) of conspiracy to devise a scheme to fraudulently obtain medical insurance benefits and to utilize the U.S. Mails."

4. The court adjudged the defendant guilty as charged and convicted and ordered that: "the imposition of sentence is suspended and defendant is placed on probation for 5 years from this date."

5. The special conditions of probation imposed by the court were:

> 1. Defendant shall make such restitution, and on such terms and conditions as may be negotiated and agreed to by the victim, or established by judgment of a court of competent jurisdiction, in accordance with such payment schedule as is approved by the Probation office.
>
> 2. Defendant shall undertake to receive counseling or psychiatric treatment under a program approved by the Probation Office, designed to achieve rehabilitation to a degree sufficient to warrant certification or recommendation by the Chief Probation Officer within the meaning of N.J.P.L. 1974, c. 161, sec. 3 (N.J.S.A. 2A:168A-2); upon completion thereof defendant may apply for an order to terminate probation supervision.

6. The Judgment and Probation Order was entered by the Honorable Vincent P. Biunno, U.S. District Judge, and filed on March 28, 1980.

DISCUSSION:

The Board argues that N.J.S.A. 2C:51-2 is dispositive without hearing in a tenured employee's hearing law case pursuant to N.J.S.A. 18A:6-10 et seq., when a tenured teacher was sentenced following a plea of guilty to a conspiracy to devise a scheme to fraudulently obtain medical insurance benefits and to utilize the U.S. Mails in violation of U.S.C. 18:1341.

The respondent argues that N.J.S.A. 2C:51-2 is inapplicable here as it became effective on September 1, 1979 and the acts of respondent on which the Board bases its charges occurred prior to that date. She further argues that N.J.S.A. 2A:135-9, the law in effect at the time of the acts and which was repealed by N.J.S.A. 2C:51-2, does not apply to school districts and conflicts with the Tenured Employees Hearing Law.

N.J.S.A. 2A:135-9 read as follows:

> Any person holding an office or position, elective or appointive, under the government of this state or of any agency or political subdivision thereof, who is convicted upon, or pleads guilty, non vult or nolo contendere, to an indictment, accusation or complaint charging him with the commission of a misdemeanor or high misdemeanor touching the administration of his office or position, or which involves moral turpitude, shall forfeit his office or position and cease to hold it from the date of his conviction or entry or plea.
>
> If the conviction of such officer be reversed, he shall be restored to his office or position with all the rights and emoluments thereof from the date of the forfeiture.

The Commissioner has determined that N.J.S.A. 2A:135-9 is applicable in certain circumstances. He so held In the Matter of the Tenure Hearing of Ernest Tordo, School District of the Township of Jackson, Ocean County, 1974 S.L.D. 97, that where respondent's conviction of accepting a bribe was not related to his employment, but happened while he was employed as a teacher, it involved moral turpitude and said:

> 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.
>
> In making a determination in the instant matter, the Commissioner must consider not only the effect of his decision on the respondent, but on the pupils, their parents, other teaching staff members, and the community at large . . .
>
> Respondent's crime and its resultant notoriety certainly touched on his position as a public school teacher, and the Commissioner holds that he must forfeit his right to tenure in his position.
>
> (at 98-99)

The Commissioner also held that where a teacher was found guilty of the charge of distribution of a controlled substance (marijuana) on two separate occasions in criminal court, it constituted moral turpitude and the teacher was required to forfeit his position pursuant to N.J.S.A. 2A:135-9. See In the Matter of the Tenure Hearing of Wesley L. Myers, School District of Gloucester City, Camden County, 1976 S.L.D. 1028.

The New Jersey Supreme Court determined in Thorp v. Board of Trustees of Schools for Industrial Education, 6 N.J. 498 (1951) that teacher tenure does not result in a teacher's employment becoming a public office, and proposed "The test of a public office is whether the incumbent is vested with any portion of political power partaking in any degree in administration of civil government, and performing duties which flow from sovereign authority." Id. at 507.

The Supreme Court stated in Board of Education of Bayonne v. Bidgood, 11 N.J. Misc. 735, 737 (1933) that "a position has been defined to be analogous to an office in that the duties that pertain to it are permanent and certain, but it differs from an office in that its duties may be non-governmental and not assigned to it by any public law of the

State." The appellant in the case was held to have been the holder of a "position" as chauffeur for the Board of Education of Bayonne, because his duties were continuous, permanent and nongovernmental. "He reported for duty daily at eight o'clock a.m. and was engaged until five o'clock p.m. on all days except Saturdays when his work began at eight a.m. and continued until twelve." Id. at 738.

By analogy a tenured teacher holds a "position" because his or her duties are continuous, permanent and nongovernmental.

N.J.S.A. 2C:51-2 reads in part:

> a. A person holding any public office, position or employment, elective or appointive under the government of this State or any agency or political subdivision thereof, who is convicted of an offense shall forfeit such office or position if:
>
> (1) He is convicted under the laws of this State of an offense involving dishonesty or of a crime of the third degree or above or under the laws of another state or of the United States of an offense or a crime which, if committed in this State, would be such an offense or crime;
>
> (2) He is convicted of an offense involving or touching such office, position or employment; or
>
> (3) The Constitution or a statute other than the code so provides.
>
> b. The forfeiture set forth in subsection a. shall take effect:
>
> (1) Upon finding of guilt by the trier of fact or a plea of guilty, if the court so orders; or
>
> (2) Upon sentencing unless the court for good cause shown, orders a stay of such forfeiture. If the conviction be reversed, he shall be restored, if feasible, to his office, position or employment with all the rights, emoluments and salary thereof from the date of forfeiture.
>
> c. In addition to the punishment prescribed for the offense, and the forfeiture set forth in 2C:51-2 a., any person convicted of an offense involving or touching on his public office, position or employment shall be forever disqualified from holding any office or position of honor, trust or profit under this State or any of its administrative or political subdivisions.

It is important to note that the Legislature has broadened the spectrum of those affected to include people holding public employment. A tenured teacher certainly holds a permanent position and not merely "employment" as the courts have defined "employment" as having duties which are nongovernmental, and neither certain nor permanent. See Thorp, Bayonne, and Fredericks v. Board of Health, 82 N.J.L. 200 (Sup. Ct. 1912).

N.J.S.A. 2C:1-1(d)(1) states:

> The provisions of the code governing the treatment and the release or discharge of prisoners, probationers and parolees shall apply to persons under sentence for offenses committed prior to the effective date of the code, except that the minimum or maximum period of their detention or supervision shall in no case be increased.

Moral turpitude is defined by Black's Law Dictionary (Fifth Edition 1979) as follows:

> The act of baseness, vileness, or the depravity in private and social duties which man owes to his fellow man, or to society in general, contrary to accepted and customary rule of right and duty between man and man. State v. Adkins, 40 Ohio App. 2d 473, 320 N.E. 2d 309, 311, 69 O.O. 2d 416. Act or behavior that gravely violates moral sentiment or accepted moral standards of community and is a morally culpable quality held to be present in some criminal offenses as distinguished from others Lee v. Wisconsin State Bd. of Dental Examiners, 29 Wis. 2d 330, 139 N.W. 2d 61, 65. The quality of a crime involving grave infringement of the moral sentiment of the community as distinguished from statutory mala prohibita. People v. Ferguson, 55 Misc. 2d 711, 286 N.Y.S. 2d 976, 981.
>
> (at 910)

After a careful and thorough review of the entire record and the particular circumstances in this matter, I **FIND:**

1. Respondent Saunders held a public position and employment under the laws of New Jersey.

2. Respondent was convicted of crimes under laws of the United States, which in the State of New Jersey are offenses involving dishonesty.

3. Respondent was convicted of crimes involving moral turpitude.

I **CONCLUDE** that respondent is guilty of unbecoming conduct; that N.J.S.A. 2C:51-2 is applicable; and that Summary Judgment **IS GRANTED** to the Board.

Hence, **IT IS ORDERED** that the position and employment of Novis W. Saunders held with the school district of the City of Elizabeth shall be and is hereby **FORFEITED**, forthwith.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, FRED G. BURKE,** who by law is empowered to make a final decision in this matter. However, if Fred G. Burke does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **FRED G. BURKE** for consideration.

9 March 1981
DATE

Ward R. Young
WARD R.YOUNG, ALJ

Receipt Acknowledged:

10 March 1981
DATE

Seymour Weis
DEPARTMENT OF EDUCATION

Mailed To Parties:

March 13, 1981
DATE

Ronald L. Packer
FOR OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE TENURE :
HEARING OF NOVIS W. SAUNDERS, : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY : DECISION
OF ELIZABETH, UNION COUNTY. :
:

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law.

The Commissioner observes that exceptions were filed by respondent pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Respondent excepts to the conclusion by the Honorable Ward R. Young, ALJ that N.J.S.A. 2C:51-2 is applicable to the matter sub judice. Respondent contends that only N.J.S.A. 2A:135-9 is applicable, which was replaced by 2C:51-2. Respondent continues by excepting the failure of the Court to cite In the Matter of the Tenure Hearing of David Earl Humphreys, School District of the Township of Pennsville, 1978 S.L.D. 691, reversed and remanded for plenary hearing State Board of Education (May 2, 1979).

Respondent notes that in Humphreys both the Commissioner and the State Board found N.J.S.A. 2A:135-9 to be applicable to school districts which respondent contends to be error on the part of both the Commissioner and the State Board.

The Commissioner is constrained to observe that such sophistry on the part of respondent exemplifies an unwarranted conclusion with which the Commissioner cannot agree.

The reply exceptions of the complainant Board are supportive of the initial decision.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

Respondent having held a public position in the employ of the Board and respondent having been convicted of a crime involving dishonesty is guilty of unbecoming conduct. Accordingly, Summary Judgment is granted to the Board and the tenured position and employment of respondent is forfeit forthwith.

COMMISSIONER OF EDUCATION

April 21, 1981

IN THE MATTER OF THE TENURE :

HEARING OF NOVIS W. SAUNDERS, :

SCHOOL DISTRICT OF THE CITY : STATE BOARD OF EDUCATION

OF ELIZABETH, UNION COUNTY. : DECISION

_____:

Decided by the Commissioner of Education, April 21, 1981

For the Petitioner-Respondent, O'Brien, Liotta & Mandel
(Raymond D. O'Brien, Esq., of Counsel)

For the Respondent-Appellant, Goldberg & Simon
(Sheldon H. Pincus, Esq., of Counsel)

The State Board of Education affirms the Commissioner's decision for the reasons expressed therein.

September 2, 1981

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1954-80
AGENCY DKT. NO. 84-3/80A

IN THE MATTER OF:

HENRY DOUMA,
Petitioner
v.
BOARD OF EDUCATION OF EAST BRUNSWICK,
Respondent.

Record Closed: January 26, 1981
Received by Agency: 3/10/81

Decided: March 9, 1981
Mailed to Parties: 3/13/81

APPEARANCES:

For the Petitioner, Henry Douma, **Nancy Iris Oxfeld,** Esq. (Rothbard, Harris & Oxfeld, attorneys)

For the Respondent, Board of Education of the Township of East Brunswick, **Frank J. Rubin,** Esq. (Rubin, Lerner & Rubin, attorneys)

BEFORE **DANIEL B. McKEOWN,** ALJ:

Henry Douma (petitioner) is employed by the Board of Education of the Township of East Brunswick (Board) as a school social service worker. He alleges in a petition filed before the Commissioner of Education that his performance has been evaluated contrary to Board policy and to the provisions of N.J.A.C. 6:3-1.21 through the asserted untimely imposition of objectives on his performance and without his agreement that those objectives are relevant to his performance. The Board denies the allegation of violation of N.J.A.C. 6:3-1.21 and of its own policy.

The Commissioner transferred the matter to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1, et seq. The record was closed January 26, 1981 upon the submission of documents entered as evidence at the hearing.

The State Board rule that petitioner claims was violated, N.J.A.C. 6:3-1.21, Evaluation of tenured teaching staff members, was effective September 1, 1979. It requires at section (d) that every board of education adopt policies and procedures to provide for annual evaluation of its teaching staff members who have acquired tenure. Though the rule was not effective until September 1, 1979 it was adopted by the State Board during the 1977-78 school year with the express provision that local boards of education develop the required policies and procedures during the following school year, 1978-79, so that such policies and procedures could be implemented September 1, 1979. (See N.J.A.C. 6:3-1.21(g))

Section (b) of the rule sets forth the following purposes to be achieved by such annual evaluation:

[TO]

1. Promote professional excellence and improve the skills of teaching staff members;
2. Improve student learning and growth;
3. Provide a basis for the review of performance of tenured teaching staff members.

Section (c) requires that the policies and procedures "be developed under the direction of the district's chief school administrator in consultation with tenured teaching staff members." Seven specific items are required to be addressed by the local board's policies and procedures to effectuate the annual evaluation of tenured teaching staff members. Those items are:

1. Roles and responsibilities for implementation of the policies and procedures;
2. Development of job descriptions and evaluation criteria based upon local goals, program objectives and instructional priorities;

3. Methods of data collection and reporting appropriate to the job description including, but not limited to, observation of classroom instruction;

4. Observation conference(s) between the supervisor and the teaching staff member;

5. Provision for the use of additional appropriately certified personnel where it is deemed appropriate;

6. Preparation of individual professional improvement plans;

7. Preparation of an annual written performance report by the supervisor and an annual summary conference between the supervisor and the teaching staff member. (Emphasis Added)

Section (d) of the rule requires that the adopted policies "be distributed to [each] tenured teaching member no later than October 1. Amendments to the policy shall be distributed within 10 working days after adoption."

Section (e) requires an annual summary conference to be held between the supervisor and the teacher who has been evaluated prior to the written performance evaluation is filed. This section also sets forth four areas which, at a minimum, are to be considered at the annual summary conference. Section (f) requires that the annual written performance evaluation, which must be prepared by a person properly certified to supervise and who has participated in the teachers' evaluation, include

1. Performance areas of strength;

2. Performance areas needing improvement based upon the job description;

3. An individual professional improvement plan developed by the supervisor and the teaching staff member;

4. A summary of available indicators of pupil progress and growth, and a statement of how these indicators relate to the effectiveness of the overall program and the performance of the individual teaching staff member;

5. Provision for performance data which have not been included in the report prepared by the supervisor to be entered into record by the evaluatee within 10 working days after the signing of the report. (Emphasis Added)

The rule defines at section (h) "individual professional improvement plan" as

> a *** written statement of actions developed by the supervisor and the teaching staff member to correct deficiencies or to continue professional growth, timelines for their implementation, and the responsibilities of the individual teaching staff member and the district for implementing the plan.

The same section also defines "job description", as that term is used in N.J.A.C. 6:3-2.21(c)2, supra, and N.J.A.C. 6:3-1.21(f)2, supra, as

> a written specification of the function of the position, duties and responsibilities, the extent and limits of authority, and work relationships within and outside the school and district;

The Board has a written policy in regard to teacher performance evaluation. It has also promulgated a written job description for the position of teacher. Presumably, petitioner, as a school social worker who is required to possess an appropriate certificate, was subject to the job description of teacher. (See N.J.S.A. 18A:1-1) On July 11, 1979 the Board also adopted a policy with respect to the procedures and guidelines for the implementation of teacher evaluation which is reproduced here in pertinent part:

> (a) All professional staff members will be evaluated in writing a minimum of three times per year (including the final summary evaluation) by appropriately certified personnel.
>
> (b) An individual improvement plan will be developed cooperatively with the professional staff member. The improvement plan will consist of a written statement of actions (performance objectives) will include timelines for implementation as well as the responsibilities of the individual teaching staff member and the district for implementing the plan.
>
> (c) Evaluation Criteria: Evaluation criteria may consist of (but need not be limited to) the teacher's use of pupil progress data, planning strategies, as well as his/her adherence to school and district policies and procedures.
>
> (d) Deadlines:
>
> By December 31 - First written evaluation
> By March 1 - Second written evaluation
> By April 1 - Annual summary (non-tenure)
> By June 1 - Annual summary (tenured) (Except in unusual circumstances)
>
> (Emphasis in Original)

Petitioner complains that a written evaluation of his performance, dated December 1979, is contrary to the Board's own policy and the State Board rule because (1) the stated objectives of the instrument were not developed "cooperatively" between him and the supervisor; (2) the stated objectives were imposed upon him by the supervisor and by the assistant superintendent in charge of personnel (assistant superintendent); and because (3) the stated objectives contain no timelines for the objectives to be met nor do such objectives set forth the responsibility of "the district for implementing the plan."

The operative facts of the matter are these. Petitioner, employed as a school social worker, is assigned to the Board's department of special education. The coordinator of the department of special education (coordinator), who was first employed by the Board in that position during June 1978, supervises teaching staff members including petitioner assigned to special education.

The coordinator is directly responsible to the assistant superintendent in charge of personnel (assistant superintendent). The coordinator first became aware at the beginning of the 1979-80 year that performance objectives had to be developed for each teacher he supervises. The coordinator explained he was advised of the need for such performance objectives, or individual "professional improvement plans", (PIPS) by the assistant superintendent. The coordinator advised the teachers of the special education department at a meeting held October 2, 1979 that each teacher must develop their own individual performance objectives, in consultation with him. The objectives were to be submitted to him by October 12, 1979. (P-3)

Petitioner submitted his performance objectives to the coordinator on October 9, 1979. (P-4) The coordinator found all performance improvement objectives submitted by teachers in special education, including petitioner's, to be acceptable. However, because the coordinator had had no experience in terms of the preparation and acceptance of individual objectives he submitted all performance improvement objectives to the assistant superintendent for final approval. (Tr. 40) He and the assistant superintendent met to discuss the submitted individual objectives. The assistant superintendent, who was not called to testify, was to have approved some individual objectives and was to have rejected others. The coordinator explained that he and the assistant superintendent "***went through all of the objectives that my staff had developed and [we] talked about changing, amending, deleting certain objectives from staff members. I then had a staff meeting on the 23rd of October at which point I explained to the staff I

had had this meeting with [the assistant superintendent] that certain objectives were unacceptable, certain objectives could be rewritten, and then we would need to think of certain other objectives. At that point, all the staff members got back their original copies, [of individual objectives]. I really don't mean all the staff members, many of the staff members did *** because there were several staff members whose objectives were acceptable to both [the assistant superintendent] and myself." (Tr. 40-41) Thus, while the coordinator initially approved all individual objectives submitted to him by teachers he supervises, the assistant superintendent did not. Petitioner's submitted individual objectives were not approved by the assistant superintendent which determination, it must be noted, apparently superseded the coordinator's earlier approval of the same objectives.

Subsequent to the meeting of October 23, petitioner submitted a memorandum dated November 2, 1979 to the coordinator, with a copy to the assistant superintendent. There, petitioner recapitulates the chronology of events from October 2, 1979 when the coordinator announced the need for the development of individual objectives by teachers to the meeting of October 23, 1979. Leaving aside that chronology as already set forth herein, as well as self-serving statements contained therein, the memorandum states: (P-4)

> "***On 10/23/79, you called a meeting of all the child study teams *** [Y]ou announced that [the assistant superintendent] had asked to see our 'PIP objectives' statements which you had already approved, and that she then rejected most of them. You distributed them to the respective staff members during the meeting, and explained that the main thing that was wrong with most of them was that they were statements of what we intended to attempt to do as part of our job. We were apparently not supposed to write about doing our job, but about something above, outside of, and/or only in some indirect way related to our job.***
>
> In response to this I have rewritten my 'PIPs objectives' as follows:
>
> 1. I shall continue to participate in professional development activities provided by the district under the terms and conditions of my contract.
>
> 2. I shall continue to participate, to the extent that it is to myself personally desirable and feasable (sic), in the activities of the New Jersey Association of School Social Workers.
>
> At your earliest convenience I would appreciate a meeting so that we can discuss this."

The assistant superintendent, upon receipt of the copy of petitioner's memorandum to the coordinator, advised petitioner by memorandum dated November 7, 1979 as follows: (P-5)

> ***For your information, I am enclosing a copy of the adopted Board policy and guidelines for evaluation. In addition, I am suggesting that you read the law as it pertains to evaluation in the State of New Jersey. Furthermore, I have reviewed all staff objectives with every administrator in the district. Since staff evaluation is my responsibility, I will determine what is acceptable and not acceptable.
>
> As written on page one of your memo, the objectives are not acceptable. They should be combined as follows:
>
> 1. Continue to participate in professional development activities; in specific the N. J. Association of School Social Workers.
>
> [The coordinator] will be discussing other objectives with you and if he deems it appropriate, they will be added as part of your improvement plan for the 1979-80 school year. Thank you.

Petitioner responded to the assistant superintendent, in writing dated November 14, 1979 as follows: (P-6)

> I appreciate your prompt response to my memo of November 2, 1979 which I had sent to [the coordinator]. Your comments certainly helped to clear up some of the existing confusion. On the other hand, some of your comments have created additional concerns for me.
>
> I could possibly accept your statement now that you, and not [the coordinator] have the major responsibility for dealing with objectives, evaluation, etc. but that is not the point. The concern that I presented in my memo was that I, and the other members of our department, were misled about this matter. We were not given the clear, concise, directions and explanations to which we are entitled ***
>
> [Petitioner here presents his argument to the assistant superintendent in support of his two submitted written objectives (P-4, ante) and concludes the memorandum as follows:]
>
> In summary, I believe that the two objectives I submitted are good ones, and that they are different from each other. I would be happy to elaborate on them in greater detail, pointing out some of the specific areas of professional development that may be encompassed in the pursuit of these two objectives.

> My own professional development, both as a school social worker, and as a member of the teaching profession, has always been very important to me, and will continue to be so.

The next day, November 15, 1979, the coordinator advised petitioner that "I have set aside an hour *** on Tuesday, November 20th, to meet with you regarding your Improvement Objectives for this present year. [1979-80] ***" (P-7)

The meeting was held November 20, 1979 between petitioner and the coordinator. Thereafter, petitioner submitted the following memorandum, dated November 27, 1979, to the coordinator:

> Last Tuesday, 11/20/79, you and I met to discuss my professional improvement plan - specifically, my professional development objectives. You will recall that in my memo of 11/1/79 I presented two objectives, number one having to do with my plan to participate in the professional development activities provided by the district and number two having to do with my plan to participate in the activities of the New Jersey Association of School Social Workers.
>
> In our meeting you refused to consider objective number one, because you said that it was your understanding that [the assistant superintendent] had already rejected that one. As you know, I have already expressed my view as to the desirability of that objective.
>
> In our meeting you also suggested two additional objectives. You alluded to the idea that they would be imposed by you if I didn't accept them. I have already expressed my view that the objectives are to be developed cooperatively and that they should not be simply imposed, however in a spirit of good faith and cooperation, I have taken your suggestions and developed them into two objectives.
>
> We agreed in our meeting that the professional development objectives are subject to later modification, as may be required by changes in needs, or in my own personal circumstances.
>
> The objectives are as follows:
>
> 1. I shall continue to participate in the activities of the New Jersey Association of School Social Workers, particularly in my capacity as a vice-president of the association. When appropriate, I shall continue to share information and ideas, both informally and in writing, with my colleagues.

2. I shall continue to visit facilities for the handicapped, which are outside of our school district; facilities which our district may, on occasion, have need for. I intend to visit three such facilities and provide written reports of my appraisal of these facilities.

3. I shall continue my efforts to develop more simple but efficient methods of reporting case activity. I have already developed case activity and case reporting forms which, in conjunction with portable dictating equipment, facilitates this process. In reporting case activity I intend to highlight the chronological and narrative flow of events so that the case records become more readable and understandable. My focus will be especially on those cases in which I have assumed the task of coordinating the case activities of the terms.

The coordinator responded by his own memorandum dated December 5, 1979 to petitioner which advised: (P-9)

> Your note of 11/27 with the objectives listed is in front of me. The objectives you have chosen to put down and their [wording] is not in line with that which we discussed on 11/20/79. Therefore, I am rejecting them. Enclosed you will find a copy of the three objectives as we discussed them. These will form the basis for your yearly evaluation.

The three objectives stated are:

1. To keep informed of the latest developments in my field and to continue to grow professionally by participating in workshops and activities as they relate particularly, but not exclusively, to the New Jersey Association of School Social Workers. As a vice-president of that association I will put out monthly information sheets to share association news with other staff members.

2. To continue to familiarize myself with community agencies and out-of-district schools and treatment centers. I will act as a resource person for the special education staff and parents who might request information about these specific agencies:

   1.
   2. [Petitioner was to identify three agencies he desired
   3. to visit]

3. I will work to keep up with the caseload at the various schools to which I am assigned. I will endeavor to close the time gap between parent meeting and report submission time.

Petitioner, upon receipt of the coordinator's memorandum, sent it together with his own handwritten note on the face thereof to the President of the East Brunswick Education Association and inquired whether the matter of his objectives is a grievable matter.

On December 13, 1979 the coordinator submitted to petitioner the first written performance evaluation for the 1979-80 year. (P-10) There, three performance objectives are listed by the numerals 1, 2, and 3. The coordinator evaluates each of the foregoing performance objectives in the following manner: for objective numeral one, "Nothing so far"; for objective numeral two, "[petitioner] has not completed his assignment - see below"; for objective numeral three, "See below."

The " 'see below' " and " 'see below' " sections of the evaluation refers to the narrative section of the evaluation set forth on page two which provides as follows:

Strong and/or Weak Points Noted:

[Petitioner] who is very much involved in establishing the professional school social worker has been to several sessions with this group. If he has shared information with his fellow social workers he has not shared that information with me.

[Petitioner] has not completed his objectives for the year by himself. The Coordinator has been forced to develop them and give them to [him]. He has, as is his way, focused on minor issues, blown things out of proportion and misinterpreted directives***.

[Petitioner] has not yet completed the part of objective #2 that he was to complete. Therefore, I am not able to address it in any way.

[Petitioner] has gone through many memos describing why he is not behind and why his system of reporting (by tape) is proper. He then insinuated that a delay in work was due to a backlog of secretarial help. The latest bit of unacceptable social worker behavior was for him to submit the exact same social evaluation for two children. Even though the children are brothers they are entitled to have social evaluations that are as unique as they are - each to the other.

His case notes come in late. His system of reporting material has been rejected and he will have to modify his report style.

Comments and/or Suggestions for improvement

- Less memos and more concentration on workload would help speed up the work.
- Write case notes - do not use tape recorder system of record-type-read-retype-submit. This system is a great waste of secretary hours.

Petitioner responded to the evaluation as follows:

"The essential problem with this evaluation report is that the three performance objectives were not developed cooperatively by [me] and *** the coordinator. [I] and the coordinator met on 11/10/79 at which time the coordinator accepted objective #1 and then proposed/imposed two additional objectives. In a spirit of good faith and cooperation, [I] agreed to develop and write up the two additional objectives. [I] submitted all three objectives in writing on 11/17/79. On 12/5/79, the coordinator rejected them and rewrote them, changing their content substantially and adding elements which had not been discussed at all.

It is important to note that the objectives which were developed and written by the coordinator were presented to [me] on 12/5/79 and that the evaluation report given to [me] six working days later, on 12/13/79. [I] was given, in effect, just one week to attempt to meet the three objectives.

As for the substance of the evaluation report, there are many errors, distortions and omissions. Paragraph one speaks of the sharing process. [I am] always willing to share appropriate information with the appropriate people. [I have] shared much information with the coordinator in the meetings which they have had.

Some of the content of paragraphs two and three has already been discussed. In addition, [I have] been able to focus on the important issues, has kept things in perspective, and interprets directives clearly when they are presented that way.

As for paragraph four, [I have] never 'insinuated' anything of the kind in regard to the 'secretarial' staff. Also, the two children referred to did each receive individual and unique evaluations.

As for case notes, [I have] kept a record of them since the first day of school in September, 1979, and he has submitted all of his case note reports within a reasonably short period of time."

Thereafter, petitioner received a job description for the position of school social worker, which he had not seen earlier, from the assistant superintendent with a memorandum dated December 14, 1979 attached thereto as follows: (P-12)

> After review and modifications with [the] Coordinator of Special Education, I am attaching a copy of the final job description for the position you hold in the district. I again thank you for all your assistance in this endeavor.

The coordinator, by letter dated January 9, 1980, advised the President of the Association with respect to petitioner's earlier question to her whether the matter of establishing one's individual objectives (See P-9, ante) is a grievable matter, as follows: (P-13)

> Although P.I.P.s are developed cooperatively this does not necessarily mean agreement. It is highly unlikely that every supervisor and supervisee will agree totally on all objectives.
>
> If you will note, the year-end evaluation of 6/19/79 [P-1] contains comments on [petitioner's] performance. The P.I.P.s for this year, quite naturally, talk to the deficiencies noted during the past year.
>
> The establishment of P.I.Ps are a nongrievable issue.

The prior year's evaluation to which reference is made sets forth the following substantive paragraphs: (P-1)

> A. Personal and Employee Attributes. ***
>
> [Petitioner] is a school social worker who is very much aware of school policies and procedures and of state rules and regulations governing special education services. He is enthusiastic about his job, in fact, sometimes too enthusiastic. He appears to favor some cases to the detriment of others.
>
> B. Professional Effectiveness and Competence.***
>
> [Petitioner] has a very strong sense of right and wrong. He often sets himself up as a gadfly - posing many what if?, what about?, questions during a discussion. These tend to make him appear like an obstructionist. While he believes he is doing a service to all by asking so many questions, many of them center on small points which he blows up to major considerations.

C. Human Relations***

[Petitioner] does not work well with all members of the child study team or with many school administrators or guidance personnel. In personal conversations with many of the people a picture has emerged of [petitioner] as working alone - often at odds with child study teams, not following up on requests made by school personnel, and as someone who is very often late with reports.

The Coordinator has had to speak with him several times regarding his method of operating. He is late, often, with reports, tries to cover up his inefficiency by shifting blame to others and continues to operate as he sees fit.

D. Related Areas. ***

[Petitioner] is willing to do extra work if it interests him. If asked to do something he doesn't choose to do, he lags, forgets and puts off completing the task.

Recommendations - ***

[Petitioner] has had several suggestions/recommendations made to him about improved performance. Under the assumption that he will make an effort to improve, I suggest that he be given a contract for the school year 1979-80.

Petitioner filed a two-page written response to that evaluation in which among other things he asserts it was he, not the coordinator, who initiated the meeting between the two; he questions how one can be "'too enthusiastic'" about their duty; he points out areas of social work not addressed in the evaluation; and he addresses his involvement in local and state organizations of social workers.

Petitioner, by memorandum dated January 22, 1980 advised the coordinator: (P-14a)

In response to your memo of 12/5/79 [P-9, supra] regarding "objectives", and your directive pertaining to objective number two, I submit the names of the following three facilities:

1. Woodbridge Diagnostic Center
2. Renaissance School
3. Bonnie Brae Special Education & Residential Treatment Center

The coordinator, by memorandum dated January 25, 1980 advised petitioner: (P-14b)

> The facilities you have chosen will have to be modified. Another social worker has chosen Bonnie Brae. I am very interested in having an in-depth evaluation of Renaissance School. Ther (sic) have been many "anti-use" comments made concerning that place.

This concludes the recitation of the objective facts of the matter. From these objective facts I find as ultimate facts the following:

1. Petitioner, upon learning that the assistant superintendent rejected his individual objectives, resubmitted his objectives on October 23, 1979. (P-4)

2. Petitioner resubmitted objectives were again rejected by the assistant superintendent.

3. The assistant superintendent advised petitioner on November 7, 1979 of one individual objective deemed acceptable by her.

4. Petitioner persisted on November 14, 1979 in his efforts to prove that his stated objectives were acceptable.

5. Petitioner, subsequent to a meeting with the coordinator, resubmitted for the third time his individual objectives. The coordinator, on December 5, 1979, finally informed petitioner of three individual objectives he was expected to meet.

6. The coordinator evaluated petitioner on December 13, 1979 in terms of the three stated objectives.

It is within this context petitioner argues that the three stated objectives assigned him by the coordinator are improper because (1) the objectivies were imposed upon him and (2) he did not agree to those objectives.

Petitioner's isolation of the requirements of N.J.A.C. 6:3-1.21 that the objectives be developed in consultation with the affected teacher to mean that he must approve the objectives is at best misleading. Specific requirements of that rule must be viewed in the context of its stated purposes at Section B. The policy goal of the rule is for boards of education to provide assistance to its teaching staff members to improve their skills for the ultimate purpose of improving the quality of education being provided all pupils. Here, the facts establish that petitioner had one view of what his goals should be while the coordinator and the assistant superintendent had another view. There may or may not be a basis for honest disagreement as to the wording of the specific individual objectives assigned petitioner. If such a basis for honest disagreement exists, it appears reasonable to believe that had petitioner, as well as the coordinator and the assistant superintendent, communicated personally with each other that the issue presented for adjudication here would not have arisen.

While it is recognized that boards of education have wide discretionary authority to establish its own rules and regulations N.J.S.A. 18A:11-1, and that its administrators to a large degree enjoy similar latitude in the day to day operation of the schools, administrators may not act with disregard for the honest beliefs of others. While I am not of the view that individual teachers have veto power of individual objectives established for the evaluation of their performance, neither am I of the view that individual objectives may be administratively established without an honest consideration of the teacher's views. In either case, the objectives finally selected by which a teacher's performance is to be measured must be reasonably related to the stated purposes of the rule. N.J.A.C. 6.3-1.21 expreses the State Board of Education's policy goal with respect to the improvement of instruction afforded pupils. The State Board has specific standards of conduct for administrators and teachers in order to achieve that goal. Petitioner asks relief on the grounds that that specific standard of conduct requires his approval when, in fact, I find that it does not. Petitioner asks the removal from his file of his evaluation in December 1979 because he had not approved his established objectives. Finding there is no requirement for his approval of the objectives, I find no basis upon which to order the removal of that evaluation. Finally, petitioner has failed to establish by a preponderance of evidence that the evaluation, performed approximately eight days after the establishment of his objectives, is arbitrary, capricious or unreasonable. The petition of appeal is **DISMISSED**.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, FRED G. BURKE,** who by law is empowered to make a final decision in this matter. However, if Fred G. Burke does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

DATE

DANIEL B. McKEOWN, ALJ

Receipt Acknowledged:

March 10, 1981
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

March 13, 1981
DATE

OFFICE OF ADMINISTRATIVE LAW

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DOCUMENTS IN EVIDENCE

P-1 Professional Staff Summary of Henry Douma

P-2 Policy of Board of Education

P-3 Document entitled "Special Education Staff Meeting"

P-4 Memorandum to Michael J. Cohen from Hank Douma

P-5 Memorandum to H. Douma from Brenda Witt

P-6 Memorandum to Mrs. Brenda Witt from Henry Douma

P-7 Memorandum to Hank Douma from Dr. Michael Cohen

P-8 Memorandum to Michael J. Cohen from Henry Douma

P-9 Memorandum to Hank Douma from M. J. Cohen

P-10 Memorandum to child study teams and speech

P-11 Individual Improvement Plan Progress Report on Henry Douma

P-12 Memorandum to Henry Douma from Brenda Witt

P-13 A letter, Certified Mail, special delivery, to Mrs. Rosalie Triozzzi from Michael J. Cohen

P-14A Memorandum to Dr. M. J. Cohen from Henry Douma

P-14B Memorandum to Henry Douma from Michael Cohen

R-1 Memorandum for the Board

R-2 Memorandum to Brenda Witt from Philip Houser

HENRY DOUMA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law.

The Commissioner observes that exceptions were filed by petitioner pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

In petitioner's exceptions he contends that the legal conclusions of the Honorable Daniel B. McKeown, ALJ are entirely inappropriate. Petitioner relies on his Letter Memorandum dated November 25, 1980 of prior submission to Judge McKeown to serve as exceptions to the initial decision.

The Commissioner notes that such submission was made in a timely fashion and was fully considered by Judge McKeown in rendering the initial decision, consequently the Commissioner deems it unnecessary to address petitioner's exceptions seriatim herewith.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

April 22, 1981

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3343-80
AGENCY DKT. NO. 207-4/76

IN THE MATTER OF:

CHARLES MARTIN,
Petitioner
v.
BOARD OF EDUCATION OF THE BOROUGH OF KEYPORT, MONMOUTH COUNTY,
Respondent.

Record Closed: February 11, 1981
Received by Agency: 3/11/81

Decided: March 10, 1981
Mailed to Parties: 3/16/81

APPEARANCES:

For Petitioner: **Thomas W. Cavanagh,** Esq. (Chamlin, Schottland, Rosen & Cavanagh)

For Respondent: **Peter P. Kalac,** Esq. (Kalac, Newman & Griffin)

BEFORE **ERIC G. ERRICKSON,** ALJ:

STATEMENT OF CASE:

Petitioner, now retired, and formerly employed as a tenured teacher by the Keyport Board of Education (Board), appeals an action of the Board on April 7, 1976 withholding his salary increment for the 1976-77 school year. He alleges that the Board's action was arbitrary, unreasonable and capricious. The Board, conversely, contends that

its action was a reasoned exercise of its statutory authority to withhold the increment of a teaching staff member pursuant to N.J.S.A. 18A:29-14.

PROCEDURAL RECITATION:

After the Petition of Appeal and an Amended Petition of Appeal had been filed before the Commissioner on April 2 and April 29, respectively, a timely Answer was filed by the Board on May 12, 1976. Oral argument on a Motion by Respondent for Summary Judgment was conducted by a hearing examiner at the Department of Education, Trenton, on August 10, 1976. Thereafter, on December 30, 1977, the Commissioner issued a decision on December 30, 1977 wherein he granted the Board's Motion and dismissed the Petition of Appeal.

Acting on petitioner's appeal of the Commissioner's decision, the State Board of Education, on May 3, 1978, remanded the matter to the Commissioner and ordered that a plenary hearing be conducted. A hearing scheduled for November 2, 1978 was adjourned at request of counsel to allow more time for discoveries. Thereafter, during August 1979, the Commissioner transferred the matter as a contested case to the Office of Administrative Law pursuant to the provisions of N.J.S.A. 52:14F-1 et seq. Further delays were occasioned by jurisdictional questions over the case in which proceedings had begun in the Division of Controversy and Disputes. Thereafter, the matter was reassigned to the undersigned who, at a prehearing conference on September 24, 1980, scheduled a one day plenary hearing which was conducted on December 2, 1980. Post hearing briefs were, by agreement, filed simultaneously completing the record.

FACTUAL CONTEXT OF THE DISPUTE:

The following facts are not in dispute:

The Superintendent notified petitioner on March 2, 1976 that he would recommend that the Board withhold his 1976-77 employment and adjustment increments. Petitioner then requested and was granted an audience before the Board at which he expressed his views of why he believed that recommendation should not be followed.

The Board, on April 7, 1976, acting on recommendation of its Superintendent of Schools, voted to withhold petitioner's employment and adjustment increments for the

ensuing 1976-77 school year. On the following day, the Board Secretary notified petitioner, in writing, that the reasons why his increment was withheld were as follows:

> "***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.***" (J-6 in evidence)

Petitioner then filed this action before the Commissioner.

SUMMARY OF TESTIMONY AND DOCUMENTARY EVIDENCE:

The Board's Superintendent of Schools testified that because of limitations of administrative personnel the practice in the district in effect during 1976 was that tenured teachers were evaluated on an "as needed" basis. He testified that his review of the grades assigned to pupils by all teachers for the second marking period caused him to become concerned over the large number of 0 (F) and 1 (D) grades which on a scale of 0-4 petitioner assigned the pupils in his classes in periods one through four. Petitioner's recorded grades in these categories for the second marking period for those classes were as follows:

Period	Subject	Assigned Grade 0	Assigned Grade 1	Total No. of Pupils
1	General Math	12	8	23
2	General Math	5	14	29
3	Algebra II	5	13	32
4	General Math	5	8	18

(J-11)

The Superintendent testified that his computation revealed that those grades of 1 and 0 had been assigned to from 56% to 87% of the pupils enrolled in those classes. He testified that he was concerned that so many below average and failing grades could signify lack of achievement. He further testified that this concern prompted him to make a series of four observations in petitioner's classroom between February 4 and March 12, 1976. His written evaluation of those visits are summarized as follows:

February 2, 1976 Visitation, Period 3, Algebra II:

Criticisms:

1. Lack of evidence of proper planning
2. Too much wasted time (21 minutes) handing out papers
3. Too much wasted time allowed for pupils to socialize
4. Pupils passive and inattentive during instruction
5. Too much time lapse between tests and their return

Commendations:

None

February 17, 1976 Visitation, Period 1, General Math:

Criticisms:

1. Minimal teacher preparation
2. Pupils appeared bored and passive
3. Pupils spoke while directions were given
4. Some pupils wasted time during the portion of the period allowed to work on the assignment
5. Too little active pupil involvement in the learning process

Commendations:

1. Class started promptly
2. Instructor walked about class giving assistance to pupils
3. Most pupils began work when the assignment was given

(J-2)

February 24, 1976 Observation, General Math, Period 4:

Criticisms:

1. Lesson plan unsatisfactory by reason of inflexibility
2. Test was overly long
3. Most pupils finished test before period ended and, with no further assignment, wasted the remaining time
4. Six pupils cheated by speaking to others while taking tests

Commendations:

1. Period began promptly; materials efficiently distributed
2. Testing on income tax form had practical value

(J-3)

March 12, 1976 Observation, General Math, Period 2:

Criticisms:

1. Pupils talked while instruction was given
2. Pupils clustered at back of the room
3. One pupil sat facing away from the teacher during instruction
4. Lesson plan consisting merely of pages and a topic was inadequate

Commendations:

1. Improved efficiency in use of class time
2. Variety of activities
3. Lesson appeared to be thought through
4. Students appeared to have good grasp of material presented

(J-4)

Petitioner testified that the material covered in his general math classes during the second marking period was more difficult than that of the first marking period which had been in large part a review of material introduced in prior years. He testified that each of his three general math classes included repeaters, special education pupils and other pupils of the lowest levels of ability, many of whom received low grades in other subjects and dropped out prior to year end. Petitioner also testified that, at year end, he assigned far fewer low and failing grades to pupils remaining in his classes. In this regard, Document J-11 in evidence reveals the following year end grades:

Period	Subject	No. Enrolled	No. Assigned Grade 0	No. Assigned Grade 1	Assigned Inc.
1	General Math	17	5	2	4
2	General Math	24	4	4	5
3	Algebra II	32	6	0	0
4	General Math	16	7	2	0

Petitioner testified that he did prepare lesson plans which were checked and approved weekly by his principal. He testified that conferences were held with the

Superintendent following receipt of each of the four evaluation reports, but that his requests for additional conference time were never granted. He testified further that the one pupil who persisted in sitting sideways in his class despite his prior admonitions and his sending her to the office, did not, in any event, disrupt the class.

Petitioner also testified that the reason he took so long to hand out pupils's papers on February 4, 1976 was that the papers were necessary for a review and that he was distributing four different tests which had been administered simultaneously to prevent pupils from copying. In this regard, he testified that pupils in his classes had no opportunity to cheat on a test. Although he did not deny that pupils taking a test were talking to each other, he voiced the opinion that some pupils in that class "simply could not keep their mouths shut for a forty minute period."

Petitioner testified further, in regard to criticisms of discipline in his classes, that had the Superintendent not been present he would have sent pupils to the office or told them to report after school. In regard to pupil misbehavior during the Superintendent's visitation on February 4, 1976, he testified that:

> "***There were a nucleus of students who thought because Mr. Fredericks was in observing that it would be their time to disrupt or they went just as far as they thought they could go before I would explode.***" (Tr. 110A)

FINDINGS OF FACT AND CONCLUSIONS:

The following findings of fact are set forth on the basis of the preponderance of credible evidence within the record:

1. Prior to the 1975-76 school year, petitioner had not been evaluated since the 1972-73 school year. The Board, during that time, was not obligated by statute or State Board of Education rule to evaluate each tenured teacher annually.

2. The classroon visitations and evaluation reports by the Superintendent were triggered by his review of the grades assigned by petitioner to his pupils in the second of the six report periods for the 1975-76 school year.

3. The Superintendent afforded petitioner one opportunity to discuss each of his evaluation reports. Petitioner expressed written and oral objections to certain contents thereof and requested additional time to discuss the reports. No additional conferences beyond the original four were scheduled by the Superintendent. Nor did petitioner persist in pressing his requests.

4. The Superintendent did not, thereafter, during the remainder of the school year, review or comment upon subsequent grades assigned by petitioner to his pupils.

5. On the basis of his observations and evaluations, the Superintendent recommended that petitioner's increment be withheld for 1976-77. There is no evidence in the record that any school administrator or supervisor other than the Superintendent at any time recommended that petitioner's increment be withheld.

6. Petitioner did prepare lesson plans which were reviewed and approved regularly by his principal. Petitioner did not exhibit those plans to the Superintendent on his first visit. On his second visit, the plans were placed before the Superintendent. No format or written directive on preparation of lesson plans existed. After the Superintendent advised petitioner of the standards he desired, petitioner's subsequent lesson plans still did not meet those standards enunciated by the Superintendent. (P-4 in evidence). In consideration of the lack of prescribed written format, I CONCLUDE there was minimal basis for Reason No. 2 that petitioner did not prepare proper lesson plans.

7. Petitioner did not maintain order in his classroom at times. Accordingly, I CONCLUDE that there was some factual basis for Reason No. 1 that petitioner failed to maintain order of the pupils in his classroom.

8. Petitioner asserts that he assigned work for pupils to do upon the completion of the testing process but admits that several pupils failed to follow his directive to work on that assignment until the end of the

period. I **CONCLUDE**, therefore, that there was factual basis for Reason No. 3 that petitioner failed to maximize instructional time.

9. There is ample evidence in the record to **CONCLUDE** that petitioner did not establish and maintain a rapport with numerous pupils in his classes. This lack of rapport provides factual basis to **CONCLUDE** that Reason No. 4 and Reason No. 5 are factually based in that there existed less than a high degree of sound educational environment in certain of petitioner's classes and that petitioner failed to adapt his teaching to the needs of all of his pupils. I further **CONCLUDE** that this resulted in an inordinately high percentage of low and failing grades in petitioner's classes, periods one through four.

I further **CONCLUDE** that petitioner's complaint that he was required to teach low level general math pupils and certain Algebra II pupils who were less capable than others provides insufficient reason to explain the inordinately high numer of D and F level grades which, in the second marking period, ranged from 56% to 87% of those enrolled in those classes.

The Superintendent's alarm and concern were justifiable. Such concern and action to prevent a repetition thereof was sustained by the Commissioner and the State Board of Education in their holdings in Kathryn Fox v. Board of Education of Watchung Hills Regional High School District, Somerset County, 1980 S.L.D. ____ (decided by the Commissioner July 14, 1980) 1981 S.L.D. ____ (decided State Board January 26, 1981).

DETERMINATION:

While not all of the reasons for withholding petitioner's increment as enunciated have wholly withstood the test of a plenary hearing, a sufficient residuum, indeed a large majority of those reasons set forth have been found to be true in fact. Those reasons grounded in fact provide ample substantiation of the action taken by the Superintendent and the Board which resulted in the withholding of petitioner's 1976-77 increment. Accordingly, it is **DETERMINED** that the Board's action bore no taint of unreasonableness, arbitrariness, capriciousness or bad faith as alleged by petitioner.

Absent a determination that its action was in any way tainted, **IT IS ORDERED** that the Board's action withholding the increment be and is **AFFIRMED**. The Petition of Appeal is **DISMISSED**.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, FRED G. BURKE,** who by law is empowered to make a final decision in this matter. However, if Fred G. Burke does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

March 10, 1981
DATE

Eric G. Errickson
ERIC G. ERRICKSON, ALJ

Receipt Acknowledged:

March 11, 1981
DATE

Seymour A. Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

March 16, 1981
DATE

Ronald L. Poole /jd
OFFICE OF ADMINISTRATIVE LAW

ms

DOCUMENTS IN EVIDENCE:

J-1	Observation Report, dated February 4, 1976
J-2	Observation Report, dated February 17, 1976
J-3	Observation Report, dated February 24, 1976
J-4	Observation Report, dated March 12, 1976
J-5A,B	Evaluation Policy for Tenure Teachers
J-6	Reasons for Withholding Increment, dated April 8, 1976
J-7	Fredericks to Martin, dated February 18, 1976
J-8	Fredericks' Affidavit
J-9	Martin's Affidavit
J-10	Deposition Transcript - Fredericks
J-11	Zampella's Grade Analysis

P-1	Petitioner's Response to Observation Report of February 4, 1976
P-2	Petitioner's Response to Observation Report of February 24, 1976
P-3	Petitioner's Response to Observation Report of March 12, 1976

CHARLES MARTIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
	:	DECISION ON REMAND
BOARD OF EDUCATION OF THE BOROUGH OF KEYPORT, MONMOUTH COUNTY,	:	
RESPONDENT.	:	
	:	

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law.

The Commissioner observes that exceptions were filed by petitioner pursuant to the provisions of N.J.A.C. 1:1-16.4a, b, and c.

Petitioner excepts to portions of the factual context determined by the Honorable Eric G. Errickson, ALJ wherein Judge Errickson makes reference to March 2, 1976 rather than March 26, 1976 (J-8) as the date of notification by the Superintendent to petitioner of the Superintendent's recommendation to the Board to withhold petitioner's increment. The Commissioner agrees with petitioner but finds such argument indeterminate of any relief to be granted. The Commissioner finds no merit in petitioner's exceptions to the terminology cited by the Court that petitioner "expressed his views" before the Board at his appearance before that body. Such terminology appears at page 5 of the Commissioner's decision of December 30, 1977 and stands unrefuted in the record. Further description appears at page 10 of that same decision:

> "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."

The Commissioner finds no relevance to such arguments in the present matter.

Petitioner contends that the Administrative Law Judge did not adhere to the required procedure in determining the findings of fact and conclusions of law required in the rules. (Petitioner's exceptions, at p. 8)

A thorough examination of the record convinces the Commissioner that such argument has no merit. In the opinion of the Commissioner, Judge Errickson did not ignore the requirements of the Administrative Code as claimed by petitioner nor is the Commissioner convinced of the probity of petitioner's claim to having been denied his rights under procedural due process.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

April 23, 1981

F.M., parent and natural guardian of A.M.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF LONG BRANCH, MONMOUTH COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Ocean-Monmouth Legal Services, Inc.
(Jerome Keelen, Esq., of Counsel)

For the Respondent, McOmber and McOmber
(Bunce Atkinson, Esq., of Counsel)

Petitioner, parent and natural guardian of A.M., a pupil under the supervision of the Board of Education of the City of Long Branch, hereinafter "Board," alleges that A.M.'s expulsion from school was illegal and improper. Petitioner prays for A.M.'s reinstatement in the Long Branch Public School System or in an alternate school system and that remedial training be provided to compensate for loss of school time.

The Board answers that its actions were legal and proper and within the scope of its authority.

A conference of counsel was held on December 15, 1978 at which the following issues were agreed upon:

1. Was the Board's action in expelling A.M. legal and proper?

2. Was A.M. accorded due process at his hearing before the Board on June 13, 1978?

A hearing was held in the Board of Education Building, Freehold, New Jersey on Thursday, March 8, 1979 where the following facts were established:

1. At the time of the hearing A.M. was 16 years old, a junior high school student classified as socially maladjusted placed in the District's Alternative School.

2. On May 18, 1978 A.M. was suspended from school for possession of marijuana pending an expulsion hearing.

3. On May 27, 1978 petitioner requested an informal hearing before the Board.

4. On June 13, 1978, a hearing to consider A.M.'s expulsion was held by the Board. The Board considered testimony concerning the marijuana incident and relevant testimony about A.M.'s entire disciplinary record which contained several suspensions for fighting, disrespect for authority and throwing an object at a teacher.

5. A.M. was placed on home instruction as a result of a consent order during the pendancy of his appeal for reinstatement.

Testimony elicited by the hearing officer indicated that A.M. had two bags of marijuana in his possession on May 18, 1978, valued at $8. Because of continued infraction of school rules, A.M. was on academic and social probation at the time and had been warned by school officials that subsequent misbehavior would result in serious charges being placed against him which could result in severe disciplinary action.

Petitioner charges that A.M. expulsion is an excessive disciplinary act considering the offense. In her opinion, A.M. could not be classified as a danger to fellow students since his "crime" was merely possession of a controlled dangerous substance, not the sale or distribution of it. Furthermore, petitioner claims, A.M.'s classification as a socially maladjusted pupil exempted him from expulsion under N.J.S.A. 18A:37-2 since the behavior of a socially maladjusted pupil by definition cannot be construed as being "willfully disobedient."

The Board counters that A.M. has been a chronic offender against the discipline of the school and a threat to his teachers and fellow students. His open defiance of school authority and his possession of a prohibited drug in school justified his removal from the school environment and was not an arbitrary, capricious or unreasonable act, as petitioner contends.

The hearing officer will first review three points in petitioner's Amended Appeal: that A.M. was excluded from his placement as a handicapped child without being provided an impartial hearing pursuant to N.J.A.C. 6:28-1.11 (now, N.J.A.C. 6:28-1.6M); that the Board's decision to expel A.M. was arbitrary and without cause as defined in N.J.S.A. 18A:37-2; and that petitioner individually, was forced to violate N.J.S.A. 18A:38-25 by the expulsion of her son.

Petitioner avers that the Board's action in expelling A.M. failed to take into consideration his classification as socially maladjusted and, furthermore, that he was denied due process as an educationally handicapped pupil by not having the

decision to expel from a special program required by law (N.J.S.A. 18A:46-1 et seq.) reviewed by the classification officer in the Commissioner's office.

The hearing officer can find no evidence that either the statutes or the rules and regulations of the State Board of Education (N.J.A.C. 6:28-1 et seq.) intend that classified educationally handicapped pupils are to be treated differently from other pupils in matters of school discipline and control. Boards of education are required by law to provide individual educational programs (I.E.P.) for handicapped pupils under state and federal laws. Boards of education are also required to maintain an orderly, as well as an efficient, school system.

In Gustave M. Wermuth et al. v. Board of Education of the Township of Livingston, 1965 S.L.D. 121 the Commissioner stated:

> "***Unacceptable behavior must be restrained and discouraged and when necessary appropriate deterrents and punishments must be employed for purposes of correction and to insure conformity with desirable standards of conduct.***" (at 129)

The hearing officer recommends therefore that the Commissioner dismiss that portion of the Amended Petition of Appeal which alleges that A.M. was expelled by the Board illegally since he was a classified educationally handicapped pupil protected from normal disciplinary action by the laws covering pupils with special needs.

The hearing officer likewise recommends that petitioner's claim that the Board's action to expel her son caused her to violate the compulsory attendance law be dismissed as groundless. Not only are the effects of N.J.S.A. 18A:38-25 vitiated by the legal act of expulsion (N.J.S.A. 18A:37-2 et seq.), the statute itself is not applicable to A.M. and petitioner since A.M. was 16 at the time the expulsion took place.

The allegation that the Board's action in expelling A.M. was arbitrary and without cause as defined by N.J.S.A. 18A:37-2 is also without merit and is recommended for dismissal. The record is replete with testimony that the pupil involved was a serious behavioral problem dangerous to the safety and welfare of both his teachers and his fellow students. His possession of a quantity of marijuana after a series of warnings that his behavior had to improve was the culmination of many months of defiance of the school's authority to which all students must submit. (N.J.S.A. 18A:37-1)

The Commissioner said in E.E. v. Board of Education of the Township of Ocean, 1971 S.L.D. 97:

> "***(T)here can be no question that a local board of education ***has the authority to ***expel***." (at 101)

In J.W. v. Board of Education of the Town of Hammonton et al., 1975 S.L.D. 774 the Commissioner determined that

> "***the possession or use by pupils in a schoolhouse or on school grounds of marijuana or any other controlled dangerous substance described in the law may not be condoned. It is the considered judgment of the Commissioner that to leave such conduct unpunished would only create a school atmosphere which would encourage younger pupils and more pupils to experiment with controlled dangerous substances. Local boards of education must deal with such problems in a manner which will discourage violations of the law.***" (at 783)

And in E.E., supra, the Commissioner asserted:

> "***Offenses involving the abuse of drugs are a serious menace to the mental health of our society, and the introduction and abuse of drugs in the public schools must be dealt with swiftly, in order to prevent their further introduction to other students.***" (at 101)

Furthermore, the Board complied fully with the warnings of the Commissioner in John Scher v. Board of Education of West Orange, 1968 S.L.D. 92:

> "***Termination of a pupil's right to attend the public schools of a district is a drastic and desperate remedy which should be employed only when no other course is possible.***" (at 96)

Respondent also complied with the Commissioner's dicta in Scher, supra:

> "[Expulsion] involves a momentous decision which members of a board of education, most of whom have had little specific training in education, psychology, or medicine are called upon to make. The board's decision should be grounded, therefore, on competent advice. Such advice can be obtained from its staff of educators, from its school physician and school nurse, from its psychologist,

> psychiatrist, and school social worker, from its counsel, and from other appropriate sources.***" (at 96)

In the instant case the hearing officer does not believe that the Board acted in an intemperate or illegal manner as alleged by petitioner. On the contrary it sought advice from experts on its staff, including its child study team, before acting and it provided the pupil and his natural guardian with procedural and substantive due process. Therefore, it is recommended that the Commissioner dismiss that part of the Amended Petition of Appeal which alleges that respondent's action in expelling A.M. was arbitrary and without cause.

Having determined that the expulsion of A.M. was justifiable and legally correct and having recommended that allegations to the contrary be dismissed, the hearing officer turns to petitioner's plea that A.M. be allowed to return to the public school he attended because she receives Aid to Dependent Children and cannot afford to send him to a nonpublic school. Additionally, A.M. has a right to a free education under Article 8, Section 4 of the Constitution of the State of New Jersey, petitioner maintains.

The Constitution does provide for a system of free public schools for all the children between the ages of five and 18. But it also charges the Legislature with providing the regulatory measures which will prevent one child from disrupting the schooling of others. Privileges, the hearing officer believes, have their compensatory responsibilities. It is clearly the responsibility of the local board of education to operate the local public schools for the benefit of the entire community. As a result it must adopt policies and, where necessary, enforce them.

In the case of Thomas v. Board of Education of the Township of Morris, 89 N.J. Super. 327 (App. Div. 1965), aff'd 46 N.J. 581 (1965) the Court declared:

> "***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. The factual determinations must be accepted if supported by substantial credible evidence.***" (at 332)

The Board is an administrative agency within the intendment of the Court's decision. It was acting within its

authority when it expelled an obstreperous pupil after due deliberation. Petitioner has not proven that the Board's decision was arbitrary, capricious or unreasonable. Nor has the hearing officer found the Board's action defective in any way. Therefore, he recommends to the Commissioner that the expulsion of A.M. be presumed to be correct and the Amended Petition of Appeal be dismissed in its entirety.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the entire record of the matter controverted herein, including the report of the hearing examiner.

The Commissioner observes that there were no exceptions filed pursuant to the provisions of N.J.A.C. 6:24-1.17(b).

The Commissioner affirms the findings and recommendations in the initial report of the hearing examiner and adopts them as his own.

COMMISSIONER OF EDUCATION

April 23, 1981

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
AGENCY DKT. NO. 376-11/78

IN THE MATTER OF:

OLD BRIDGE EDUCATION ASSOCIATION AND JOSEPH SCHULTZ,
Petitioners,
v.
OLD BRIDGE TOWNSHIP BOARD OF EDUCATION, MIDDLESEX COUNTY,
Respondent.

APPEARANCES:

Sanford R. Oxfeld, Esq., for petitioners (Rothbard, Harris & Oxfeld, attorneys)

Gordon J. Golum, Esq., for respondent (Wilentz, Goldman & Spitzer, attorneys)

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

Petitioners seek 30 days' termination pay for Joseph Schultz, basing the claim on language in Schultz' employment contract. The Old Bridge Township Board of Education (Board) asserts Schultz was dismissed for just cause and the termination clause in the employment contract does not apply. The matter proceeds on cross-motions for summary judgment.

I

A hearing was held before the Board on July 19, 1979, concerning allegations that Schultz had falsified an on-the-job accident report. Schultz was represented by counsel, knew the nature of the hearing, had the opportunity to present witnesses in his behalf and to cross-examine witnesses appearing for the Board.

At the close of the hearing the Board deliberated and, sometime later in the same evening, announced its findings as follows:

> We, the members of the Board of Education, find as a matter of fact that Joseph Schultz on June 28, 1978, made allegations to his employer that he expexpenced a work-related injury and requested medical attention. The Board of Education also finds that on June 29th Joseph Schultz submitted an accident report for compensation for the alleged work-related injury and that he reviewed and signed such a statement. The Board of Education also finds that Joseph Schultz was not in fact injured at work on June 28, 1978, and that the statement signed on June 29, 1978 was a false statement made to his employer.
>
> The Board of Education also finds that as a result of the falsification of record, Joseph Schultz will no longer be permitted to be employed by the Board of Education and that his relationship with the Board of Education has resulted in irreparable reconciliation. The Board of Education, therefore, moves that Joseph Schultz be dismissed effective immediately. (Emphasis supplied).
>
> Upon recorded roll call vote, the motion was passed 5-0.

II

Schultz argues that he is entitled to 30 days' termination pay because his employment was ceased upon passage of the above resolution and the contract calls for 30 days' notice, in writing, of termination. The subject clause, in its entirety, states

> It is hereby agreed by the parties hereto that this contract may at any time be terminated by either party giving to the other thirty days' notice in writing of intention to terminate the same, but that in the absence of such notice, the contract shall run for the full term named above.

The Board argues that Schultz was not terminated but was dismissed for just cause and these circumstances obviate his argument.

III

It is long established that a school employee under contract may not be summarily dismissed without notice and good cause. See, e.g., Amorosa V. Jersey City Board of Education, 1964 S.L.D. 126; Branin V. Middletown Township Board of Education, et al, 1967 S.L.D. 9. Although there may be distinctions made in other contexts, I use good cause and just cause as equivalent terms in this matter. BLACK'S LAW DICTIONARY 623, 775 (5th ed. 1979). The central thought is that the maker of the decision must, in his or its discretion, find sufficient, adequate and reasonable cause, regulated by good faith, upon which to base the decision.

The Board, after a full hearing and careful deliberation, found that Schultz falsified an accident report. It also decided that this was sufficient, adequate and reasonable cause for the dismissal it then voted.

I have reviewed the entire record in this matter including the complete transcript of the hearing conducted on July 19, 1978. No procedural deficiencies appear; no procedural right was abridged. In the absence of any procedural irregularity or allegation of arbitrariness, I may not substitute my judgment for that of the Board on the substantive issue. Kopera v. West Orange Board of Education, 60 N.J. Super. 288 (App. Div. 1960).

The motion of the Board, therefore, is **GRANTED**. The petition of appeal is **DISMISSED** accordgngly.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, FRED G. BURKE,** who by law is empowered to make a final decision in this matter. However, if Fred G. Burke does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

AGENCY DKT. NO. 376-11/78

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

11 MARCH 1981
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

12 March 1981
DATE

Sigmund Gross
DEPARTMENT OF EDUCATION

Mailed To Parties:

March 17, 1981
DATE

Ronald L. Parker/SH
OFFICE OF ADMINISTRATIVE LAW

bm

OLD BRIDGE EDUCATION ASSOCIATION AND JOSEPH SCHULTZ,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY.	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law.

The Commissioner observes that exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Petitioner excepts to the finding by the Honorable Bruce R. Campbell, ALJ that petitioner is not entitled to any pay by his termination without thirty (30) days' notice by the Board because of inapplicability of the termination clause in his contract. Petitioner contends that the Board erred in not awarding him thirty (30) days' termination pay because of its belief that his termination with cause rendered the termination clause in his contract inoperable. Petitioner contends that no law exists to support such a conclusion.

The reply exceptions of the Board refute those of petitioner and affirm the initial decision. The Board relies on Dennis v. Thermoid Co., 128 N.J.L. 303 (E. & A. 1942) wherein is noted:

> "***Much point is made that the by-laws of the company provided that all officers were removable, at any time, with or without cause. However, plaintiff was employed for the year for the reasons mentioned. Inconsistent statements call for a construction. Since the employment was from year to year, it is inconsistent to say that it was terminable at will. No doubt it was terminable for cause; but without cause would change the intent of the parties. Contracts must have some reciprocal basis since no bargain can be all on one side. A contract becomes valid because there is an exchange of promises.***" (Emphasis added.) (at 305)

The fact that petitioner herein was terminated with cause after investigation and deliberation by the Board is not in dispute.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

April 24, 1981

DATE OF MAILING April 24, 1981

OLD BRIDGE EDUCATION ASSOCIATION AND JOSEPH SCHULTZ,

PETITIONERS-APPELLANTS,

V.

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

RESPONDENT-APPELLEE.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, April 24, 1981

For the Petitioners-Appellants, Rothbard, Harris & Oxfeld
(Sanford R. Oxfeld, Esq., of Counsel)

For the Respondent-Appellee, Wilentz, Goldman & Spitzer
(Gordon Golum, Esq., of Counsel)

The State Board of Education affirms the Commissioner's decision for the reasons expressed therein.

July 1, 1981

Pending New Jersey Superior Court

LEAH JACOBS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

For the Petitioner, Philip Feintuch, Esq.

For the Respondent, Louis Serterides, Esq.

Petitioner is a teacher employed by the Board of Education of the City of Jersey City, hereinafter "Board." Petitioner alleges that during the first two years of her employment (September 1960 through June 1962) she was categorized as a "Teacher In Training" at a depressed salary and was denied membership in the Teachers' Pension and Annuity Fund (TPAF) a fact which, if true, will subsequently diminish her retirement allowance.

Petitioner prays for relief in the form of an Order from the Commissioner of Education requiring the Board to pay her the sum of $9,650.00 due her in accordance with a decision made in 1973 by the Commissioner in Yanowitz et al. v. Board of Education of the City of Jersey City, 1973 S.L.D. 57, and to adjust payments "***retroactively, presently and prospectively***" to the appropriate rate as if petitioner were a member of the TPAF since 1960, plus interest on delayed compensation and counsel fees.

Petitioner's lack of membership in TPAF is the crux of the matter and distinguishes it from Yanowitz , supra, which involved teachers who were TPAF members whose paychecks reflected mandated deductions, except for short periods of time when one or another served as a per diem substitute.

As in Yanowitz, petitioner's problem is exacerbated by the Board's use of the term "Teacher in Training." The Commissioner pointed out in Yanowitz that the use of euphemisms to categorize a teacher as a temporary employee when that teacher is fully certified and performing the duties of a regular teacher is specifically prohibited in N.J.S.A. 18A:1-1 and N.J.S.A. 18A:66-2 and is a guise to conceal the real situation for the purpose of paying the teacher reduced salary. The courts have previously said,

> "***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.***"

(Board of Education of Jersey City v. Margaret M. Wall and the State Board of Education, 119 N.J.L. 308 (Sup. Ct. 1938))

> "The courts have ***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.***"

(Downs v. Board of Education of Hoboken, 13 N.J. Mis. R. 853 (1935)) (See Yanowitz, supra, at 75)

In light of these decisions the hearing officer concludes that petitioner was indeed a regular teacher in the employ of the Board between September 1960 and June 1962 and was entitled to the emoluments of office then accorded other full-time, regular teachers.

The hearing officer, having examined the facts established through mutual stipulation, also finds that petitioner was illegally denied the right to join TPAF during the controverted period through wrongful actions of the Board and/or its agents.

The Board argues that since petitioner could have "bought back" her pension rights for the controverted period after she attained regular employment in September 1962 but "chose not to," she has waived her claim to being designated as a regular teaching staff member between September 1960 and June 1962 and the salary and other emoluments attendant thereto.

The courts do not agree, nor does the hearing officer:

> "***A person may waive statutory provisions for his benefit only if they do not involve considerations of public policy.***"

(Linden Board of Education v. Liebman, 56 N.J. Super. 556, 564, (Chan. Div. 1959); Yanowitz, supra)

In its Answer to the Petition of Appeal the Board asserts further that petitioner is barred by the statute of limitations from seeking any recovery whatsoever for alleged damages stemming from the Board's decision not to employ her at her proper rank and salary level some sixteen to eighteen years before.

The hearing officer disagrees in part and notes that the Commissioner held in Yanowitz, supra, at 77-78:

> "***The promotion and enforcement of fair dealing and the prevention of results contrary to good conscience and fair dealing are involved in estoppel. The doctrine can be invoked only to promote fair dealing.***
>
> "It is elemental that a municipal corporation, such as a local board of education, cannot make an illegal or ultra vires act legal on any principles of estoppel. As the Court stated in Gruber et al. v. Mayor and Township Committee of Raritan Township, 73 N.J. 120 (App. Div. 1962) at p. 126: '***A municipality is not totally exempt from the principles of fair dealing.***' The Court quoted Howard D. Johnson Company v. Township of Wall, 36 N.J. 443, 446 (1962) as follows:
>
> > '***Indeed government itself is created to provide justice; its agent, a municipality, should be loath to succeed upon a mere tactical advantage.'***
>
> "Public policy demands that the mandate of the law should override the doctrine of estoppel. No amount of misrepresentation can prevent a party, whether a citizen or an agency of government, from asserting as illegal that which the law declares to be such. Montgomery v. Wilmerding, 26 N.J. Super. 214, 220 (Chan. Div. 1953), 31 C.J.S. Estoppel Sec. 138, p. 685.***"

The hearing officer concludes that respondent did not indeed deal fairly with petitioner during the controverted period in 1960-62. Respondent illegally prevented petitioner from applying for membership in TPAF on the spurious ground that petitioner was not a regular teacher but, in effect, a long-time substitute ineligible for membership in the state pension fund. As a result petitioner was harmed financially to a considerable degree not only because her pay during those two years was lower than the prevailing scale but also prospectively inasmuch as TPAF is a service-oriented pension plan with future benefits dependent upon a formula which puts a premium on length of membership. (N.J.S.A. 18A:66-1 et seq.)

Because the Board's illegal actions deprived petitioner of salary and pension benefits rightfully hers, the hearing officer recommends that the Commissioner order the Board to correct the inequities in its treatment of petitioner between September 1960 and June 1962 in the following manner:

(1) That petitioner be paid the sum of $1,600 for salary lost during the 1960-6- and 1961-62 school years by virtue of having been wrongfully and illegally categorized as a substitute teacher;

(2) That the Board "buy back" petitioner's membership in TPAF for the years 1960-61 and 1961-62, wrongfully and illegally denied petitioner by Board action. Purchase of credit for such service is provided for in N.J.S.A. 18A:66-13 through payment of an amount certified by the TPAF actuary, into the system's annuity savings fund. The Board's liability in this regard should be diminished only by the amount which petitioner would have paid into TPAF had she been allowed to become a member during the 1960 to 1962 period. Petitioner's share in the "buy back" for those two years may be deducted from the $1,600 due her as back salary.

The hearing officer further recommends that petitioner be denied her claim to restoration of salary lost between September 1962 when she was employed as a regular teacher and placed on the first step of the then-existing salary guide and March 1972 at which point she was within six years of the date on which she filed the instant claim. This decision is based on the reversal of the Commissioner's decision in Castner v. Plumsted, 1979 S.L.D. _____ (decided June 11, 1979), rev'd in part State Board of Education December 5, 1979 wherein the State Board ruled that the statute of limitations barred even rightful and legal claims that are statutorily stale.

However, the hearing officer recommends that petitioner's salary level be adjusted retrospectively to March 1972, as well as prospectively, to reflect the two years she was illegally denied full employment rights.

In summary the hearing officer concludes and recommends to the Commissioner that the Petition of Appeal be upheld to this extent:

1. That petitioner be awarded $1,600 for pay lost between 1960 and 1962;

2. That the Board pay into TPAF sufficient funds to "buy back" petitioner's illegally withheld membership for the 1960-62 period mitigated by that share which petitioner would have paid into the annuity fund at the time she was denied membership;

3. That petitioner's salary after March 1972 be adjusted to reflect the two steps on the salary guide she was denied on being accorded permanent employment in September 1962.

The hearing officer further concludes and recommends to the Commissioner that petitioner's plea for adjustments to her salary between September 1962 and March 1972 be denied and that portion of the Petition of Appeal be dismissed.

Petitioner also prays for interest on any amounts due her as a result of this decision, as well as counsel fees. Awards for punitive damages, counsel fees and interest charges may properly be awarded only by the courts, absent statutory provision granting such power to an administrative authority. (See Charles Schlottman v. Board of Education of the Borough of Bound Brook, Somerset County, 1980 S.L.D. _____ (decided June 2, 1980); Edward C. Coyle v. Board of Education of Maple Shade, Burlington County, 1979 S.L.D. _____ (decided September 24, 1970); 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.)

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the entire record of the matter controverted herein including the report of the hearing examiner. The Commissioner observes that there were no exceptions filed pursuant to the provisions of N.J.A.C. 6:24-1.17(b).

In the matter of the hearing examiner's recommendations, the Commissioner, while affirming the findings that petitioner herein was entitled to recognition as a regular teacher between September 1960 and June 1962, disagrees with the hearing officer's resultant recommendation that petitioner be awarded $1,600 for salary lost between 1960-62. The Commissioner finds that petitioner's claim for salary is barred by the statute of limitations (N.J.S.A. 2A:14-1) and that the application of the equitable doctrine of laches bars the entire claim except for the period commencing with the school year 1978-79. Basil M. Castner v. Board of Education of the Township of Plumsted, Docket No. A-1691-79, N.J. Superior Court, Appellate Division, March 9, 1981 and Marjorie A. Lavin v. Board of Education of the Borough of Hackensack, Docket No. A-2875-79, N.J. Superior Court, Appellate Division, March 9, 1981

The Commissioner concurs with the hearing officer's finding that petitioner was indeed a regular teacher in the employ of the Board between September 1960 and June 1962 and that the use of euphemisms to categorize a teacher as a temporary employee when that teacher is fully certified and performing the duties of a regular teacher is specifically prohibited in N.J.S.A. 18A:1-1 and N.J.S.A. 18A:66-2. Further, the Commissioner directs the Board of Education to take the necessary steps

to ensure two years' credit for petitioner in TPAF by paying into the pension fund sufficient money to "buy back" petitioner's membership for the 1960-62 period mitigated by that share which petitioner would have paid.

The Commissioner likewise sets aside the hearing officer's recommendation that petitioner's salary after March 1972 be adjusted to reflect the two steps on the salary guide denied on being accorded permanent employment in September 1962.

The Commissioner observes that an application of the defense of laches is a bar to all claims for the six years preceding the filing of the petition. Union Township Teachers' Association, on behalf of Joseph Caliguire et al. v. Board of Education of the Township of Union, Union County, Docket No. A-3065-79, N.J. Superior Court, Appellate Division, March 9, 1981 However, the Commissioner finds that petitioner is entitled to salary credit based on the negotiated salary guide presently in force for the two years of employment by the Board of Education between September 1960 and June 1962. Such credit is to be applied prospectively commencing with the 1978-79 school year.

The Commissioner, having reviewed the remaining conclusions reached by the hearing officer, accepts them as his own and those portions of the Petition of Appeal are hereby dismissed.

COMMISSIONER OF EDUCATION

April 29, 1981

Dismissed State Board of Education
Pending New Jersey Superior Court

GRACE DONNELLY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF ROCHELLE PARK, BERGEN COUNTY,	:	
RESPONDENT.	:	

For the Petitioner, Goldberg & Simon
(Louis P. Bucceri, Esq., of Counsel)

For the Respondent, Beattie & Padovano
(Ralph J. Padovano, Esq., of Counsel)

Petitioner is a tenure teacher who has been employed by the Board of Education of the Township of Rochelle Park, hereinafter "Board," as the school librarian since 1970. She holds certification as an elementary teacher (K-8), school librarian, and media specialist. Petitioner contests her assignment by the Board to a position entitled "Thorough and Efficient Coordinator" (T&EC) and seeks an order from the Commissioner of Education relieving her of those duties, or other relief which the Commissioner deems appropriate.

The Board asserts that the duties assigned petitioner as the T&EC are clearly within the scope of her certification as a teacher, and that the position of T&EC is not a separately certificated position.

A hearing was conducted in the office of the Bergen County Superintendent of Schools, Wood-Ridge, on May 22, 1978 before a hearing examiner appointed by the Commissioner. The purpose of the hearing was to gather the facts regarding the duties of the T&EC and any other relevant information. Several documents were admitted in evidence and Briefs were filed after the hearing. Petitioner submitted a Reply Brief.

The report of the hearing examiner follows:

The essential facts are not in dispute. The record shows that petitioner was unilaterally assigned by the Board to the position of T&EC and that she protested by letter. (P-2-4) She was relieved of her duties as librarian by Board resolution for one-half day per week, as necessary, so she could devote that time to T&EC duties. (R-1) Petitioner received no extra compensation; however, she was paid her expenses for trips and workshops outside the school district. (Tr. 25-26; P-5-6)

Petitioner asserts that the person assigned the duties of T&EC should be an administrator and she testified that at all the workshops she attended she was the only librarian. All others present were "Superintendents, Assistant Superintendents or building principals***." (Tr. 58-59)

The hearing examiner finds that the issue to be determined is whether or not a T&EC may be a teacher and, if so, may those duties be assigned unilaterally against the teacher's wishes.

Respondent relies on N.J.S.A. 18A:11-1, in part, to support its contention that petitioner's assignment is a managerial prerogative. That statute reads as follows:

"The board shall-

a. Adopt an official seal;

b. Enforce the rules of the state board;

c. Make, amend and repeal rules, not inconsistent with this title or with the rules of the state board, for its own government and the transaction of its business and for the government and management of the public schools and public school property of the district and for the employment, regulation of conduct and discharge of its employees, subject, where applicable, to the provisions of Title 11, Civil 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."

Respondent relies, also, on N.J.S.A. 18A:27-4 which empowers boards of education to make rules governing the employment of its teaching staff members.

Under the New Jersey Constitution, Art. VIII, § IV, par. 1, the Legislature enacted the Public School Education Act of 1975 (N.J.S.A. 18A:7A-1 et seq.) which provides for a thorough and efficient system of free public schools. Nothing in this Act or the New Jersey Administrative Code, Title 6 delineates any position designated "Thorough and Efficient Coordinator." Thus,

there is no legal or administrative requirement to establish such a position. Nevertheless, a review of the Act and N.J.A.C., Title 6 reveals that certain mandates are set forth requiring compliance by all school districts in the State. For example, N.J.A.C., Title 6 requires the creation of a five-year educational plan, the setting of district goals, and the setting of educational objectives and standards. Particularly, N.J.A.C. 6:8-3.3 requires that:

> "Written educational objectives and standards for the educational program (curriculum), based upon district and school goals, shall be developed in consultation with teaching staff members under the direction of the chief school administrator."
> (Emphasis added.)

The hearing examiner concludes that the responsibility for carrying out the mandates of the Act and N.J.A.C., Title 6 is clearly that of each district's chief school administrator. However, the coordination of the many requirements of the Act may be performed by any certificated teaching staff member so long as the duties assigned do not include supervisory functions. Any supervision of staff requires a special certificate, e.g., School Administrator, School Principal, or Supervisor. However, nothing in the Act or in N.J.A.C., Title 6 precludes the unilateral assignment of a teacher to carry out some T&EC duties.

The hearing examiner determines, therefore, that the Commissioner must examine these duties assigned petitioner to properly evaluate the propriety of her assignment as the district's T&EC.

Petitioner testified that she prepared "a guideline for operating curriculum"; that she composed a form to be used by the district's teachers in setting objectives which would satisfy the law; that she composed this form without direction from the Superintendent or the State Department of Education; that she conducted after school workshops to instruct the district's teachers on how the forms were to be used; that the Superintendent was present at some of these meetings; that the forms were used to teach the staff how to fulfill their "T&E" responsibilities; and that she reviewed the forms and determined whether or not the standards and objectives set by the teachers were adequate. (Tr. 14-18, 54, 62)

Petitioner testified further that she was always in attendance when the State's monitors visited the school and as a result of the monitors' visits she informed the teachers of areas in need of improvement. She testified, also, that the Superintendent had never seen the objectives she had formulated. (Tr. 19-22)

The Superintendent testified that he held a meeting with petitioner and instructed her to review the previous year's work by the T&EC and to

> "***make plans and review materials, letters and so forth of instruction for the current year. I also instructed her to coordinate with the County Superintendent's office to find out where we had to go this year.***"
> (Tr. 75)

He testified that he recommended that the Board hire someone full time to "take care of" the T&EC and other positions required by State and Federal programs. (Tr. 83)

Nothing in the record refutes petitioner's testimony regarding her performance as the district's T&EC. Her further contention that as a result of these duties she has insufficient help or time to adequately perform her duties as a librarian is not meritorious. Obviously, the Board must realize that the duties she is being required to perform as T&EC will necessarily diminish to some degree the time petitioner can devote to the library; nevertheless, this is a proper determination which the Board is empowered to make. N.J.S.A. 18A: 11-1

The hearing examiner recommends that petitioner's request for additional compensation for performing the duties of T&EC be denied. The hearing examiner finds that the duties performed by petitioner as the school district's T&EC are generally, if not wholly, supervisory in nature and that petitioner is not properly certified to perform T&EC duties as now assigned her by the Board. Specifically, petitioner's supervision of the creation of objectives and standards and her instruction of staff in this regard are activities beyond the scope of her certification. (Tr. 16, 52-54)

Approximately fifteen years prior to the enactment of the Public School Education Act of 1975 the Commissioner discussed at length the distinction between supervisory and non-supervisory duties. In Frank T. Grasso et al. v. Board of Education of the City of Hackensack, 1960-61 S.L.D. 137 the Commissioner stated as follows:

> "***Administration deals with the planning, organizing, and directing of the day-by-day management and operation of the public schools to achieve the objectives of public education in conformance with law, State Board of Education rules, and local board of education rules and policies.

> "Supervision deals with the development and maintenance of high standards of curriculum, instruction and guidance and the continuous improvement thereof. It includes, among other things, the observing, advising and directing of teachers in their instructional and guidance activities inside and outside the classroom. Through advice, either upon request or otherwise, through programs of in-service training and through curriculum improvement activities, the supervisory staff acquaints the classroom teachers with the aims, materials and methods of education and encourages and assists them to achieve the objectives of the schools. The supervisory staff is also available to the administrative staff as consultants on educational problems.***" (at 138)

> "***The Commissioner would point out that it is not always possible nor is it necessary to make sharp distinctions in categorizing the many duties that a teacher performs. Certainly the intent of the rules governing the licensing of teachers is not to restrict the effective use of each person's particular competencies. Neither is it required that a teacher be limited to the classroom in performing services. Teachers do many necessary and important things in addition to working with pupils in the classroom. For instance, teachers work on committees to improve curriculum and to prepare bulletins, and their suggestions and advice may be sought by supervisors and principals. At times such an activity may border on what might be considered to be supervision or administration. Any conclusion in such a case would have to rest on what the teacher actually did and the degree to which the activity went beyond teaching or clerical work to decision-making and the directing of others. Many of the instances recited in this petition are of the border-line nature and more would have to be known of the actual acts in order to determine whether they went beyond teaching to supervising.***" (Emphasis supplied.) (at 140)

The hearing examiner finds that the Commissioner's determination in Grasso, supra, is as applicable today as it was when written and that petitioner's duties in the instant matter are generally supervisory in nature.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record of the matter controverted herein, including the report of the hearing examiner and the exceptions filed by the parties pursuant to the provisions of N.J.A.C. 6:24-1.17(b).

Petitioner takes exception to the hearing examiner's refusal to award monetary compensation to her for the increased workload placed upon her. Petitioner contends that the Board had taken unfair advantage of her to their financial benefit in light of the burdensome nature of the duties imposed by her role with "thorough and efficient" compliance.

The Commissioner notes that it is his responsibility to enforce and abide by the provisions of N.J.S.A. 18A and in the instant matter finds N.J.S.A. 18A:29-1 to be controlling. He affirms the recommendation of the hearing examiner that petitioner's supervision of the formulation of the objectives and standards and her instruction of staff in this regard are activities beyond the scope of her certification, and likewise affirms those findings denying petitioner's entitlement to additional compensation.

The Board contends that the hearing examiner erred in finding that petitioner's duties were supervisory in nature and, as a result of this finding, the Board is concerned with the potential ramifications that could affect districts with limited budget and administrative personnel resources.

The Commissioner has reviewed the record in the instant matter and takes this opportunity to reinforce the hearing examiner's recommendation with particular reference to Grasso, supra, wherein the Commissioner stated:

> "***At times such an activity may border on what might be considered to be supervision or administration. Any conclusion in such a case would have to rest on what the teacher actually did and the degree to which the activity went beyond teaching or clerical work to decision-making and the directing of others.***" (at 140)

In the instant matter, the Commissioner concurs with the finding of the hearing examiner that the scope of delegated responsibility was supervisory in nature. Further, the Commissioner cautions all boards that, in the delegation of responsibility, such delegation be reviewed to ensure such activity does not impose administrative and/or supervisory responsibilities on individuals lacking appropriate certification.

Accordingly, the Commissioner accepts as correct the conclusions reached by the hearing examiner and embraces them as his own.

COMMISSIONER OF EDUCATION

April 30, 1981

HELEN K. JUNGBLUT,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF DELAWARE, HUNTERDON COUNTY,	:	
RESPONDENT.	:	

For the Petitioner, Schaff, Conley & Motiuk
(Richard M. Conley, Esq., of Counsel)

For the Respondent, Bernhard, Durst & Dilts
(Edmund R. Bernhard, Esq., of Counsel)

Petitioner, employed as a bus driver by the Board of Education of the Township of Delaware, hereinafter "Board," challenges an action of the Board taken on May 20, 1976 by which her employment was terminated after approximately 11 years of service on May 21, 1976. Petitioner alleges that such termination violated her right to continued employment under her contract through June 30, 1976 and reemployment in prospective school years.

Petitioner further alleges that she was denied due process in that she was given no warning of the Board's impending action and that she was denied a proper hearing prior to the termination of her contract. Petitioner seeks relief in the form of reimbursement for pay withheld and reemployment or, in the alternative, a hearing as to the cause of her dismissal or a statement of reasons therefor.

Respondent admits that it dismissed petitioner as of May 21, 1976 for good cause even though her contract had no termination clause or procedure. Respondent admits further that it may have inadvertently violated the terms of its contract with petitioner and offers in its answer to compensate petitioner for any loss of pay from May 21 to June 30, 1976.

On May 20, 1976 the Board by a 6-1 vote terminated petitioner's contract as a bus driver. According to the minutes of the meeting the action was taken following an accident which occurred on May 10, 1976 in which the bus petitioner was driving ran off the road and was severely damaged. The decision was, "***felt to be in the best interest of Mrs. Jungblut and the Board.***" (J-1)

After learning of her dismissal, petitioner applied for unemployment assistance before the New Jersey Division of Unemployment and Disability Insurance which was first denied. On September 27, 1976, an Appeal Tribunal reversed the denial after finding that petitioner's dismissal, "***was not for negligence or carelessness and was therefore not for misconduct connected with the work.***" (Petition of Appeal, Exhibit G)

On September 16, 1976 the Board's Personnel Committee reopened the case of petitioner's dismissal. After discussion the question to restore petitioner to duty failed by a 3-4 vote. (J-2)

A conference on the appeal of petitioner to the Commissioner for reemployment by the Board as a school bus driver and the award of back pay for the time remaining on her contract following her dismissal was held in the office of the Assistant Commissioner in charge of the Division of Controversies and Disputes on January 26, 1977.

The issues were determined to be:

1. Whether or not petitioner was improperly terminated as a school bus driver during the 1975-76 school year by the Board's action of May 20, 1976.

2. Whether or not petitioner is entitled to reasons, or an appearance before the Board, regarding its action to terminate her employment.

3. Whether or not petitioner is legally entitled to continued employment by the Board for the 1976-77 school year if, in fact, the Commissioner decides in her favor in respect to Issues 1 or 2.

Since the facts in the case are stipulated and undisputed, it is determined that a formal hearing is not necessary and the matter is presented to the Commissioner for summary judgment. To prepare for this decision, the issues are discussed seriatim below.

The question of whether or not petitioner was properly dismissed on May 20, 1976 hinges on the terms of her contract and the statutes governing the administration of public schools.

The Board derives its authority to employ persons as school bus drivers from N.J.S.A. 18A:16-1, which provides, inter alia, that:

> "Each board of education***shall employ*** employees, as it shall determine, and fix and alter their compensation and the length of their terms of employment."

Furthermore, N.J.S.A. 18A:11-1 provides boards of education with authority to:

> "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."

Therefore the hiring of petitioner for the 1975-76 and previous school years and her dismissal on May 21, 1976 "***in the best interest***of the school district***" were within the discretionary powers of the Board under the prevailing statutes.

In her appeal to the Commissioner, petitioner states:
***

> "10. The reason that petitioner's school bus went off the road on May 10, 1976 is that she had confiscated a water pistol from several school children who had been causing a disturbance with it on the bus, and that later, while petitioner was driving, one of the school children lunged for the water pistol [which was] in a box with petitioner's pocketbook, causing her to take her eye off the road."

The Commissioner is constrained to point out that the disciplining of pupil riders is not the first responsibility of a school bus driver. Rather, the primary duty of a school bus driver is to drive his/her bus in a safe manner thereby ensuring the safety of pupils assigned thereon.

As amended in 1969, N.J.S.A. 18A:25-2 in part that,

> "***The driver shall be in full charge of the school bus at all times and shall be responsible for order;***if unable to manage any pupil, [the driver] shall report the unmanageable pupil to the principal of the school which he attends.***"

The statute thereby limits the responsibility of the school bus driver in maintaining discipline to reporting, unruly pupils to the principal. Nowhere is a bus driver authorized to forcefully confiscate or withhold a water pistol from an offending pupil while the bus is in motion. For the driver to take his/her eyes off the road and, in effect, lose his/her concentration on the task of driving a school bus loaded with children is to be remiss in the performance of duty.

Petitioner should have either stopped the bus until order was restored or, absent a threatening emergency, should have continued the route and reported the individual or individuals responsible for the disorder to the principal involved.

The Commissioner believes that the accident, which resulted in damage to the school bus exceeding $6,000 and narrowly missed injuring a score of youthful passengers, did result from careless, if inadvertent and unintentional, operation of the vehicle. Therefore he concludes that the decision of a majority of the Board to terminate the services of the driver involved in such a potentially dangerous mishap is both rational and legal.

Absent proof that a board's action falling within its discretional and statutory powers is arbitrary, capricious or without good reason, the Commissioner will not intervene. As was said over 45 years ago and many times since:

> "***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.***" Kenney v. Bd. of Educ. of Montclair, 1938 S.L.D. 647 (1934), aff'd State Board of Education, 649 (1935) (at 653)

Having determined that the Board's actions dismissing petitioner were entirely within its discretionary authority, it remains for the Commissioner to determine whether said action may be taken without compensating petitioner for the balance of his contract which contained no termination clause.

In previous decisions, the Commissioner has held a distinction to exist between termination upon notification and termination for cause. Leon Gager v. Board of Education of Lower Camden County Regional High School District No. 1, 1964 S.L.D. 81; Anthony Amorosa v. Board of Education of Jersey City, 1964 S.L.D. 126

> In addition, N.J.S.A. 18A:6-30.1 reads as follows: "When the dismissal of any teaching staff member before the expiration of his contract with the board of education shall be decided, upon appeal, to have been without good cause, he shall be entitled to compensation for the full term of the contract, but it shall be

> optional with the board whether or not he shall continue to perform his duties for the unexpired term of the contract." (Emphasis added.)

Thus, both statute and the Commissioner have made clear that a teaching staff member terminated upon showing of good cause may forfeit the 60 days' contractual termination pay. In the instant matter, which involves a Board employee other than a teaching staff member, the Commissioner finds no statutory authority for terminating a contract except on its own terms. Accordingly, absent a termination clause in petitioner's contract and absent statutory authority terminating the contract of a non-teaching staff member upon showing of good cause, the Commissioner holds that the Board is liable for the terms of the contract, less any amount paid petitioner by the Division of Unemployment and Disability Insurance.

The second issue concerns petitioner's claims that the Board did not give her reasons for her dismissal nor allow her to appear before the Board prior to dismissal. (Petition of Appeal, at p. 6)

The Commissioner knows of no statute or regulation of the State Board of Education requiring a local board to give an employee, other than a teaching staff member, advance notice of its intention to consider termination of employment, hold hearings either public or private on the question, or give the employee in writing or orally the reason or reasons for dismissal.

Petitioner's confidence that N.J.A.C. 6:21-16.3 and/or 6:21-11.3(j) are controlling in this matter (Exhibit F) is misplaced. Both items cited refer to proceedings against a holder of a transportation contract and the vendor's employees, not the employees directly hired by the board. Frances Finkle v. Board of Education of the City of Paterson, 1976 S.L.D. 726

Petitioner likewise relies on Katz v. Board of Trustees of Gloucester County College, 125 N.J. Super. 248 (App. Div. 1973) and Donaldson v. North Wildwood Board of Education, 65 N.J. 236, 246 (1974) to support the argument that at least an informal appearance, if not a formal hearing, should take place when a teaching staff member is to be denied reemployment. Such reliance is again misplaced since the cases cited apply to professional teaching staff members, not support personnel employed in petitioner's category.

In Carol Fahnestock v. Board of Education of the Borough of Madison, 1978 S.L.D. 858 the Commissioner reiterated his position thusly:

> "***Moreover, the Commissioner finds and determines that the applicable provisions of N.J.S.A. 18A:27-10 et seq. and N.J.A.C. 6:3-1.20, pertaining to the rights of non-tenured teaching staff members to request an informal appearance before a local board of education after they have been notified that their employment contracts will not be renewed for an ensuing academic year is not pertinent to employees whose employment status is not that of a teaching staff member. N.J.S.A 18A:1-1***" (at 861)

The question as to whether or not petitioner is entitled to reemployment for the 1976-77 school year is rendered moot by the conclusions drawn in Issues 1 and 2. However, the Commissioner would not have intervened in any event in the decision contained in the minutes of the Board's September 16, 1976 meeting in which a motion to reconsider petitioner's permanent dismissal was defeated 3-4. (Petitioner's Appeal at p. 5) It is clearly a board's prerogative to employ such personnel as it deems warranted.

Having found that the Board has not violated any law or regulation, nor abused its discretion with respect to petitioner's termination of employment, the Commissioner hereby grants summary judgment for the Board. The cross-appeal of petitioner for summary judgment in her behalf is denied. Except for monies due her as settlement of her aborted contract, there is no further relief to be granted petitioner herein.

The Petition is dismissed with prejudice.

COMMISSIONER OF EDUCATION

April 30, 1981

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3397-80
AGENCY DKT. NO. 255-5/80A

IN THE MATTER OF:

MIDDLESEX COUNTY EDUCATIONAL SERVICES COMMISSION EDUCATION ASSOCIATION,
Petitioner,
v.
BOARD OF DIRECTORS OF THE MIDDLESEX COUNTY EDUCATIONAL SERVICES COMMISSION,
Respondent.

Record Closed: January 29, 1981
Received by Agency: 3/16/81

Decided: March 16, 1981
Mailed to Parties: 3/18/81

APPEARANCES:

For Petitioner: **Stephen E. Klausner,** Esq. (Klausner & Hunter)

For Respondent: **Stanley C. Gerrard,** Esq.

BEFORE **ERIC G. ERRICKSON,** ALJ:

Petitioner, the Middlesex County Educational Services Commission Education Association (Association), in an action filed on May 27, 1980 before the Commissioner of Education, alleges that its member teachers are not provided certain rights and benefits to which they claim entitlement pursuant to statutory provision set forth in N.J.S.A.

18A:6-66. Specifically, they claim entitlement to paid sick leave, pay for public holidays, minimum employment increments, a salary schedule, credit for military service, enrollment in the Teacher Pension and Annuity Fund and tenure eligibility.

The Respondent Board of Directors of the Middlesex County Educational Services Commission (Board) conversely asserts that the teacher members of the petitioning Association are employed as supplemental teachers, that it has in good faith engaged in negotiations procedures with the Association, and that its teacher employees who are employed on an hourly basis are not entitled to additional benefits.

PROCEDURAL RECITATION:

The matter was transferred by the Commissioner on June 2, 1980 to the Office of Administrative Law for processing as a contested case pursuant to the provisions of N.J.S.A. 52:14F-1 et seq. In compliance with agreements reached at a prehearing conference on September 3, 1980, a plenary hearing was conducted at New Brunswick on October 30, 1980. Numerous facts stipulated to by the parties were placed on the record. Thereupon, petitioner rested, moved for summary decision, relying on the stipulated facts, and declined to call witnesses. That Motion was held in abeyance and respondent was directed to proceed to enter into the record testimony that would reveal additional facts regarding the operation of the Middlesex County Educational Services Commission. The Board called as its sole witness its Superintendent. Petitioner called one rebuttal witness. Respondent cross-moved for summary decision. Post hearing briefing was concluded on January 29, 1981.

UNDISPUTED FACTS:

The following facts as stipulated to by the parties or otherwise established and uncontested in the record reveal the context of the dispute:

The Board of Directors of the Middlesex County Educational Services Commission operates pursuant to the provisions of N.J.S.A. 18A:6-51 et seq. which became effective July 1, 1968. The Board provides supplemental instruction to pupils enrolled only in private and parochial schools. It requires that the instructors it employs hold teaching certificates issued by the New Jersey State Board of Examiners. All instructors employed have held and do hold such certificates.

The instructors employed by the Board teach small groups of pupils numbering from one (1) to seven (7). The instruction is given in mobile motorized and nonmotorized units outside the private and parochial school buildings. Each instructor so employed teaches in one or more of those mobile units.

The operations of the Board are funded by the State Legislature under Public Laws 192 and 193 of 1977 based on estimates by the Board of the number of referral pupils it expects in an ensuing year.

Five categories of remedial instruction are provided: speech correction, compensatory education, English as a second language, supplemental instruction, and home instruction. The Board's first instructor was hired on April 13, 1978. Referrals are entirely voluntary and subject to change throughout each year. Parents have the right to withdraw their children from any program at any time.

TESTIMONY OF WITNESSES:

The Superintendent testified that teachers are employed by the Board on an "as needed" basis without contract and without guarantee of reemployment in any ensuing year. She testified that they begin employment after the academic year begins, spend approximately ten (10) days verifying class rosters, pre-planning, and preparing year end reports. She testified that they instruct pupils approximately 155 days between October and May. She testified that the teachers are paid on an hourly basis, work less than a full school day, are subject to rescheduling because of pupils who drop, overcome their educational handicap or are withdrawn. She testified, however, that the total hours per week per teacher is not typically altered within a school year.

The Superintendent testified that the teachers do not record grades on report cards, do not engage in curriculum planning, are not required to submit lesson plans or record books, do not have extra curricular, lunchroom or hall duties and are rarely formally evaluated (P-3). She testified that for attendance at Wednesday afternoon inservice meetings, scheduled preparation time, voluntary attendance at PTA meetings and time spent in preparation of twice yearly pupil progress reports, the Board's teachers are compensated at the same hourly rate as for scheduled classes.

A speech correctionist employed by the Board testified that, although not directed to do so, she keeps daily lesson plans and attendance records (P-5, 6). She testified that she confers with parents, gets their signatures on mandated permission forms (P-7) prior to beginning instruction, and prepares mandated year end individual speech evaluation reports (P-8).

FINDINGS OF FACT:

On the basis of a preponderance of credible evidence within the record, I **FIND** the following facts to be considered with those uncontroverted facts previously set forth:

1. The Board's teachers begin work later than the beginning of the academic year and end work earlier than the close of the academic year.

2. The Board's teachers, for the 1980-81 school year, work daily schedules which range from less than two (2) hours per day to six (6) hours per day. (R-5, R-8) Their rate of compensation is $7.00 per hour. (R-10, 11) The number of assigned hours per week rarely is altered after a year begins.

3. On March 7, 1980, the Superintendent mailed a questionnaire to the Board's teachers advising that scheduled instructional time would be based on the amount of service requests of schools and asking whether the individual desired to continue in employment for the ensuing year. No contract promise or guarantee of employment for ensuing years is issued to its teachers by the Board or its Superintendent. When inquiry was made by the N.J. Employment Service as to whether one of the Board's teachers would be reemployed, the Superintendent advised that it was anticipated that the individual would be offered reemployment.

4. The Board's teachers are not required to and do not participate in curriculum planning, extra curricular activities, lunchroom supervision, hall monitoring, grading of pupils, preparation of report cards or formal procedures involving evaluation of their performance. They are paid for assigned preparation time.

5. The Board's teachers provide remedial instruction to small groups of pupils, prepare twice yearly individual progress reports, attend meetings with the Superintendent twice monthly, occasionally attend PTA conferences and occasionally meet with parents. For all of these activities, they are paid on an hourly basis. They are not paid nor are substitutes provided when they are absent for illness or other reason.

6. The Board's teachers were not admitted to membership in TPAF on the basis that they were temporary hourly employees without contract. (R-1, 1A; R-2, 2A, 2B; R-3) Nor do they receive the fringe benefits such as sick leave and paid holidays or health benefits.

DISCUSSION AND CONCLUSIONS:

Petitioner contends that the relief sought is mandated by the following statute:

> 18A:6-66. Rights and benefits of personnel
>
> Persons holding office, position or employment under a board of directors of a commission shall enjoy the same rights and benefits as are enjoyed by persons holding office, position, or employment under a public school district board of education.

Conversely, the Board contends that petitioners not have such entitlement for the reason that teachers similarly employed in such positions by a public school district do not enjoy those benefits. The Board buttresses this argument by citing Point Pleasant Beach Teachers' Association et al. v. Board of Education of the Borough of Point Pleasant Beach, 172 N.J. Super. 11 (Appellate Division 1980); Barbara Kuboski and Florence Sgromolo v. Board of Education of the Borough of South Plainfield, 1978 S.L.D. 322; Elizabeth Mancini v. Board of Education of the City of Vineland, decided April 11, 1980; Claire Bisgay et al. v. Board of Education of the Township of Edison, decided September 8, 1980; Hamilton Township Supplemental Teachers' Association et al. v. Board of Education of the Township of Hamilton, decided October 1, 1980; and Carlene E. Garretson et al. v. Board of Education of the Borough of Middlesex, decided November 3, 1980.

A careful review of the case law which must be considered as controlling precedent, given the factual pattern in the instant matter, supports the **CONCLUSION** that the Board's teachers rendered supplemental instruction in all substantial points identical to the terms and conditions of supplemental teachers who brought action in Bisgay, supra. Therein, the Commissioner, in support of his determination that those hourly paid supplemental teachers were not entitled to substantially the same relief as that sought herein stated:

> ***In many instances, as in the case herein, these pupils are screened by the local child study team and an educational program is designed by a learning disabilities teacher consultant in accordance with each pupil's individual needs. The supplemental teacher is then required to implement the individualized educational program as designed by the learning disabilities teacher consultant on a small group individual basis. The supplemental instruction afforded to each child is removed from the regular classroom setting; however, the overall responsibility for decision making with respect to each child's educational achievement by and large ultimately remains that of the learning disabilities teacher consultant and his or her regular classroom teacher. In this regard the supplemental teacher serves as the catalyst through which the educational goals in certain basic skills areas are achieved to eventually mainstream the affected pupils.
>
> It is clear from a reading of the provisions of N.J.S.A. 18A:27-2 that a person who is not the holder of an appropriate teaching certificate may not provide instruction to pupils in the public schools of New Jersey. However, the Courts have held in Biancardi, supra, and Point Pleasant Beach, supra, possession of an appropriate teacher's certificate is not the sole basis upon which a person may lay claim to a tenure status pursuant to N.J.S.A. 18A:28-5, or, in fact, be eligible for many of the benefits otherwise accorded to regular teaching staff members pursuant to statutory prescription. The Commissioner is constrained to observe that supplemental instructional services which local boards of education must provide to certain of their pupils who require remediation in the basic skills areas are actually an extension of an educational program which a regularly certificated classroom teacher would provide to such pupils. The severity of the educational handicaps of these pupils requires a more intensified and individualized instructional program than that which could be attained in the regular classroom environment. In any event, the ultimate goal to be achieved in affording educationally handicapped pupils supplemental instruction is to have them return to their regular classroom on a full time basis.
>
> In the Commissioner's judgment those persons who serve as supplemental teachers actually assist the regular classroom teacher by providing such remedial instruction for certain limited periods of time during the school day in accordance with an educational plan

> developed, not by the supplemental teacher, but rather by a specially certificated learning disabilities teacher consultant. Supplemental instruction which is provided under these circumstances is analogous to the character and nature of employment services which, in effect, could be provided by appropriately certified substitute teachers who are, in fact, taking the place of a regular classroom teacher with the expectation that these pupils will be returned to the regular classroom teacher upon their attainment of minimum proficiency in the basic skills subject matter areas. The Commissioner so holds.
>
> In arriving at the above findings and determination the Commissioner does not intend to convey to local boards of education or their teaching staff members that a tenure status could not be acquired in a part-time or full-time position in which supplemental instruction is mandated by law. The Commissioner finds and determines herein that, when a local board of education determines that compliance with the mandate of a thorough and efficient education for certain of its pupils requires supplemental instruction which can be only provided by persons who are specially certificated and who possess those skills and abilities above and beyond those of the regular classroom teacher, then these persons are tenure eligible pursuant to the provisions of N.J.S.A. 18A:28-5.
>
> Accordingly, for the reasons expressed in the Commissioner's findings and determination herein, the initial decision on remand is reversed. The instant Petition of Appeal is hereby dismissed.

Similarly applicable and controlling in the instant matter, are the following words of the State Board of Education in its denial of tenure to a number of supplemental teachers when it reversed the Commissioner's holding in Hamilton, supra.:

> In Point Pleasant Beach Teachers Association v. Board of Education of Point Pleasant Beach, decided by Appellate Division on March 27, 1980, Docket No. A-1980-78, the court held that teachers employed under Title I of the Elementary and Secondary Education Act were not "teaching staff members" within the meaning of the Teacher Tenure Statute, N.J.S.A. 18A:28-5. While we note some differences between Title I teachers and the supplemental teachers involved here, we believe the two positions to have so many characteristics in common that the Point Pleasant Beach case is controlling here. In that decision the Appellate Division observed among other things that Title I teachers were hired annually as needed and on an hourly basis, that they individually submitted a written request for employment each year, that they were not evaluated as were classroom teachers, and that they acted primarily as tutors giving individual remedial aid to the children. All these elements are likewise present in the case of supplemental instructors in Point Pleasant Beach.
>
> The Petitioners have emphasized two differences between Title I teachers and other supplemental teachers: (a) the latter perform

> special education services mandated by the Legislature in the Public School Education Act of 1975 (N.J.S.A. 18A:7A-1 et seq.) and the rules of the State Board implementing that legislation (N.J.A.C. 6:28-3.2(b)); Title I programs, on the other hand, are not mandated; and (b) Title I programs are funded by the Federal Government -- an uncertain source of funding, whereas monies for supplemental instruction under state and/or local auspices do not suffer from such uncertainty. We do not consider these factors to change the essential character of the supplemental instructor's job: it is basically temporary and variable, depending upon the needs of children of the district from time to time. For example, in one year a school might need three supplemental reading teachers, while in the next year only two would be required; or if three were retained, their respective hours could be greatly shortened. Even though the general program for the handicapped is mandated, it requires, as the Appellate Division said of Title I, "a flexibility in operation which would be impeded if its instructors were granted tenure." Point Pleasant Beach, supra, slip opinion page 7.

The controlling precedent in case law in regard to petitioner's claim to sick leave entitlement was iterated in Garretson, supra, wherein the Commissioner overturned the Administrative Law Judge's holding that those supplemental teachers were entitled to sick leave:

> ***In Woodbridge in reference to employees eligible for sick leave benefits the term "steadily employed" means regular continuous employment for the entire school year. In the present matter employment of petitioners was for a term markedly less than for the entire school year, starting as it did variously in early October and ending one week or more before the end of the regular academic year.***
>
> ***For the aforestated reasons, that portion of the determination by the Court awarding cumulative sick leave to the part-time Title I teachers is herewith set aside.***

Petitioner mistakenly places reliance on cited case law including Susan Stuermer v. Board of Education of the Special Services School District of Bergen County, 1978 S.L.D. 628. Stuermer is factually distinguishable from the instant matter by reason of the fact that Stuermer had acquired tenure in a public school district prior to her transfer to a special services school district in a tenurable, contractual position with full salary and emoluments. Those facts contrast sharply with the part time supplemental teachers herein who are employed without contract on an hourly part time basis.

In the instant matter, the temporary and variable nature of the less than full year employment of the Board's teachers is unmistakably identical to that found in Bisgay,

supra, Hamilton, supra, and Garretson, supra. Similarly, petitioner's acceptance of their terms of part time employment as hourly employees without contract, paid sick leave, paid holidays, and other benefits enjoyed by regular full time classroom teachers is on point with factors deemed controlling in Bisgay, Hamilton, and Garretson. Accordingly, it is **CONCLUDED**, on the basis of precedent in case law, that petitioners would not have been entitled under existing controlling case law to these benefits had their employment been in the public schools. Nor are they entitled as employees of the Commission as a matter of law to sick leave, pay for public holidays, minimum employment increments, a salary schedule, or credit for military service, N.J.S.A. 18A:6-66. While certain of these beneifts may be appropriately raised by petitioner at the negotiating table, pursuant to the provisions of N.J.S.A. 34, they may not be ordered as the result of this action. The remaining item of relief sought, namely enrollment in TPAF was not raised by petitioners under the proper jurisdiction. Determining eligibility for enrollment is an exclusive prerogative of the Trustees of TPAF. Accordingly, it is **CONCLUDED** that the Commissioner is without authority to order relief in the form of a directive to enroll supplemental part-time teachers without contract in TPAF.

DETERMINATION:

In consideration of the conclusions heretofore set forth, it is **DETERMINED** that petitioner is not entitled to the relief sought. Accordingly, Petitioner's Motion for Summary Decision is **DENIED** and Summary Decision is entered in favor of the Board. The Petition of Appeal is **DISMISSED**.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, FRED G. BURKE,** who by law is empowered to make a final decision in this matter. However, if Fred G. Burke does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

OAL DKT. NO. EDU 3397-80

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

March 16, 1981
DATE

Eric G. Errickson
ERIC G. ERRICKSON, ALJ

Receipt Acknowledged:

March 16, 1981
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

March 18, 1981
DATE

Ronald L. Parker/bt
OFFICE OF ADMINISTRATIVE LAW

plb

DOCUMENTS IN EVIDENCE:

R-1,1A	Murphy to Henry; Rura to Commission Secretary
R-2A, B	Henry to Murphy; Murphy to Henry; Henry to Pavlik
R-3	Pension Information 1977
R-4A, B	N.J.A.C. 6:28-5.1 et seq. and 6.1 et seq.
R-5	Dugan Schedule
R-6	Nowak Schedule
R-7	Zollar Schedule
R-8	Albanese Schedule
R-9	N.J.S.A. 18A:6-66
R-10	Board Minutes, October 19, 1979
R-11	Board Minutes, March 21, 1980
R-12	Henry to Auxiliary Staff Member
R-13	Henry to Manning

P-1	Student Progress Report Undated (1978-79)
P-2	Student Progress Report, May 28, 1980
P-3	Evaluation of Janet Manning, March 19, 1980
P-4	Monthly Log of K. Henry, October 29, 1980
P-5	Pupil Attendance - Kenny, 1980-81
P-6	Instructional Plan - Kenny, October 20-27, 1980
P-7	Notice to Parent of Speech Correction Diagnosis
P-8	Speech Evaluation Report

MIDDLESEX COUNTY EDUCATIONAL SERVICES COMMISSION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF DIRECTORS OF THE MIDDLESEX COUNTY EDUCATIONAL SERVICES COMMISSION, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law.

The Commissioner observes that exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Petitioner excepts to the conclusions of the Honorable Eric G. Errickson, ALJ and contends that Judge Errickson's decision is directly contrary to N.J.S.A. 18A:6-66 which states:

> "Persons holding office, position or employment under a board of directors of a commission shall enjoy the same rights and benefits as are enjoyed by persons holding office, position, or employment under a public school district board of education."

The Board's reply exceptions refute the exceptions filed by petitioner and affirm the decisions of the Court. The Commissioner agrees. He finds that, as stated by the Board, Judge Errickson's decision comports with the following prior decisions of the Court, the Commissioner and the State Department of Education: Point Pleasant Beach Teachers' Ass'n et al. v. Board of Education of the Borough of Point Pleasant, 173 N.J. Super. 11 (App. Div. 1980); Claire Bisgay et al. v. Board of Education of the Township of Edison, decided by the Commissioner. January 18, 1980, aff'd State Board September 8, 1980; Hamilton Township Supplemental Teachers' Ass'n et al. v. Board of Education of the Township of Hamilton, 1979 S.L.D. _____ (decided November 30, 1979), rev'd State Board October 1, 1980; and Carlene E. Garretson et al. v. Board of Education of the Borough of Middlesex, decided November 3, 1980.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

April 30, 1981

Pending State Board

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3341-80
AGENCY DKT. NO. 386-12/77

IN THE MATTER OF:

JOSEPHINE KLINE,
Petitioner
v.
BOARD OF EDUCATION OF VOORHEES TOWNSHIP,
Respondent.

Record Closed: February 2, 1981
Received by Agency: 3/19/81

Decided: March 13, 1981
Mailed to Parties: 3/19/81

APPEARANCES:

Arnold M. Mellk, Esq., for the Petitioner

Robert F. Blomquist, Esq., for the Respondent

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

On December 13, 1977, Josephine Kline filed a petition with the Commissioner of Education alleging that she was not placed on the proper salary schedule. The respondent denied the allegation. Petitioner moved for summary judgment and briefs were submitted by the parties.

No decision was made regarding this Motion and the matter was referred to the Office of Administrative Law on August 29, 1979 for a decision as a contested case pursuant to N.J.S.A. 52:14F-1, et seq. On October 11, 1979, the matter was returned to

the Commissioner of Education since the petition had been filed prior to January 6, 1979. Pursuant to an agreement between the Office of Administrative Law and the Commissioner of Education, the matter was again filed with the Office of Administrative Law on May 29, 1980. At the Prehearing Conference held on October 17, 1980, the petitioner renewed the Motion for Summary Judgment and it was decided that the parties would submit supplemental briefs.

The undisputed facts in this matter are:

(1) Petitioner has been employed by the respondent as a school nurse since September 1, 1971.

(2) Petitioner is a registered nurse and has a New Jersey Certification as a school nurse since January 1972.

(3) By contract, petitioner received a salary of $7,000 for the 1971-72 school year (J-1).

(4) By contract, petitioner received a salary of $7,700 for the 1972-73 school year (J-2 and 3).

(5) By contract, petitioner received a salary of $8,000 for the 1973-74 school year (J-4).

(6) By contract, petitioner received a salary of $8,300 for the 1974-75 school year (J-5).

(7) By contract, the petitioner received a salary of $8,600 for the 1975-76 school year (J-6).

(8) By contract, petitioner received a salary of $9,450 for the 1976-77 school year (J-7).

(9) For the 1977-78 school year, petitioner's salary was fixed at step 9 of the Non-Degree Schedule of the Teacher Salary Guide.

(10) Petitioner's request to be placed on the Bachelor Degree Schedule of the Teacher Salary Guide at the appropriate step was denied by LeRoy E. Swoyer, Superintendent of Schools, by letter dated October 6, 1977.

(11) By affidavit, dated April 10, 1978, Mary G. Berg stated that she was employed by the respondent as an elementary grade teacher, and that she held a New Jersey Elementary Grade Certificate but did not possess a Bachelor Degree. Ms. Berg stated that as of 1970-71 the respondent adopted a Teacher Salary Guide for Non-Degree, Bachelor Degree and Master Degree employees and that she was placed on the Bachelor Degree schedule and remained on this schedule until her retirement in June 1973 (J-18).

(12) The respondent's Teacher Salary Guide for the 1970-71 and 1971-72 school years provided salary schedules for Non-Degree, Bachelor Degree and Master Degree employees (J-8 and 9).

(13) The respondent's Teacher Salary Guide for the 1972-73 and 1973-74 school years provided salary schedules for Bachelor Degree and Master Degree employees (J-10).

(14) The respondent's Salary Guide for the 1974-75, 1975-76, 1976-77 and 1977-78 school years provided salary schedules for Non-Degree, Bachelor Degree and Master Degree employees (J-11 and J-12).

(15) The respondent adopted a contractual salary guide policy on January 25, 1978 (J-13).

(16) The respondent's Salary Guide for the 1978-79, 1979-80 and 1980-81 school years provided salary schedules for Non-Degree, Bachelor Degree, Bachelor Degree plus fifteen and Master Degree employees (J-14, 15, 16 and 17).

The first issue in this matter is whether the petitioner was placed on the wrong salary schedule at any time since July 1, 1972, the effective date of N.J.S.A. 18A:29-4.2.

This statute provides that:

> 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 experienced steps and training levels that apply to teachers.

There are a substantial number of school board decisions which have consistently held that this statute prevents school boards from discriminating between school nurses without Bachelor Degrees and other teaching staff members without Bachelor Degrees. Elsie Wilson v. Board of Education of the Borough of Florham Park, 1977 S.L.D. 823, Sara Louise Miller v. Board of Education of the Township of Lakewood, 1976 S.L.D. 960, Shirley Martinsek v. Board of Education of the Eastern Camden Regional School District, 1975 S.L.D. 1100, Evelyn Lenahan v. Board of Education of the Lakeland Regional High School District, 1972 S.L.D. 577.

Petitioner's employment with the respondent started on September 1, 1971, a year prior to the adoption of N.J.S.A. 18A:29-4.2. For that school year, the petitioner was paid $7,000 (J-1). The Teacher Salary Guide for the 1971-72 school year provided a first step salary of $6,500 for Non-Degree employees and a first step salary of $7,350 for employees holding a Bachelor Degree. No explanation was provided for how the petitioner's salary was calculated for this school year nor was there any indication as to whether she was given credit for prior experience.

For the 1972-73 school year the petitioner was paid an adjusted salary of $7,700 (J-3) and for the 1973-74 school year the petitioner's salary was $8,000 (J-4). The Salary Teacher Guides for those years provided schedules for Bachelor and Master Degrees and the specific salaries of the petitioner are not contained on these Guides.

The cases have held that if a board of education fails to promulgate a Non-Degree Schedule then teaching staff members who do not have degrees are to be paid on the Bachelor Degree Schedule at the appropriate step. Board of Education of the Township of Lakewood v. Lakewood Education Association, 1979 S.L.D. ____ (decided on April 20, 1979) affirmed by State Board of Education on August 8, 1979, Martinsek, supra. Since the respondent did not have a Non-Degree Schedule for the 1972-73 and 1973-74 school years, the petitioner should have been paid according to the Bachelor Degree Guide at the appropriate step.

Additionally, during the 1972-73 school year, Ms. Berg, a certified teacher, who did not have a Bachelor Degree was paid a salary based on the Bachelor Degree Schedule (J-18). It appears clear that pursuant to N.J.S.A. 18A:29-4.2 the petitioner's salary should have been based on the Bachelor Degree schedule for that year. I FIND no merit to the respondent's argument that it could discriminate between the petitioner and Ms. Berg since Ms. Berg's contract was signed before the effective date of N.J.S.A. 18A:29-4.2 and the tenure statute, N.J.S.A. 18A:6-10, prohibited it from reducing Ms. Berg's salary without just cause.

Since the petitioner has not shown that she was entitled to credit for any experience prior to her employment with the respondent, her salary for the 1972-73 school year should have been $8,100, the second step on the Bachelor Degree Schedule (J-10) and her salary for the 1973-74 school year should have been $8,400, the third step on the Bachelor Degree Schedule (J-10).

I cannot accept petitioner's argument that she was entitled to a salary equal to the fifth step of the Bachelor Degree Schedule for the 1972-73 school year and the sixth step of the Bachelor Degree Schedule for the 1973-74 school year which is based solely on the fact that she was placed on the top step (7) of the Non-Degree Schedule for the 1974-75 school year (J-5 and J-11).

After the 1973-74 school year, the respondent adopted Teacher Salary Guides which contained Non-Degree Schedules. There has been no showing that since the retirement of Ms. Berg at the end of the 1972-73 school year that there has been any teaching staff member who has been paid a salary based on the Bachelor Degree Schedule and who has not held that degree. Therefore, after the 1973-74 school year, the respondent correctly paid the petitioner a salary based on the Non-Degree Schedule except for the 1974-75 school year.

The Non-Degree Schedule of the Teacher Salary Guide for the 1974-75 school year provided a top step (7) salary of $8,300 (J-11) and this was the salary paid to the petitioner (J-5). Since the petitioner was entitled to a salary of $8,400 for the 1973-74 school year, the respondent cannot pay the petitioner less for the 1974-75 school year pursuant to the provisions of the tenure statute, N.J.S.A. 18A:6-10. Pearl Schmidt v. Board of Education of the Passaic County Regional High School, 1975 S.L.D. 19. Thus, the Board is required to maintain the petitioner's salary at $8,400 until the next step on the

Non-Degree Schedule exceeded that sum. That occurred the following year when the top step on the Non-Degree Schedule was fixed at $8,600 (J-11).

Therefore, I **FIND** that for the 1972-73, 1973-74 and 1974-75 school years the respondent underpaid the petitioner the total sum of $900.

The last issue is whether the petitioner's claim for back salaries is barred by laches. No evidence was presented to show when the petitioner first became aware that her compensation was not based on the correct schedules for the 1972-75 school years or when her claim was brought to the attention of the respondent. The petitioner in her brief filed on April 27, 1978 stated that she brought her salary claim to the attention of her collective bargaining representative in or about 1974 and that the representative thereafter brought it to the attention of the respondent. No evidence was presented to prove this representation. It was shown that on October 6, 1977 the respondent sent a letter to the petitioner advising her that she had been properly placed on the salary schedule. Thereafter on December 13, 1977, the petition was filed in this matter.

In two recent opinions, the State Board of Education has held that the equitable defenses of estoppel or laches barred claims for prior military service. Marjorie Lavin v. Board of Education of the Borough of Hackensack, 1980 S.L.D. ___ (decided by the State Board of Education on March 5, 1980), Union Township Teachers Association on Behalf of Joseph Caliguire, Jr. et al. v. Board of Education of the Township of Union, 1980 S.L.D. ___ (decided by the State Board of Education on March 5, 1980). In reaching these decisions, the State Board of Education cited two Appellate Division decisions, Giorno v. Township of South Brunswick, 1970 N.J. Super. 162 (App. Div. 1979) and Kloss v. Township of Parsippany-Troy Hills, 170 N.J. Super. 153 (App. Div. 1979). Although all of these decisions dealt with the military credit provision contained in N.J.S.A. 18A:29-11, the legal theory expressed therein is equally applicable to claims arising under the provisions of N.J.S.A. 18A:29-4.2. Therefore, I **CONCLUDE** that the doctrine of laches is applicable in this matter and has foreclosed the petitioner's right to claim a back salary payment.

Therefore, I **CONCLUDE** that the petition is hereby **DISMISSED WITH PREJUDICE.**

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, FRED G. BURKE,** who by law is empowered to make a final decision in this matter. However, if Fred G. Burke does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **FRED G. BURKE** for consideration.

March 13, 1981
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

March 17, 1981
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

March 19, 1981
DATE

Ronald L Parker/ed
OFFICE OF ADMINISTRATIVE LAW

ms

ADDENDUM

EXHIBITS ADMITTED INTO EVIDENCE:

J-1 Employment Contract between the petitioner and the respondent for the 1971-71 school year.

J-2 Employment Contract between the petitioner and the respondent for the 1972-73 school year.

J-3 Second Employment Contract between petitioner and respondent for the 1972-73 school year.

J-4 Employment Contract between the petitioner and the respondent for the 1973-74 school year.

J-5 Employment Contract between the petitioner and the respondent for the 1974-75 school year.

J-6 Employment Contract between the petitioner and the respondent for the 1975-76 school year.

J-7 Employment Contract between the petitioner and the respondent for the 1976-77 school year.

J-8 Respondent's Teacher Salary Guide for the 1970-71 school year.

J-9 Respondent's Teacher Salary Guide for the 1971-72 school year.

J-10 Respondent's Teacher Salary Guide for the 1972-73 and 1973-74 school years.

J-11 Respondent's Teacher Salary Guide for the 1974-75 and 1975-76 school years.

J-12 Respondent's Teacher Salary Guide for the 1976-77 and 1977-78 school years.

J-13 Contractual Salary Guide Placement Policy adopted by the respondent on January 25, 1978.

J-14 Respondent's Teacher Salary Guide for the 1978-79 school year.

J-15 Respondent's Teacher Salary Guide for the 1979-80 school year.

J-16 Respondent's Teacher Salary Guide for July 1, 1980 through January 31, 1981.

J-17 Respondent's Teacher Salary Guide for February 1, 1981 through June 30, 1981.

J-18 Affidavit of Mary G. Berg, dated April 10, 1978.

JOSEPHINE KLINE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF VOORHEES, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law.

The Commissioner observes that no exceptions were filed in a timely fashion by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

May 1, 1981

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 0076-81
AGENCY DKT. NO. 539-11/80A

IN THE MATTER OF:

"R.B." BY HIS GUARDIAN,
BESSIE JONES,
Petitioner
v.
MONMOUTH REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION, MONMOUTH COUNTY,
Respondent.

Record Closed: March 12, 1981
Received by Agency: 3/18/81

Decided: March 17, 1981
Mailed to Parties: 3/20/81

APPEARANCES:

Jerome P. Keelen, Esq., for petitioner (Ocean-Monmouth Legal Services, Inc.)

William R. Deisinger, Esq., for respondent (Reusille, Cornwell, Mausner & Carotenuto, attorneys)

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

Petitioner ("R.B.") alleges he was denied due process in an expulsion hearing before the Monmouth Regional High School District Board of Education (Board). He seeks a stay of the expulsion and reinstatement and supplemental instruction.

The matter was opened before the Commissioner of Education and transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on January 16, 1981 at which issues were defined; it was determined that the matter would proceed to summary judgment on cross-motions, memoranda of law and the pleadings, and a schedule of memorandum submissions was agreed to. It was also agreed that the request for interim relief in the form of a stay of expulsion would be held in abeyance pending the outcome of the present matter. "R.B." is receiving home instruction as this matter proceeds. The record was closed on March 12, 1981.

The issues to be determined are whether "R.B.'s" procedural rights were abridged by his inability to compel two witnesses to testify in his behalf at the expulsion hearing and, if so, to what relief, if any, is he entitled.

I

The incident that precipitated the present matter took place on September 23, 1980. The details need not be probed here. The incident resulted in "R.B.'s" suspension from school. After notice, an expulsion hearing was scheduled for October 16. At the request of "R.B.'s" counsel it was adjourned to October 28. Prior to the hearing, "R.B.'s" counsel attempted to secure the appearance of two students, not directly involved in the incident, as witnesses on "R.B.'s" behalf. Cooperation was received from the high school administration in this regard, but the parents of the witnesses refused to let them appear.

At the beginning of the hearing on October 28, "R.B.'s" counsel stated for the record that "R.B." should not be subject to the hearing because of his inability to present witnesses in his own behalf because the school board was not vested with subpoena powers. At hearing the Board presented five witnesses, all of whom gave testimony substantially unfavorable to "R.B." His case was limited to his own testimony and that of his foster mother.

The Board asserts "R.B." was granted every opportunity to present his case and was accorded his right to due process in every respect. There were no procedural or substantive defects in the proceeding before the Board.

II

Petitioner relies heavily on the holding in R.R. v. Bd. of Ed. of Shore Regional High School, 109 N.J. Super. 337 (App. Div. 1970). Although the circumstances in R.R. are different from those of the present matter, a holding of the court is most pertinent to this case. At 347, the court states, "N.J.S.A. 18A:37-2 [Causes for suspension or expulsion of pupils], N.J.S.A. 18A:37-4 [Suspension of pupils by teacher or principal] and N.J.S.A. 18A:37-5 [Continuation of suspension; reinstatement or expulsion] must, therefore, be construed to require public school officials to afford students facing disciplinary action involving the possible imposition of serious sanctions, such as suspension or expulsion, the procedural due process guaranteed by the Fourteenth Amendment."

This clearly creates the right to have adverse witnesses appear and answer questions. Tibbs v. Bd. of Ed. of Tp. of Franklin, 144 N.J. Super. 287 (App. Div. 1971), aff'd 59 N.J. 506 (1971).

Hoffman v. Jannarone, 401 F. Supp. 1095 (D.N.J. 1975), modified 532 F. 2d 746 (3rd Cir. 1976) states plainly that witnesses may be subpoenaed by a board of education pursuant to N.J.S.A. 18A:6-20. That statute reads

> The right to testify; counsel; witnesses; compulsory process
>
> Any party to any dispute or controversy or charged therein, may be represented by counsel at any hearing held in or concerning the same and shall have the right to testify, and produce witnesses to testify on his behalf and to cross-examine witnesses produced against him, and to have compulsory process by subpoena to compel the attendance of witnesses to testify and to produce books and documents in such hearing when issued by (a) the president of the board of education, if the hearing is to be held before such board, or (b) the commissoner, if the hearing is to be held before him or on his behalf, or (c) the president and secretary of the state board, if the hearing is to be held before such board of trustees of the state or county college or industrial school, if the hearing is to be held before such board, or (e) the chairman and secretary of the higher education board, if the hearing is to be held before such board or before one of its committees or before the chancellor.
>
> The subpoena shall be served in the same manner as subpoenas issued out of the superior court are served. (Emphasis supplied).

In light of the clear language of the statute and the above cited cases, it cannot be said that "R.B" was not entitled to have subpoenaed the two witnesses he wished to present as part of his case.

It was not necessary for petitioner to seek removal of the matter to the jurisdiction of the Commissioner in order to secure the appearance of the two witnesses (which was denied by the Board) because the means of compelling their attendance or at least initiating process was there at hand.

Neither party's memorandum of law mentions N.J.S.A. 18A:6-20. However, the facts stipulated constitute a constructive denial of "R.B.'s" exercise of rights under that statute to compel the attendance of witnesses whose testimony he expected to be helpful to his case.

I **FIND** and **CONCLUDE,** therefore, that "R.B.'s" procedural due process rights were abridged in this matter.

As appropriate relief, it is **ORDERED** that this matter be remanded to the Monmouth Regional High School District Board of Education for de novo hearing in accordance with this Initial Decision.

I do not retain jurisdiction.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, FRED G. BURKE,** who by law is empowered to make a final decision in this matter. However, if Fred G. Burke does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **FRED G. BURKE** for consideration.

16 MARCH 1981
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

18 March 1981
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

March 20, 1981
DATE

Ronald L. Parker/bg
OFFICE OF ADMINISTRATIVE LAW

ms

R. B., by his guardian BESSIE JONES,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE MONMOUTH REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	
RESPONDENT.	:	

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law.

The Commissioner observes that no exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

It is directed that this matter be remanded to the Monmouth Regional High School District Board of Education for a proper hearing with appropriate witnesses pursuant to N.J.S.A. 18A:6-20.

COMMISSIONER OF EDUCATION

May 4, 1981

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1117-80
AGENCY DKT. NO. 177-5/78

IN THE MATTER OF:

ELLEN BRINGHURST AND SUSAN KORNACKI,
Petitioners
v.
BOARD OF EDUCATION OF THE CITY OF CAPE MAY, CAPE MAY COUNTY,
Respondent.

Record Closed: February 2, 1981
Received by Agency: 3/19/81

Decided: March 17, 1981
Mailed to Parties: 3/23/81

APPEARANCES:

For the Petitioners, Greenberg & Mellk (**William S. Greenberg,** Esq., of Counsel)

For the Respondent, **Martin R. Pachman,** Esq.

BEFORE **LILLARD E. LAW,** ALJ:

Petitioners, nontenured teaching staff members employed for three consecutive academic years by the Board of Education of the City of Cape May, hereinafter "Board," were notified by the Board on April 7, 1978 that they would not be reemployed for the 1978-79 school year. Petitioners allege that the Board's stated reason of "unsatisfactory performance" for the termination of their employment was not the actual reason and requests that the Commissioner of Education issue an order to direct the Board

to reemploy petitioners to such status and with such pay and benefits to which they would have been entitled had they not been discharged. The Board denies the allegations and asserts that its actions were at all times in compliance with Education Law, Title 18A and the Administrative Code, Title 6.

On July 2, 1979, this matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

It is necessary, at this juncture, to review the procedural history of the instant matter as follows:

PROCEDURAL HISTORY

Petitioners are two (2) nontenured teaching staff members employed by the Cape May City Board of Education since September of 1975. During the course of their three (3) year employment, each of the teachers had been evaluated ten (10) times. Petitioners were among five (5) nontenured teachers who were to be voted upon by the Board in the Spring of 1978 with respect to contract renewal and consequent granting of tenure.

Between February 13 and Feburary 20, 1978, the Administrative Principal interviewed each of the five (5) teachers for periods of about one (1) hour.

On March 2, 1978, each of the five (5) teachers received a letter from the Administrative Principal indicating whether or not he would be recommending them for tenure. With respect to petitioners, the letters indicated that he would recommend against their renewal. The three (3) remaining teachers were recommended for renewal.

On March 9, 1978, at its regular monthly meeting, the Board voted publicly to not renew petitioners' contracts for the 1978-79 school year and, on April 5, 1978, reaffirmed that position after a "Donaldson" presentation by petitioners. N.J.S.A. 6:3-1.20)

On May 5, 1978, petitioners filed a Petition of Appeal before the Commissioner of Education pursuant to N.J.S.A. 18A:6-9 requesting that the Commissioner render a determination that the Board's actual reason for terminating petitioner's employment as

well as the Administrative Principal's recommendation of same, was in fact, to punish petitioners for their activities in the Cape May City Education Association and for support of that organization.

On August 1, 1978, a conference of counsel was held in the office of the Assistant Commissioner of Education in charge of Controversies and Disputes and the following issues were formulated with regard petitioner's allegations:

ISSUES

1. Was the Board's reasons not to renew petitioner's employment contracts for the 1978-79 school year; which would have granted them both a tenured status, for reasons other than unsatisfactory performance?

2. Whether the Board's actual reason for terminating petitioners' employment, as well as the reason for the Principal's recommendation of same, was in fact to punish petitioners for their activities in the Cape May Education Association and for their support of that organization?

3. Does the Commissioner have jurisdiction to hear and determine Issue #2 above?

4. Whether respondent's two word statement of reasons for terminating petitioner's employment, ie., "unsatisfactory performance," are sufficient as a matter of law.

5. Are petitioners entitled to re-employment?

The parties also agreed to the following Stipulation:

STIPULATION

1. That the Board was at all times in compliance with N.J.A.C. 6:3-1.19 and N.J.A.C. 6:3-1.20.

The initial hearing before the Commissioner's office was held in Cape May on October 6, 1978 and further hearings were scheduled on this matter for December 4, 11, and 15, 1978. Subsequently, the December 4, 1978 hearing was adjourned on request of counsel due to conflicting court schedule.

On September 11, 1978, the Cape May Education Association hereinafter "Association," filed a petition before the Public Employment Relations Commission, hereinafter "PERC," charging the Cape May City Board of Education with unfair labor practices.

On October 16, 1978, eleven days after hearings in this matter had commenced before the Commissioner of Education, the Board received a Complaint and Notice of Hearing on the unfair labor practice allegations filed with PERC.

The hearings before PERC were scheduled for December 5, 1978.

At the commencement of these hearings before PERC, the Board, citing the Supreme Court's decision in Hinfey v. Matawan, 77 N.J. 514 (1978), propounded a motion requesting the Public Employment Relations Commission stay its proceedings and await the results of the proceedings before the Commissioner of Education. This Motion was denied by the Hearing Officer of PERC and the hearing before that agency proceeded on December 5, 6 and 7, 1978.

On December 11, 1978, hearings resumed before the Commissioner of Education. At the commencement of these hearings, the Board informed the Hearing Officer that it had made a motion before PERC requesting a stay of proceedings before that agency and that its motion had been denied. The Board propounded a motion before the Commissioner of Education requesting that the Commissioner stay these proceedings citing Hinfey v. Matawan. The Hearing Officer denied the Board's motion for a stay of the proceedings but he stipulated that no further hearings would be scheduled before the Commissioner of Education until the Board had an opportunity to appeal the decisions of both agencies.

On December 11, 1978, the Board requested leave to appeal the decision of the Hearing Examiner of PERC to that Agency's Chairman pursuant to N.J.A.C. 19:14-4.6(b).

On January 10, 1979, the Board filed a Motion for leave to Appeal the interlocutory decision of the Public Employee Relations Commission. On January 19, 1979, the Appellate Division of Superior Court granted the Motion for Leave to Appeal. The Appellate Division ordered that the matter before the Commissioner of Education be stayed pending the conclusion of the proceedings before PERC. This stay, however, could be vacated by a motion of either party thirty (30) days after the completion of the PERC proceedings or the handing down of its determination whichever occurred earlier.

The matter proceeded before PERC on January 11, 12 and March 12, 13, 14, 15, 19 and 20, 1979. Both parties were given full opporunity to examine witnesses, present evidence and argue orally. In addition, both parties filed post-hearing briefs and on July 31, 1979, the PERC Hearing Officer made his decision and recommended order. Cape May City Education Association v. Cape May City Board of Education, 5 N.J. PERC. 10184 (1979). The PERC Hearing Officer found that on the limited issue of the teacher interviews, questions concerning loyalty to the Association and mobilization of parents in opposition to budget cuts violated. N.J.S.A. 34:13A-5.4(A)(1). PERC further found that, despite the above violation, there was insufficient evidence to indicate that petitioners' dismissal from their positions was motivated in whole or in part by the Board's or the Administrative Principal's harboring anti-union bias against petitioners.

The Association appealed the Hearing Officers decision with respect to the denial of this allegation and on September 21, 1979 the Commission affirmed the Hearing Officer's decision. Cape May City Education Association v. Cape May City Board of Education, 5 N.J. PER 10214 (1979)

On November 2, 1979, the Association filed a Notice of Appeal with the Appellate Division of the Superior Court seeking a review of PERC's final ruling. By way of decision dated December 16, 1980, the Appellate Division affirmed PERC's decision. In the Matter of the Cape May City Board of Education and Cape May City Education Association, A-672-79 (Sup. Ct. N.J. App. Div. December 16, 1980.)

On December 3, 1979, attorneys' for the herein petitioners notified the Commissioner of Education that the proceedings before PERC had terminated and, therefore, requested that the proceedings before the Commissioner of Education be resumed pursuant to the Appellate Division's order of January 19, 1979.

On April 30, 1980, a prehearing conference was held and it was determined that the Board would initially proceed with the instant motion to dismiss issues one, two and three, originally set forth in the conference of counsel dated August 1, 1978. The Board propounded a Motion for Summary Judgment and the parties submitted Briefs of Counsel in support of their respective positions.

By way of Decision on Motion and Order dated August 5, 1980, the undersigned determined that Issues Number one, two and three had been sufficiently disposed by PERC, and granted the Board's Motion for partial Summary Judgment on those issues. The Court, however, denied the Board's Motion for Summary Judgment with regard to Issue Number Four (4) and, by Order of the Commissioner, this single unlitigated issue was set down for hearing.

A hearing was set down for November 24, 1980 at the Woodbine Municipal Court, Woodbine, New Jersey. At hearing petitioner propounded a Motion for Summary Judgment grounded upon the proposition that the matter before the Commissioner of Education had been fully heard before PERC and that there were no material facts in dispute. Petitioner argues that notwithstanding that the parties are the same and the facts are the same before the two agencies, two completely separate and difference legal results may issue. Petitioner argues that pursuant to the holding in City of Hackensack v. Winner, 82 N.J. 1 (1980) this Court is bound by the factual determinations of the PERC hearing examiner set forth in Cape May City Education Association v. Cape May City Board of Education, 5 N.J. PERC 10184 (1979).

Petitioner also asserts, among other things, that for judicial economy there is no need for further hearing in this matter and that the record should be closed.

The Board opposes petitioner's motion and, in the alternative, propounded its Cross Motion for Summary Judgment.

This concludes the recital of the Procedural History in this matter.

The single issue before this tribunal is whether the Board's statement of reasons not to reemploy petitioners was sufficient as a matter of law. This Court, pursuant to its Decision on Motion for Summary Judgment, will rely upon the record before PERC.

STATEMENT OF FACTS

The facts in this matter show that during the course of petitioner's three year probationary employment the Administrative Principal observed and evaluated both petitioners ten (10) times. The Board's Evaluation Criteria, as set forth in its "Teacher Evaluation Analysis," provides as follows:

"EVALUATION (Criteria)

"It is the agreement of the teachers, Board, and the administration that the following criteria be given attention during observation and evaluation:

I. 1. All observation and performance of a teacher shall be conducted openly.

2. Teachers shall be evaluated by administrator.

3. Teachers shall be given a copy of all reports of classroom visitations when a written report is made.

4. Teachers will be expected to hold a conference with the evaluator as soon as possible after a written evaluation is made.

5. Teachers may request a conference with the evaluator after the written evaluation and conference is concluded so as to give the teacher time to react verbally or in writing.

6. Teachers and administrator should review the contents of teacher personnel files periodically to update and alleviate misunderstandings.

7. All teacher personnel files should include copies of evaluation reports, along with copies of certifications, veteran status, proof of teaching experience and degrees, and include any other materials pertinent to the position.

8. Evaluation of a teacher shall be concluded prior to severance. This evaluation must be in written and verbal form.

II. Evaluation reports shall be presented by the evaluator and teachers in acordance with the following procedures:

1. Evaluation reports shall be issued in the name of the evaluator based upon observations and evaluations of said evaluator.

2. All written reports shall be addressed to the teacher.

3. Reports shall be narrative, and include a list of items to be observed.

4. Reports should be written to include the strengths and weakness of the teacher with specific suggestions as to measures which the teacher might take to improve teacher performance.

5. Non-tenure teachers are to be evaluated at least three times per year the last evaluation conferences being held no later than March 30th.

III. In the event of an unfavorable evaluation, a Teacher Association Evaluation Committee is available to teachers to aid them in overcoming their weaknesses as outlined by the evaluator.

Procedures: If a teacher receives an evaluation listing weaknesses, the teacher may request the services of the Teacher Association Evaluation Committee to work with the teacher." (CP-4)

In addition thereto, the Items To Be Observed are set forth therein, as follows:

"PERSONAL QUALIFICATIONS:

A. Care for appearance.
B. Regard for child behavior.
C. Use of voice.

PROFESSIONAL QUALIFICATIONS:

A. Knowledge of subject.
B. Command of language.
C. Understanding of pupils.

SCHOOL MANAGEMENT:

A. Maintenance of control.
B. Handling routine and materials.
C. Use of time in classroom.

TEACHING EFFECTIVENESS:

A. Preparation and use of plans.
B. Provides for group participation.
C. Selection of materials and activities.
D. Provides for individual differences.
E. Provides for student participation.
F. Establishes rapport." (CP-4)

The Administrative Principal's observation and evaluations of petitioners shows that said evaluations were favorable. In no instance is it found that the evaluations forthrightly sets forth an unsatisfactory rating for either petitioner Bringhurst (CP-4 through CP-13) or petitioner Kornacki (CP-19 through CP-28). The evaluations indicate that petitioners' performance was satisfactory, good or excellent with respect to the "Items To Be Observed." The Administrative Principal did set forth recommendations for improvement, however, each observation and evaluation was complimentary and supportive of the teachers' performance.

A pivital issue in this matter concerns the Administrative Principals' "tenure interview" conducted with petitioner Bringhurst on February 13, 1978 and petitioner Kornacki on Feburary 15, 1978. The Board's policy, 5005 Evaluation, provides that:

> "A. Prior to re-employment and/or advance, the Administrator shall make recommendations based on efficiency, health, cooperation and conduct.***. (P-1)

In addition to petitioners' tenure interviews, the Administrative Principal conducted such interviews with three (3) other teaching staff members who were completing their third year of employment and, thus, subject to a tenure status upon the award of an employment contract for the subsequent academic year. The record shows that the Administrative Principal used an outline entitled "Tenure Discussions" when conducting his tenure interviews with the five (5) teachers. The outline, dated February 13, 1978, set forth the following statements and questions:

> "1. Policy 5005 *** The administrator shall make recommendations based on efficiency, health, cooperation and conduct.
>
> 2. Do you enjoy working at Cape May City School? Working for me?
>
> 3. Why do you think it necessary to reduce services in the school? How would you handle the falling enrollment problem?
>
> 4. Do you understand the uniqueness of my position as a principal and superintendent of school? How can a principal have good relations with teachers when mandated to participate in negotiations? How would you play the role?
>
> 5. How can you be loyal to your peers when they are so split on every issue in the school? How do you remain neutral?

6. Why are there so many problems among teachers? What is the problem? How would you solve them?

7. Tell me why you think the board should offer you tenure?

8. What assurances can give me that you will be accountable for your childrens' success after you receive tenure?

9. Do you have any questions you want to ask me? Do you have any questions about tenure?

10. I shall make my recommendations prior to March 9th, 1978 and will inform you of my recommendations in writing.

Thank you for your time." (CP-16)

Thereafter, by way of a memorandum dated March 2, 1978, the Administrative Principal set forth the following:

"TO: Ms. Bogle
Ms. Bringhurst (Circled, CP-3)
Ms. Englert
Ms. Groom
Ms. Hicks
Ms. Kornacki (Circled, CP-18)
Ms. Lafferty
Ms. Owens
Ms. Slack

FROM: John Demarest, Administrator

RE: Renewal of Contracts for 1978-79

18A:27-4. Power of Boards of Education to make rules governing employment of teachers, employment thereunder *** (Statute omitted)

Board Policy #5005 *** Evaluation *** (Policy omitted)

Board-Teacher Agreement - Article VIII - A (1977-78)

'Teachers shall be notified of their employment and salary status for the ensuing year no later than April 1 ***'

Board-Teacher Agreement - Article IX - Teacher Evaluation (1977-78)

'A teacher shall have the right, upon request, to a conference with his evaluator after completition of the evaluation.'

I (shall, shall not) recommend you to the Personnel Committee of the Cape May City Board of Education for a renewal of your contract for 1978-79." (shall not circle for Bringhurst, CP-3; Kornacki, CP-18)"

In March 1978, pursuant to Board policy #5005, the Administrator Principal made his recommendations to the Board, in part, as follows:

"***Evaluations are a rather subjective tool to demonstrate the worth of a staff member. Reducing this subjectively to a scale 1-10 may be an exercise in frustration.

On the other hand it may be beneficial for Board members to observe the results.

On a scale of 1 - 10:

Ms. Bogle.....	Efficiency.....	4	
	Health.....	9	
	Cooperation.....	9	
	Conduct.....	9.....	31
Ms. Bringhurst.....	Efficiency.....	6	
	Health.....	9	
	Cooperation.....	5	
	Conduct.....	5.....	24
Ms. Englert.....	Efficiency.....	6	
	Health.....	9	
	Cooperation.....	9	
	Conduct.....	9.....	33
Ms. Kornacki.....	Efficiency.....	5	
	Health.....	5	
	Cooperation.....	5	
	Conduct.....	4.....	22
Ms. Slack.....	Efficiency.....	9	
	Health.....	9	
	Cooperation.....	9	
	Conduct.....	9.....	36

Instructional

1. Based on Board Policy #5005, categories of Efficiency, Health, Cooperation and Conduct, I recommend the following non-tenured teachers for a tenured contract for the school year 1978-79:

   Ms. Bogle
   Ms. Englert
   Ms. Slack

2. I recommend the following non-tenured teachers for non-tenured contracts for the school year 1978-79:

Ms. Groon
Ms. Hicks
Ms. Owens ***" (CP-14)

On March 10, 1978, the Board notified petitioners that their employment would terminate effective June 30, 1978. Petitioner's thereupon filed written requests with the Board for a statement of reasons for the nonrenewal of their employment contracts for the 1978-79 school year. In response to petitioners' written requests the Board Secretary sent both petitioners a notice dated March 10, 1978, which stated, in toto, as follows:

"NOTICE OF TERMINATION OF EMPLOYEE

To: Ms. Bringhurst/Ms. Kornacki

You are hereby notified that your employment by the Cape May City Board of Education will be terminated on June 30, 1978 and that you will not be offered a contract for the 1978-79 school year.

This termination is made for the following reasons:

1. Unsatisfactory performance.***"

This concludes a recital of the Statement of Facts.

DISCUSSION AND TESTIMONY

It was stipulated that during the course of petitioners' employment with the Cape May City Board, they were each evaluated by the Administrative Principal, on ten (10) different occasions. A review of those evaluations showed them to be uniformly favorable. The PERC Hearing Examiner credited petitioner Bringhurst's testimony that she was "under the impression that all her evaluations were good, that Demarest was very pleased with her performance." A similar statement was made by petitioner Kornacki. (HE:5)

The Administrative Principal's final evaluation of petitioners took on a new form, wherein he rated each teacher on a one (1) to ten (10) scale for four qualities;

efficiency, health, cooperation and conduct. The testimony shows that he had never used such a scale to rate teachers before. (HE:8,9)

The Administrative Principal also conducted a tenure interview with petitioners and three (3) other non-tenured teachers. The Administrative Principal recognized that it was important to advise teachers of their deficiencies and the results of the tenure interview, however, he admitted that he mentioned nothing negative in his tenure meetings with petitioners. (HE:5) The PERC Hearing Examiner found that, "at no time did Demarest indicate to Bringhurst that he would make an unfavorable decision on tenure," (HE:7) and "at no time during this interview did Demarest indicate that Kornacki might not receive a favorable recommendation for tenure." (HE:8) The testimony reveals that the notes that the Administrative Principal made during each of these tenure interviews were later destroyed "despite the likelihood of further proceedings after the Board voted against tenuring Bringhurst and Kornacki." (HE:8) The PERC Hearing Examiner found the Administrative Principal's testimony that he felt the notes were of no value to be "difficult to credit." (HE:8 note 13)

During the course of the PERC hearings in this case, the Administrative Principal testified at length concerning his interpretation and evaluation of petitioner's ratings in each of the four (4) aforementioned categories. In regard to petitioner Kornacki's "cooperation" rating, the Administrative Principal attributed her low rating to her refusal to fill out papers necessary to refer a pupil to the Child Study Team (CST); her failure to send a written notice to the Administrative Principal when she put children out of her classroom for disciplinary reasons; her failure to bring the pupil's deficiencies to the attention of parents; her failure to clear up problems with other teachers; and her failure to clean up after the animals in her classroom. Each alleged shortcoming was rebutted by petitioners and the Hearing Examiner found no support for the Administrative Principal's finding.

As to the failure to fill out the papers for referring the pupil to the CST, the PERC Hearing Examiner found that petitioner Kornacki actually recommended that the pupil in question be referred to the CST and denied refusing to fill out any forms. The PERC Hearing Examiner found the Administrative Principal's testimony not to be credible. (HE:9, note 14)

With regard to petitioner Kornacki's failure to send written notice to the Administrative Principal when she allegedly put children out of the classroom for disciplinary reasons, the PERC Hearing Examiner found that one (1) such incident existed. (HE:9, note 15) The PERC Hearing Examiner found there to be no evidence that petitioner Kornacki failed to bring pupil's deficiencies to the attention of their parents. (HE:9, note 16) Petitioner Kornacki's alleged failure to clear up problems with other teachers was denied by petitioner and all other teachers testifying. The PERC Hearing Examiner specifically found that the Administrative Principal's charge in this aspect "must be discounted." (HE:9, note 17)

The Administrative Principal's allegation that petitioner Kornacki failed to take care of the animals in her classroom was refuted both by petitioner and the Administrative Principal's own evaluation of her which commended her use of animals in the classroom. (HE:10, note 18)

The PERC Hearing Examiner found one allegation to warrant serious attention supporting the administrators poor evaluation of petitioner Kornacki. That was her pupils low SRA test scores. The Administrative Principal subsequently testified "that the scores were not a major factor in his negative tenure recommendation." In his final determination of petitioner Kornacki, he expresses his optimism about that academic success of her pupils. The testimony shows that the test scores of Kornacki's pupils improved in April 1978. (HE:10; HE:10, note 19, 20)

With regard to petitioner Bringhurst's unfavorable ratings, the Administrative Principal charged that petitioner "dumped" problem pupils in Mr. Bogel's class on a regular basis. The PERC Hearing Examiner found that:

> "The child in question did advanced work while in Bogel's remedial class. He was allowed to go only if he had behaved himself. Bogel had no objection to it. Demarest himself knew of the 'unauthorized transfer' yet he did nothing about it and did not so much as mention it to Bringhurst at any time." (HE:10, note 21)

The PERC Hearing Examiner found that the Administrative Principal's categories "were never clearly defined or differentiated." (HE:9) With regard thereto, the Hearing Examiner stated that:

> "Demarest described 'conduct' as a manifestation of cooperation. He drew no further distinction between the two. At one point, he stated that 'conduct' includes achievement of students. The only frame of reference discussed in this record concerning student achievement is the SRA test scores. Both Bringhurst and Kornacki received identical low ratings for 'cooperation' and 'conduct' despite the fact that Bringhurst's students' scores were fine and Kornacki's were considered unsatisfactory." (HE:11)

The findings and concludions of the PERC Hearing Examiner with regard to the reasons for petitioners non-renewal are set forth herein as follows:

> "The reasons given by Demarest for not recommending tenure for Bringhurst and Kornacki are often flimsy and inconsistent. (The facts contained herein may consitute part of the record before the Commissioner of Education for determination of issues raised by them under the Education Law. See footnote 2, supra (HE:15, note 33)) He did not bring problems he perceived in their performance to their attention and his evaluations of them are often misleadingly good, if indeed he did not mean to do so. After deciding to refuse to recommend them, it was questionable at best to have a tenure meeting with them and probe into factionalism in the school while avoiding all clues as to his decision. If the 'problem' at the school was not one of union activities, but of failure of open communication, as Demarest described it, his conduct, as displayed in the tenure interviews is designed to aggravate rather than mitigate it. There was no credible testimony that factionalism was central to Bringhurst or Kornacki's unsatisfactory performance. Demarest claimed they did not cooperate with other teachers, but this was refuted by the testimony of three teachers, as well as the denials by Bringhurst and Kornacki."
>
> "His explanation of how he rated the teachers and what the categories mean was shot with contradictions. Bringhurst and Kornacki lost points for the same 'faults' in three different categories. Bogle's thoughts were confined to one category. The suspicion could arise that 'cooperation and conduct' included loyalty to the Board over the Association. Demarest also testified about an 'emotional' problem of Bringhurst but this was uncorroborated. If factionalism affected a teacher's performance, it was Bogle's performance that suffered."

The PERC Hearing Examiner, while finding that anti-union animus was not a motivating factor behind the Administrative Principal's actions, did find that the Administrative Principal was unable to present coherent reasons for his failure to recommend tenure for petitioners' Bringhurst and Kornacki. (HE:16)

It is undisputed that petitioners were notified by the Board in early March 1978, that they were not to be re-employed for the following school year. Petitioners then requested, in writing, a statement of reasons for their non-renewal. In response, Board Secretary Briant informed petitioners by letter dated March 10, 1979 of the reason for their non-renewal. That letter gives the following as the reason for petitioners non-renewal:

"***This termination is made for the following reasons:

1. Unsatisfactory performance.***"

Petitioners contend that no other reason besides "unsatisfactory performance" was provided petitioners as a reason supporting their non-renewal. They assert that such a response, purporting to be a statement of reasons for Board action, violates the fundamental principles of fairness required in instances such as this as set forth by the Supreme Court of New Jersey in Donaldson v. Board of Education of North Wildwood, 65 N.J. 236 (1974).

Petitioners argue that the single reason given here for termination of their employment is so non-specific, vague, ambiguous and nebulous as to leave it solely to petitioners what the Board in its collective judgment meant. Nowhere in the statement "unsatisfactory performance" is there any indication of correctable deficiencies which may be of service to these professionals. Nowhere in such a vague statement could these teachers find anything that would aid them in obtaining future employment. They assert that the precautionary purpose served requiring such reasons as suggested in Monks, supra has been ignored. They argue that the lack of specific reasons left this Board undisciplined against arbitrary and abusive exercise of its broad discretionary powers.

Petitioners cite the matter in Strauss v. Board of Education of the Borough of Glen Gardner, Hunterdon County, 1977 S.L.D. 41, wherein the Commissioner determined that the singular reason given by the Board for the non-renewal of Strauss's contract "inability to relate and work cooperatively with the staff in furtherance of the Glen Gardner School and to the detriment of the effectiveness of their educational system" failed to meet the requirements of Donaldson, supra. In the matter of Hazel Richardson and Deborah Anderson v. Galloway Board of Education, OAL Dkt. No. EDU 405-12/75; 423-12/75, Administrative Law Judge Thomas found that subjective evaluations whereby the Board evaluated its staff in categories by grading them strong, average and weak

constituted an arbitrary and unreasonable method of evaluation. Judge Thomas directed that both teachers be reinstated in their positions with back salary and emoluments as of the date of their termination. (Affirmed pursuant to the 45 day rule; no action taken by the Commissioner) The Appellate Division rendered a decision concerning the issue raised here. In Kornhaber v. Board of Trustees of William Paterson College of New Jersey, A-3827-78, decided April 7, 1980, the Court reviewed action taken by William Paterson College in voting not to reappoint Appellant Kornhaber. Upon appellant's request, the Board supplied a statement of reasons for his non-renewal. The reasons given were "insufficient professional growth" and "needs of the institution." Citing Donaldson, supra the Court concluded that the Board's purported statement of reasons violated the purpose and intent of the Donaldson decision.

Petitioners argue that viewed in light of the cases cited above, the single reason given for the non-renewal of Bringhurst and Kornacki is clearly violative of the intention and principle of Donaldson.

They assert that such violative action on the part of the Board cannot be excused some four (4) years after Donaldson made it absolutely clear what is required of local Boards. They contend that the Board's action is even more suspect in light of the PERC Hearing Examiner's finding that "Demarest was certainly aware of the Donaldson requirements***" (HE:8, note 13) They contend that the events surrounding the termination of petitioner's employment such as the Administrative Principal conducting a tenure interview despite his already foregone conclusion that he would not recommend petitioners' for re-employment; his failure during the course of that interview to mention anything negative regarding petitioners' employment; the wholly inaccurate and unexplainable categories of evaluating petitioners; his unsupported attempt to give credence to the ratings given to petitioners and the Board's action in the face of well-settled and known law all evidence the lack of good faith underlying this Board's termination of the employment of Bringhurst and Kornacki. They argue that the Board's termination of petitioners must be vacated and petitioners should be made whole to the greatest extent possible, including reinstatement with back pay and other emoluments.

Petitioners contend that the authority of the Commissioner to award proper relief is unquestioned. In Rockenstein v. Board of Education of the Borough of Jamesburg, 1975 S.L.D. 191, 197, the Commissioner stated:

> "Petitioner is entitled to be made whole for her lost earnings and other benefits of which she was deprived by the Board's improper non-renewal of her teaching contract. Petitioner should not be required to pursue the matter beyond the established forum of administrative review in order to be made whole. This determination is grounded on the maxim 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. 50 C.J.S. Judgement, § 592. Petitioner argues rightly that our system of jurisprudence requires that where there is a wrong there must be a remedy and that the only appropriate remedy is to make the wronged party whole." (Affirmed, App. Div., reported at 1976 S.L.D. 1167.)

Petitioners, therefore, request that they be reinstated to their former teaching positions with all back pay and emoluments due to them as though they had continued in their employment with the Board.

The Board objects to the determination of this court that the instant matter is now ripe for summary disposition with the use of the record before PERC in lieu of a second plenary hearing. The Board argues that it must not defend against a charge which was never made in the petition, a charge which standing alone should have been dismissed, and which now, remains undefined.

The court disagrees with the Board's contention and finds that petitioners' Petition of Appeal, indeed, alleged that the Board's stated reasons of "unsatisfactory performance" for the termination of their employment was and is at issue. The court also finds that the Board failed to show that those "facts" before PERC were not the same facts which would have been heard in a second plenary hearing.

The Board submits that Paragraph A of the Petition of Appeal which requests that the Commissioner render a determination: "A. Declaring that respondent's stated reason for termination of petitioner's employment, i.e., 'unsatisfactory performance', is not in fact the actual reason, in light of petitioners' uniformly favorable evaluations in the previous three years; ***", fails to state a claim sufficient to have even entitled petitioners to a plenary hearing. The Board cites the Commissioner's holding in Margaret Perrault v. Board of Education of Hopewell Valley Regional School District, Mercer County, 1978 S.L.D. 145, 148, wherein petitioner failed to provide detailed specific instances of illegal or improper action by the Board with respect to petitioner's non-employment and the Commissioner concluded that "a cause of action had not been stated." Therein, the petitioner claimed specific violations of law regarding the number

of evaluations received, and that the reasons were false. The Commissioner found that the statutes regarding the number of evaluations had been complied with, noted that the evaluations buttressed the reasons stated by the Board, and refused to permit the matter to proceed.

The Board asserts that in the instant matter, the only detailed and specific instances provided by petitioner related to the now dismissed allegation regarding union activity. There were and are no allegations of otherwise improper conduct. The Board contends that standing alone, the petition as it is now constituted fails on its face to provide any basis for hearings or even a claim upon which relief should be granted.

The Board argues that the single issue remaining in this case "the Board's reasons not to re-employ petitioners" was addressed only tangentially in the hearings before PERC. A brief review of that agency's administrative responsibility and the procedure followed thereunder will illustrate the point beyond argument.

As the PERC Hearing Examiner found at page 15 of his Report, the standard used by PERC to determine if a violation of N.J.S.A. 34:13-5.4(a)(3) has taken place;

> "***involve a preliminary showing by the Charging Party (Petitioner herein) of two essential elements. There must be proof that the employee was exercising the rights guaranteed by the Act, or that the employer believed said employee was exercising such rights, and proof that the public employer had knowledge, either actual or implied of such activity. *** the two fold test uphold the employer's legitimate prerogative to discharge, suspend or refuse to promote employees for reasons unrelated to union activities. The employer may take such action for any cause or no cause at all so long as it is not retaliatory. It is the Charging Party that must prove its case by a preponderance of the evidence."

Under this standard, the Board argues, violation is determined by proof of two things - 1) union activity on behalf of the employee and 2) actual or implied knowledge of that activity by the employer. This standard takes no account of any other basis for the action taken by the employer. This sole issue of motivation is the retaliatory issue. As the standard states, once that issue is addressed, PERC's inquiry is at an end. In the litigation before that agency, the actual sufficiency of the Board's reasons for the nonrenewal of petitioners was truly irrelevant.

Therefore, the petition should be viewed on its own, at this stage, and should be dismissed as to paragraph "A" for failure to state a claim upon which relief should be granted. Perrault, supra

The Board asserts that this proceeding is not a tenured teacher hearing case pursuant to the Tenured Teacher Hearing Law. Notwithstanding petitioner's position to the contrary, the action of the Board must be upheld if it is found to not be based upon illegal or unconstitutional reason, or if its action was not arbitrary or capricious. Bonchick, supra The burden of proof does not rest with the Board to come forward and prove that the staff member is guilty of a specified number of charges. Long Branch Education Association and William Cook v. Board of Education of the City of Long Branch, 1975 S.L.D. 1029, aff'd 1976 S.L.D. 1150. Rather, once a prima facie case is made by petitioners, the Board must merely demonstrate that there was a reasonable basis for it s non-renewal decision.

The Board argues that it is automatic that when a board of education takes action consistent with its statutory authority, such action is entitled to a presumption of validity and will not be overturned unless it is established that the controverted action is arbitrary, capricious or unreasonable. Schink v. Board of Education of Westwood Consolidated School District, 60 N.J. Super. 448, 476 (App. Div. 1960); Thomas v. Morris Township Board of Education, 89 N.J. Super. 327, aff'd 46 N.J. 581 (1966); Joseph J. Dignan v. Board of Education of Rumson-Fair Haven Regional High School District, Docket No. A-444-74 New Jersey Superior Court, Appellate Division, October 10, 1975. In the instant matter, petitioners, as probationary teaching staff members shall be continued in its employ so long as it complies with the provisions of N.J.S.A. 18A:27-3.1 et seq. The Board, of course, may not determine not to offer continued employment of a probationary employee for proscribed reasons (e.g. race, color, religion, etc.) or in violation of constitutional rights or in an arbitrary or capricious fashion. Donaldson, supra

Further, the Board argues, performance is not limited to mere classroom performance, but may include the total professional performance of the staff members, including whether or not a conflict exists which is disruptive of efficient functioning. Donaldson, supra; Phoebe Baker v. Board of Education of Lenape Regional High School et al., 1975 S.L.D. 471.

The Board observes that supervisory evaluations of classroom teachers are a matter of professional judgment and necessarily highly subjective. George Ruch v. Board of Education of Greater Egg Harbor, 1968 S.L.D. 7. If such a subjective judgment may trigger a plenary hearing and require a decision concerned with the merits of the judgment, then the discretion of local boards to employ personnel is severely compromised. The distinction between tenured and nontenured personnel is a distinction without a difference, with the privileges of those who have met the requirement of tenure being acquired by those who have not. Claire Haberman v. Board of Education of Morris Plains, 1975 S.L.D. 848, 852. In essence, the Commissioner would be required to substitute his judgment for that of the local board, and that will not be done absent an affirmative showing that such action was arbitrary, capricious or unreasonable. Such action is entitled to a presumption of validity. Boult and Harris v. Board of Education of Passaic; 1939-40 S.L.D. 7, 13 aff'd State Board 15, aff'd 135 N.J.L. 329 (Sup. Ct. 1947), aff'd 136 N.J.L. 521 (E. & A. 1948), Kane v. Board of Education of Hoboken, 1975 S.L.D. 12; Klig v. Board of Education of Palisades Park, 1975 S.L.D. 168.

It is the claim of petitioners herein that the letter sent by the Board in March 10, 1978 which gave "unsatisfactory performance" as the reason for their termination is insufficient as a matter of law. The Board submits that the purpose for a statement of reasons was originally set forth by the Supreme Court in the Donaldson decision so that it will disclose "correctable deficiencies and be of service in guiding his future conduct; perhaps it will disclose that the non-retention was due to factors unrelated to professional or classroom performance***." (at p. 245) The Board contends that neither that decision, nor N.J.S.A. 18A:27-3.2 enacted in furtherance thereof deliniates the detail into which such reasons must delve. Indeed, it would appear that professional or classroom performance would be a sufficient statement to meet the very purpose set forth in Donaldson, supra, without working the breadth of the Board's discretionary authority.

The Board asserts that in the instant matter, that statement does not appear in isolation. On March 2, 1978, the Administrative Principal provided each of the petitioners with a separate statement (CP-3, CP-18) which outlines the basis for his recommendation of non-renewal. In those statements the administrator outlined that his recommendation was based upon Board Policy 5005, and Teacher Evaluations. In addition, immediately following the meeting of the Board on March 2, 1978, a copy of the Administrative Principal's actual recommendations was provided to petitioners through

their Union President by a Board Member. (trp. 1080, CP-14) Thus, the petitioners in fact had the following: the administrator's indication he was relying upon petitioners evaluations and Board Policy; petitioners had those evaluations and policies; petitioners had his analysis of the application to their evaluations of the policy, and on March 10, 1978, petitioners had the conclusions reached by the Board. The Board submits that by March 10, 1978, petitioners had as much at their disposal as did the Board itself.

The Board cites the matter in Richard Gearing v. Board of Education of Manasquan, 1977 S.L.D. 751, the Commissioner voted that the statement of reasons itself was information yet it incorporated the employee's evaluation into the letter. The Commissioner concluded that no useful purpose could be served by requiring the Board itself to further detail those reasons which it incorporated by reference. In another case even more akin to the current one, Helen Peggy Cappetto v. Board of Education of the Borough of South Plainfield, 1978 S.L.D. 545, the petitioner received a letter from the Superintendent of Schools referencing her evaluations and concluding that her "overall teaching performance does not justify your continued employment." The only difference in these two situations is that in the instant matter the basis for the conclusion of the Board provided separately. The Commissioner in Cappetto, supra found that the information "does in fact contribute compliance". In another case, Mary Ann McCormack, et al. v. Board of Education of Northern Highlands Regional High School District, 76 S.L.D. 754, the reason given to one petitioner was "the majority of the Board felt they could get a letter teacher". In that case the Commissioner ruled that the reason given was admittedly not precise***. Nonetheless, the Court in Donaldson ruled that there are many reasons for such decision *** although the reasons "were subjective in nature, they are not per se rendered inadequate by the fact. Nor are they inadequate in the context of the instant petition since such petitions fail to detail specific instances of arbitrary or frivolous action***."

The Board further submits that the petitioners reliance upon Strauss v. Board of Education of Borough of Glen Gardner, 1977 S.L.D. 841 is misplaced. In that case there is no record of any of the auxillary material having been provided and that the reason given there was not based upon the written evaluations of the employee.

The Board contends that in the light of the information which was provided, it is submitted that the intent of the Donaldson decision, and the statutory enactment were in fact carried out. Indeed, petitioners appeared before the Board with prepared charts to

attempt to refute the Administrative Principal's assessment of them, brought over twenty (20) witnesses to tesify in their behalf and had legal counsel representing them in their effort. After such an extensive presentation, it is difficult to conclude that petitioners did not know the deficiencies to which the Board pointed in their performance.

Assuming arguendo that such statement was insufficient the Strauss case points out that where a review of the record discloses that the Board was sufficiently aware of petitioners professional performance, and that its statement was not an intentional or covert act of concealment or bid forth, but the nascent result of inadequate comprehension of the Education Law, the appropriate remedy was to cause the Board to issue a more detailed statement. See also Eddie Jones v. Board of Education of City of Englewood, 1977 S.L.D. 903. As the Commissioner noted in Margaret Pelore v. Board of Education of South Brunswick, 1977 S.L.D. 232, aff'd State Board 1977 S.L.D. 240 "the Commissioner finds no authority in law to grant petitioners request for reinstatement***. Had the legislature intended that a violation of N.J.S.A. 18A:27-32 would result in the specific relief of reemployment, it would have provided the Commissioner so holds."

The Board further submits that even if it is found that the material submitted to the petitioners was insufficient as a matter of law, the appropriate remedy is to order the provision of a revised statement of reasons, and no other.

FINDINGS AND CONCLUSIONS

Having carefully reviewed and considered the entire record in the instant matter, I **FIND** the Procedural History and the Statement of Facts as set forth hereinbefore are hereby adopted by reference as FINDING OF FACT.

I further **FIND** the following facts:

1. The record before PERC, including the transcript of the proceedings, documents in evidence and the report of the Hearing Officer to be complete in all respects to dispose of the single issue before this Court and for the final determination by the Commissioner of Education.

2. The Board was in compliance with N.J.S.A. 18A:27-3.1 and N.J.A.C. 6:3-1.19, Supervisor of Instruction; observation and evaluation of non-tenured teaching staff members.

3. The Board was in compliance with N.J.A.C. 6:3-1.20, Procedure for appearance of nontenured teaching staff member before a local board of education upon receipt of notice of nonreemployment.

4. Petitioner's evaluations, executed by the Administrative Principal on ten (10) occasions for both petitioners over a three (3) year period, were uniformly favorable to petitioners.

5. The Administrative Principal failed to cite an "unsatisfactory performance" of either petitioner in his evaluations of them.

6. The Administrative Prinicpal violated Board policy (Evaluation I. 8 and II. 4) when he failed to issue a written report to petitioners' subsequent to his Tenure Discussion with petitioners. (CP-4)

7. The Administrative Principal destroyed and/or failed to maintain his notes of petitioners' responses to his questions of the Tenure Discussion conducted by the administrator. (CP-16)

8. At hearing, the Administrative Principal was unable to satisfactorily define or explain his ratings of petitioners with regard to "cooperation" and "conduct" pursuant to Board policy #5005 and as presented to the Board. (CP-14)

9. The Board was in substantial noncompliance with N.J.S.A. 18A:27-3.2 when it advised petitioners that the reasons for their nonreemployment was "unsatisfactory performance." N.J.S.A. 18A:27-3.2 provides that:

> "Any teaching staff member receiving notice that a teaching contract for the succeeding school year will not be offered may, within 15 days thereafter, request in writing a statement of the reasons for such non-employment which shall be given to the teaching staff

> member in writing within 30 days after the receipt of such request." (Emphasis supplied.)

Having made such findings of fact, I further **FIND** that the Board's contention that its statement of reasons for petitioners' nonreemployment coupled with the Administrative Principals' memorandum dated March 2, 1978 (CP-18), met the statutory requirement pursuant to N.J.S.A. 18A:27-3.2, is without merit and is hereby rejected. The Board's failure to forthrightly enunciate those specific alleged "unsatisfactory performances" fails to meet the standards set forth by the Supreme Court in Donaldson where it said:

> "It appears evident to us that on balance the arguments supporting the teacher's request for a statement of reasons overwhelm any arguments to the contrary. The teacher is a professional who has spent years in the course of attaining the necessary education and training. When he is engaged as a teacher he is fully aware that he is serving a probationary period and may or may not ultimately attain tenure. If he 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 deficiences and be of service in guiding his future conduct; perhaps it will disclose that the nonretention was due to factors unrelated to his professional or classroom performance and its availability may aid him in obtaining future teaching employment; perhaps it will serve other purposes fairly helpful to him as suggested in Drown (435 F 2d at 1184-1185); and perhaps the very requirement that reasons be stated would, as suggested in Monks (58 N.J. at 249), serve as a significant discipline on the board itself against arbitrary or abusive exercise of its broad discretionary powers."

Neither the Boards statement of reasons nor the Administrative Principal's memorandum disclosed any "correctible deficiences" that would be of "service in guiding their future conduct," or aid [them] in obtaining future teaching employment." Nor was the Board's stated reasons of "unsatisfactory performance" found to be set forth in any of the ten (10) evaluations executed by the Administrative Principal.

I **FIND,** therefore, that the Board's single stated reason not to reemploy petitioner for the 1978-79 school year is unsupported by the facts in this matter.

I **DETERMINE,** therefore, that the Board failed to meet the statutory requirement of N.J.S.A. 18A:27-3.2 and the standards as set forth by the Supreme Court in Donaldson.

Under normal circumstances Board action is entitled to a presumption of validity Thomas v. Board of Education of Morris Township, 89 N.J. Super. 329. The Commissioner of Education has, however, firmly and unflinchingly held that Board action that is arbitrary, capricious, unreasonable, biased or otherwise not in good faith will not be upheld. Cullum v. North Bergen Board of Education, 15 N.J. 285 (1954); Ruch v. Board of Education of Greater Egg Harbor, Atlantic County, 1968 S.L.D. 910 aff'd 1969 S.L.D. 202; Page v. Board of Education of the City of Trenton, 1973 S.L.D. 700, remand 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; Hicks v. Board of Education of the Township of Pemberton, Burlington County, 1975 S.L.D. 332. Such is the case with the herein matter. I **CONCLUDE** that the termination of both petitioners was arbitrary, unreasonable and without a basis in fact.

Accordingly, it is **ORDERED** that both petitioners be reinstated in their positions with back salary and emoluments as of the date of their termination mitigated by their earnings in other employment, as if there had been no break in their employment with the Board. Hazel Richardson and Deborah L. Anderson v. Board of Education of the Township of Galloway, Atlantic County, OAL DKT. NO. EDU 405-12/75, Initial Decision dated October 18, 1979; Robert Tucker v. Board of Education of the Borough of Lawnside, Camden County, 1980 S.L.D. ___ (decided June 18, 1980).

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, FRED G. BURKE,** who by law is empowered to make a final decision in this matter. However, if Fred G. Burke does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

OAL DKT. NO. EDU 1117-80

I hereby **FILE** my Initial Decision with **FRED G. BURKE** for consideration.

17 March 1981
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

March 19, 1981
DATE

Seymour Lewis
DEPARTMENT OF EDUCATION

Mailed To Parties:

March 23, 1981
DATE

Ronald L. Parker/bt
OFFICE OF ADMINISTRATIVE LAW

ms

DOCUMENTS IN EVIDENCE

P-1 Board Policies #5004 through #5009

CP-3 Letter dated March 2, 1978 addressed (circled) to Ms. Bringhurst

CP-4 Bringhurst "Teacher Evaluation Analysis" 11-12-75

CP-5 Bringhurst "Teacher Evaluation Analysis" 12-11-75

CP-6 Bringhurst "Teacher Evaluation Analysis" 1-26-76

CP-7 Bringhurst "Teacher Evaluation Analysis" 10-27-76

CP-8 Bringhurst "Teacher Evaluation Analysis" 12-6-76

CP-9 Bringhurst "Teacher Evaluation Analysis" 1-20-77

CP-10 Bringhurst "Teacher Evaluation Analysis" 3-18-77

CP-11 Bringhurst "Teacher Evaluation Analysis" 10-4-77

CP-12 Bringhurst "Teacher Evaluation Analysis" 12-13-77

CP-13 Bringhurst "Teacher Evaluation Analysis" 2-3-78

CP-14 Memorandum to (Board) Personnel Committee from John Demarest dated March 1978

CP-16 Tenure Discussions dated 2-13-78

CP-18 Letter dated March 2, 1978 addressed (circled) to Ms. Kornacki

CP-19 Kornacki "Teacher Evaluation Analysis" 10-6-75

CP-20 Kornacki "Teacher Evaluation Analysis" 12-4-75

CP-21 Kornacki "Teacher Evaluation Analysis" 1-19-76

CP-22 Kornacki "Teacher Evaluation Analysis" 10-28-76

CP-23 Kornacki "Teacher Evaluation Analysis" 12-8-76

CP-24 Kornacki "Teacher Evaluation Analysis" 1-21-77

CP-25 Kornacki "Teacher Evaluation Analysis" 4-12-77

CP-26 Kornacki "Teacher Evaluation Analysis" 10-6-77

CP-27 Kornacki "Teacher Evaluation Analysis" 11-30-77

CP-28 Kornacki "Teacher Evaluation Analysis" 1-23-78

Exhibit B Notice of Termination of Employee

ELLEN BRINGHURST AND SUSAN KORNACKI,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CAPE MAY, CAPE MAY COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law.

The Commissioner observes that no exceptions were filed in a timely fashion by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

In the present matter the Commissioner observes that the Honorable Judge Law in his decision, ante, orders

> "***that both petitioners be reinstated in their positions with back salary and emoluments as of the date of their termination mitigated by their earnings in other employment, as if there had been no break in their employment with the Board. Hazel Richardson and Deborah L. Anderson v. Board of Education of the Township of Galloway, Atlantic County, OAL DKT. NO. EDU 405-12/75, Initial Decision dated October 18, 1979; Robert Tucker v. Board of Education of the Borough of Lawnside, Camden County, 1980 S.L.D. ____ (decided June 18, 1980).***"

The Commissioner cannot agree with such disposition of the instant matter. The Commissioner observes that the State Board recently rendered a decision in Tucker, supra, in which it stated:

> "***The Commissioner has already determined that the Board acted in this matter in an arbitrary and capricious manner which amounted to an abuse of its discretion. We affirm the Commissioner in that respect and further are of the view that the Board's

> gross violation of education law and policy rises to the level of bad faith. We feel that educational necessity requires that we compel compliance with the educational policy involved herein by the imposition of a sanction short of reinstatement. ***"
> (Emphasis supplied.)

(Robert P. Tucker v. Board of Education of the Borough of Lawnside, Camden County, 1980 S.L.D ___ (decided June 18, 1980), aff'd in part/reversed in part State Board decided March 4, 1981)

In the instant matter, the Commissioner observes that nothing in the record before him provides convincing evidence that the Board's actions herein were arbitrary or capricious or taken for prescribed reasons. Donald Banchik v Board of Education of the City of New Brunswick, 1976 S.L.D. 78

Therefore, if in Tucker, supra, the State Board could find that a board's action rose to the level of "bad faith" and still not provide the remedy of reinstatement, to order reinstatement in the instant matter, where no such evidence of bad faith or arbitrary or capricious behavior have been demonstrated, would be to ignore the long-accepted standard of review which prevails in matters relating to the nonremployment of non-tenured teaching staff members. Schink v. Board of Education of Westwood Consolidated School District, 60 N.J. Super. 448, 476 (App. Div. 1960); Thomas v. Morris Township Board of Education, 89 N.J. Super. 327, aff'd 46 N.J. 581 (1966); Joseph J. Dignan v. Board of Education of Rumson-Fair Haven Regional High School District, Docket No. A-444-74 New Jersey Superior Court, Appellate Division, October 10, 1975

While Judge Law has characterized the evaluations of petitioners as "uniformly good", the Commissioner is constrained to observe that his review of those same evaluations leads him to conclude that there existed references to sufficient areas of concern which could reasonably lead a board of education to make a determination not to offer tenure to a teaching staff member notwithstanding whether or not that individual was recommended by the chief school administrator. Furthermore, in regard to such recommendation, the Commissioner has held in Ronnie Abramson v. Board of Education of the Township of Colts Neck, Monmouth County 1975 S.L.D. 418 that

> "***[L]ocal boards of education clearly have the authority, which is not possessed by school administrators, to make the final judgments with respect to the employment of personnel to staff the schools of the State.***" (at 423)

Finally, the Commissioner feels constrained to address the question of whether the reason given to petitioners herein met the requirements of Donaldson v. Board of Education of North Wildwood 65 N.J. 236 (1974). In the Commissioner's judgment, Judge Law's determination that the Board's stated reasons lacked that specificity necessary for meeting the standards established by Donaldson, supra, is entirely correct. However, the relief he requires as a consequence of such finding far exceeds that which the Commissioner has ordered in similar circumstances as in Deborah Strauss v. Board of Education of Glen Gardner 1977 S.L.D. 841, namely that the board of education provide reasons for non-renewal which are sufficient to

> "'*** disclose correctible deficiencies and be of service in guiding *** future conduct ***' ***." (at 842)

Accordingly, and for the reasons as stated herein, the findings and determinations of the Administrative Law Judge ordering petitioners reinstated are hereby reversed. Petition of Appeal is hereby dismissed with prejudice except that the Board is directed to provide to petitioners, should they so request, a statement of reasons of sufficient specificity as to fulfill the requirements and spirit of Donaldson, supra.

COMMISSIONER OF EDUCATION

May 4, 1981

ELLEN BRINGHURST AND SUSAN KORNACKI, :

PETITIONERS-APPELLANTS, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE CITY OF CAPE MAY, CAPE MAY COUNTY, : DECISION

RESPONDENT-RESPONDENT. :

:

Decided by the Commissioner of Education, May 4, 1981

For the Petitioners-Appellants, Greenberg & Mellk (William S. Greenberg, Esq., of Counsel)

For the Respondent-Respondent, Carroll, Panepinto, Pachman, Williamson & Paolino (Martin R. Pachman, Esq., of Counsel)

This is another case where teachers whose employment contracts were not renewed have attacked the statement of reasons given to them by the board of education. The controversy has been complicated by litigation of related issues before the Public Employment Relations Commission, in which the teachers alleged that the motivation for their non-renewal was unlawful anti-union bias. PERC found that the non-renewals were not motivated by such bias. The teachers then proceeded with a petition to the Commissioner, alleging that the Board's stated reason of "unsatisfactory performance" was not the actual reason nor was it a sufficient statement. The Administrative Law Judge took no further testimony, but granted summary judgment for the Petitioners on the basis of the transcript of testimony before PERC. The Judge concluded that the termination of the Petitioners was arbitrary and without a basis in fact, and he ordered reinstatement of the Petitioners to their former positions with back salary and emoluments.

The Commissioner reversed the order of reinstatement, but directed the Board to furnish Petitioners, should they so request, with a statement of reasons of sufficient specificity as to fulfill the requirements and spirit of Donaldson v. Board of Education of North Wildwood, 65 N.J. 236 (1974). With respect to the evaluations of the Petitioners, the Commissioner said (slip opinion, page 31):

> "the Commissioner is constrained to observe that his review of those same evaluations leads him to conclude that there existed references to sufficient areas of

> concern which could reasonably lead a board of education to make a determination not to offer tenure to a teaching staff member notwithstanding whether or not that individual was recommended by the chief school administrator."

We agree with the Commissioner's decision and with his ruling, above quoted, that the record contained evidence sufficient to sustain the Board's determination not to renew. As to Petitioner Bringhurst there was evidence of lack of attention to the affective needs of children which made her unsuitable for assignment to the primary grades; testimony showing a serious problem in the relationship of Bringhurst with some of her peers, such as her saying with respect to team teaching with another staff member "I don't want to work with that nut"; and evidence of her consistently poor spelling, as well as failure to give proper information to at least one parent regarding a child's performance. As to Petitioner Kornacki, the Administrative Principal testified to a series of deficiencies in performance which included Petitioner's use of a high-pitched voice with children, relatively poor results of her classes on standardized tests, messy classroom, disciplinary problems, a refusal to follow procedure regarding the referral of a child to the Child Study Team, and a lack of candor as to the true ability of children when speaking to parents. Even though much of this evidence was hotly contested by Petitioners and some of the judgments of the school authorities were undoubtedly subjective, the Board's determination is nevertheless entitled to a presumption of correctness and may not be overturned if supported by substantial evidence. This fundamental principle was clearly expressed in Thomas v. Board of Education of Morris Township, 89 N.J. Super. 327 (App. Div. 1965), affirmed o.b. 46 N.J. 581, where the Appellate Division said (89 N.J. Super. at page 332):

> "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. The agency's factual determinations must be accepted if supported by substantial credible evidence."

It is also well established that the school administrators and the Board have the right to make subjective judgments so long as they do so in good faith. In Donaldson, supra, the Supreme Court emphasized that in creating a right in the staff member to a statement of reasons for non-renewal, the Court did

not intend to curb in any way "the breadth of the board's discretionary authority to decide whether any particular teacher should or should not be reengaged." The opinion concluded by referring with approval to the Commissioner's procedure in Ruch, supra, as follows (65 N.J. at page 247):

> "He held that, procedurally, the burden of sustaining the appeal was on the teacher and that the teacher's 'bare allegation' of arbitrariness was 'insufficient to establish grounds for action.' He declared to enter into a reevaluation of the teacher's classroom performance and teaching competence, pointing out that the matter involved the supervisor's professional judgment which was highly subjective and which was not charged to have been made in bad faith."

For the foregoing reasons, the decision of the Commissioner is affirmed.

Jack Bagan opposed in the matter.

October 7, 1981

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3298-80
AGENCY DKT. NO. 217-4/80A

IN THE MATTER OF:

BERGENFIELD EDUCATION ASSOCIATION, et als.,
Petitioners
v.
BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD, BERGEN COUNTY,
Respondent

Record Closed: February 20, 1981
Received by Agency: April 3, 1981

Decided: April 1, 1981
Mailed to Parties: April 7, 1981

APPEARANCES:

Gregory T. Syrek, Esq., for Petitioners
(Goldberg & Simon, attorneys)

Robert H. Greenwood, Esq., for Respondent
(Greenwood & Sayovitz, attorneys)

OAL DKT. NO. EDU 3298-80

BEFORE **ARNOLD SAMUELS,** ALJ:

The petitioners are a group of teachers who were employed by the respondent, Bergenfield Board of Education, in positions categorized as Title I, Compensatory Education and/or Supplemental Instructors. The Bergenfield Education Association is designated as the school district's representative of the teacher employees. For purposes of this action, none of the individual petitioners were tenured or employed under contracts other than the Title I, compensatory or supplemental education programs. On April 18, 1980, they filed a petition with the Commissioner of Education claiming that they should be given tenure or credit towards tenure, compensation and other benefits on the same basis as regular teaching staff members. In addition, petitioner Mary McEwan contested the respondent's refusal to grant her a maternity leave of absence to commence on January 1, 1980. On May 28, 1980, the matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. On July 7, 1980, petitioners Helen M. Casazza and Mary McEwan filed amended petitions alleging that the respondent improperly failed to renew their employment for the 1980/81 school year solely because of legal expenses they caused the Board to incur. The respondent filed answers denying the petitioners' allegations and urging various affirmative defenses.

A prehearing conference was held on August 26, 1980, and a prehearing order resulted. At that time the number of petitioners was reduced by the withdrawal of Nancy L. Reed, Joan Schnuer, Elisa Nesnay, Beth Linkletter, Louise Rubenstein, and William J. Zitelli.

On August 28, 1980, the parties stipulated and agreed that the Bergenfield Education Association was dismissed and eliminated as a party petitioner.

A three-day hearing was held on December 16, 17 and 18, 1980. Extensive briefs were filed on all issues by the parties and the record closed on February 20, 1981.

At the time of trial, counsel indicated that eight additional individuals had withdrawn as petitioners: Martha Bertisch, Jamie K. Milestone, Ella J. Thomas, Karen Snyder, Linda Rosenthal, Constance Bellia, Virginia Atfield and Marion Franz.

The following six petitioners remained in this action and this decision will hereafter apply only to them and to their claims:

Claire M. Kingsley
Elaine Nicholas
Mary McEwan
Beverly Katz
Helen M. Casazza
Joan Moore.

The remaining issues to be decided are summarized as follows:

1. Are petitioners entitled to be awarded tenure in their employment (assuming that they are properly certified and have been employed by respondent for more than the requisite three years)?

2. Irrespective of the answer to number 1 above, are petitioners entitled to be compensated on a pro rata basis with other teachers of similar qualifications and experience?

3. Assuming they have improperly been denied sufficient remuneration in the past, are they entitled to back pay for prior employment service?

4. Are the petitioners entitled to sick leave and State health benefits in the same manner as regular teaching staff members?

5. Should the petitioners' claims be barred prior to hearing on the merits because of laches or the 90-day time limit for filing in N.J.A.C. 6:24-1.2?

There were two additional issues that were disposed of summarily during the hearing:

A. Mary McEwan claimed that she was improperly denied a maternity leave by the Board in December 1979. Since she had the same claim simultaneously pending in the Division on Civil Rights, she withdrew that cause of action from this forum.

B. Helen M. Casazza and Mary McEwan both claimed that their employment had been improperly terminated by the respondent for the sole reason that their actions against the Board were costing the respondent money. After both of these petitioners concluded their testimony and rested, respondent moved to dismiss these claims on the ground that they did not present a prima facie case or sustain their burden of proof. After considering the evidence presented by Helen M. Casazza and Mary McEwan on this charge, it was found as a FACT that Mary McEwan produced no evidence whatsoever to support her allegation; and it was also found as a FACT that Helen M. Casazza's only "evidence" in support of this charge was her unsupported "assumption" that it was true. This did not constitute even a modicum of proof and was completely insufficient. Therefore, these claims by both Mary McEwan and Helen M. Casazza were dismissed.

Before deciding the remaining claims on their merits, the respondent's motions for dismissal based upon laches and the bar of the 30-day time limit in N.J.A.C. 6:24-1.2 should be considered:

This discussion is limited to the 90-day time limit referred to above. Little or no proof or argument was presented on the question of laches and that defense is therefore eliminated from consideration.

The motion for dismissal is based upon the uncontroverted fact that each of the alleged inequities comprising the bases of petitioners' claims arose or began when the respondent first employed each petitioner. In each case, this initial employment was substantially more than 90 days prior to the commencement of this action on April 18, 1980.

> Filing and service of petition.
>
> To initiate a proceeding before the Commissioner to determine a controversy or dispute arising under the schools laws, a petitioner shall file with the Commissioner the original copy of the petition, together with proof of service of a copy thereof on the respondent or respondents. Such petition must be filed within 90 days after receipt of the notice by the petitioner of the order, ruling or other action concerning which the hearing is requested. . . .
> N.J.A.C. 6:24-1.2.

This 90-day filing requirement has been frequently applied by the Commissioner and by the courts in a variety of situations. See Bernards Tp. Bd. of Ed. v. Bernards Tp. Education Ass'n, 79 N.J. 311, 326-7, n. 4 (1979); Riely v. Hunterdon Central High Bd. of Ed., 173 N.J. Super. 109 (App. Div. 1980). It is uncontroverted that the petition in the instant action was filed considerably after 90 days from the commencement of the various actions of the respondent that are complained of by the petitioners. These actions are the initial employment and nonpayment of desired benefits as to each petitioner.

The above rule "may be relaxed or dispensed with by the Commissioner, in his discretion, in any case where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice." N.J.A.C. 6:24-1.19. On its face this rule gives the Commissioner broad discretion to relax the 90-day limitation as he sees fit and, until recently, the Commissioner often used this discretion. However, recent decisions clearly indicate that the liberal application of such discretion no longer prevails, and the 90-day rule will not be lightly regarded. See Kallimanis v. Bd. of Ed. of Carlstadt, EDU 868-80 (N.J.O.A.L. August 8, 1980), aff'd 1980 S.L.D. (September 26, 1980); Baley v. Bd. of Ed. of Tp. of Mansfield, EDU 4997-79 (N.J.O.A.L. February 6, 1980 at 3-4), aff'd 1980 S.L.D. (June 20, 1980); Riely, supra, at 112-13; Wagner v. Bridgewater-Raritan Regional School District Bd. of Ed., 1978 S.L.D. 827 (November 3, 1978).

In the case at hand, the petitioners have not shown any reasons that would justify a relaxation of the 90-day bar.

However, another argument advanced by the petitioners carries their causes of action outside of the operation of N.J.A.C. 6:24-1.2: The alleged discrimination with respect to tenure, salary and other important benefits, if verified, would constitute a continuing violation of the petitioners' rights. (See verified petition, Count I, Paragraphs 6 - 12.)

The subject of a continuing violation that can toll the operation of a statute of limitations in a discrimination case was treated at length by the United States Supreme Court in United Airlines, Inc. v. Evans, 431 U.S. 553 (1977). This case involved application of the 180-day filing limit under Title 7 of the Civil Rights Act, 42 U.S.C.A. § 2000e-5(e). Its definitive concepts have been applied to a wide variety of proceedings involving claims of discrimination. In Evans, the plaintiff claimed in 1973 that the United Airlines seniority system gave present effect to a past illegal act (compelling her to resign in 1968 because of a "no marriage" rule). The Court looked at the nature of the seniority system itself and found it to be neutral and unbiased in its operation. It was then held that a neutral seniority system that gives present effect to a past discriminatory act, which past act is not the subject of a timely complaint, does not constitute a continuing violation. Because it was barred by the 180-day time limitation, the past discriminatory event (wrongful termination in 1968) was of no present legal significance. Therefore, a challenge to a facially neutral system could not be predicated upon the past event of no present legal significance.

The federal courts have since followed Evans, for the most part, in dealing with the issue of continuing violations, attempting to find a present violation rather than merely acknowledging the present effect of a past act. Where the courts have found a past act, which does not occur within the permissible period of time for filing, and no present violation within the period of limitation, they have generally denied application of the continuing violation theory. See Alston v. Allegheny Ludlum Steel Corp., 465 F. Supp. 171 (W.D. Pa. 1978), aff'd 594 F. 2d 854 (3rd Cir. 1979); Goldman v. Sears Roebuck & Co., 607 F. 2d 1014 (1st Cir. 1979); Freude v. Bell Telephone Co., 438 F. Supp. 1059 (E. D. Pa. 1977); Martin v. Georgia-Pacific Corp., 568 F. 2d 58 (8th Cir. 1977); Fowler v. Birmingham News Co., 608 F. 2nd 1055 (5th Cir. 1979); Carter v. Delta Airlines, 441 F. Supp. 808 (S.D. N.Y. 1977).

The petitioner's allegations in the case at hand, if true, do not fit into the above mold, which is limited by present effects of past acts. The petitioners' claims are

a direct attack against the continuing operation and neutrality of the tenure and employment benefits systems of the respondent. There was seemingly no action by the Board, in an order, ruling or other directive, at any identifiable time, which denied the petitioner-teachers the benefits enjoyed by regular teaching staff members. Instead, petitioners claim that the respondent continually engages in practices which result in discrimination, and that such wrongful practices continue to date. (See verified petition, Count I, paragraph 12).

Under these circumstances, there is an alleged continuing discriminatory pattern, with some of the claimed illegal acts falling within the 90-day period immediately prior to the filing of the petition. Under such circumstances, the bar of N.J.A.C 6:24-1.2 has not operated to preclude this action, and the petitioners' claims should therefore be decided on their merits.

"Title I" teachers are those employed under Title I of the Elementary and Secondary Education Act, 20 U.S.C.A. 276 et seq. It is a federally funded project, variable in amount and availability from year to year, which provides and pays for special instructional programs in the schools.

Supplemental teachers perform specialized educational services (such as instruction for educationally handicapped children) mandated by the legislature in the Public School Education Act of 1975 (N.J.S.A. 18A-7A-1 et seq.) and the regulations implementing that legislation [(N.J.A.C. 6:28-3.2(b)].

Compensatory Education Teachers are employed and funded by school districts under a wide variety of other special programs.

For purposes of the issues to be decided here, the petitioner-teachers employed in all three programs defined above are regarded as a single interchangeable group, as opposed to regular staff members, who are accorded tenure and other employment benefits sought by the petitioners.

The essence of this dispute is the petitioners' contention that they are entitled to tenure and related benefits because the performance, duties and responsibilities of their employment have met all of the same terms and conditions required of regular teaching staff members, who would ordinarily acquire tenure upon fulfillment of the

statutory three years of service in accordance with N.J.S.A. 18A:28-5. All of these teachers, regardless of category, are required to hold and do hold valid teaching certifications issued by the State Board of Examiners.

While the statute does not define "teaching staff member" in great detail (see N.J.S.A. 18A:1-1), for the purposes of this decision, that term means a regular teacher who is unquestionably entitled to tenure upon satisfying the statutory time period.

In establishing the basic standards to be used in deciding this question, certain generally accepted concepts should be applied:

A. The source of funding a teacher's salary is not necessarily dispositive of the question of his or her entitlement to tenure; and it is immaterial whether or not a board of education chooses to acknowledge the acquisition of tenure. Ruth Nearier, et als, v. Bd. of Ed. of the City of Passaic, 1975 S.L.D. 604, 609; Jack Noorigan v. Bd. of Ed. of Jersey City, 1972 S.L.D. 266, aff'd in part/ rev'd in part 1973 S.L.D.777.

B. The right of tenure does not come into being until the precise conditions laid down in the statute have been met. Zimmerman v. Bd. of Ed. of Newark, 38 N.J. 65, 72 (1962), cert. den. 371 U.S. 956 (1963); Ahrensfield v. State Bd. of Ed., 126 N.J.L. 543 (E. & A. 1941).

C. "Whether a professional employee of a board of education qualifies as a teaching staff member eligible for tenure depends upon the nature of the employment tendered and accepted. This determination can only be made after an examination of the terms, conditions and duties of the employment and a consideration of the conduct of the parties. Biancardi v. Waldwick Bd. of Ed., supra, at 213." Point Pleasant Beach Teachers Ass'n v. Callam, 173 N.J. Super. 11 (App. Div. 1980).

Each of the petitioners testified to the factual details of her employment. Four administrators testified for the respondent regarding their understanding of the terms and conditions of the petitioners' employment. Therefore, in deciding each petitioner's entitlement to the relief requested, a factual examination is required, together with a consideration of the conduct of the parties.

For purposes of such an examination, after hearing and considering the testimony of each petitioner, and having reviewed the exhibits marked in evidence, a listing of which is attached hereto, the court makes the following FINDINGS OF FACT:

As to Helen M. Casazza

1. Helen M. Casazza was employed as a Title I/Compensatory Education Instructor for approximately half of the 1978/79 school year and for the entire 1979/80 school year (exclusive of previous contract employment beginning in 1973).

2. Her employment in the 1978/79 school year involved an experimental, pilot program in which she worked for four months with a regular teacher. This program was limited in time to one year and was not repeated.

3. During her four months of employment in the above program, Ms. Casazza was compensated on an hourly basis for 29 to 30 hours of work per week. Her work day began at 8:30 a.m. and ended at 4:00 p.m.

4. During the above four months, the 16 children in that group were first-graders who were selected for special attention according to diagnosed needs. They were taught individually and in small groups by Ms. Casazza and by the regular teacher.

5. Ms. Casazza worked along with the regular teacher in evaluating the students and in preparing grades for their report cards. Individual files and records were kept for each

student, and Ms. Casazza participated in testing them three times a year, using standardized tests. She also engaged in conferences with the children's parents.

6. Ms. Casazza also attended staff meetings with regular teachers, so she could help them learn to handle the 18 children in this experimental program.

7. Ms. Casazza was supervised and observed by her Principal and department head, who gave this program special attention. She was evaluated and received a written evaluation once a year, but her evaluations were not as frequent or as thorough as regular teachers'.

8. Ms. Casazza was asked to attend general parents' meetings for her class only.

9. She kept track of supplies and did other work jointly with the regular teacher.

10. Ms. Casazza was paid at an hourly rate based upon monthly vouchers that she submitted, and she received no pay for holidays, preparation time, lunch time or days that schools were closed. She had no relationship to a salary guide, no sick leave benefits, and no insurance benefits.

11. Ms. Casazza was aware of her Title I, or compensatory education, status on a year-to-year basis and she expected it would last until an opening arose, so that she might be given a contract as a regular teacher. This did not happen.

12. The regular teacher with whom Ms. Casazza worked during her first four months of employment had the primary responsibility for assigning grades to the children, even though Ms. Casazza had substantial input into the process.

13. During the 1979/80 school year, Ms. Casazza worked with a mixed group of third, fourth and fifth grade students, giving them remedial instruction in order to advance their test results up to their assigned grades. She worked with an average of six students at a time. There were 16 to 18 such students in the class, receiving individualized remedial instruction.

14. It is clear that Ms. Casazza's duties and responsibilities primarily involved assigned teaching responsibilities in individual remediation to pupils outside of and supplemental to the usual large classroom environment.

15. Ms. Casazza was notified of her reemployment for the 1979/80 school year by form letter from the Board, specifically directed to her as a nontenured employee, in accordance with N.J.S.A. 18A:27-10 et seq.

16. At the beginning of her 1978/79 assignment to the experimental class, Ms. Casazza was informed by the administration that this unique program was limited to a one-year first grade experiment, and the children would be dispersed into other classes at the conclusion of that year. Her assignment was to assist the regular teacher.

17. Any regular or additional duties performed by Ms. Casazza in the above class were permitted her by the regular classroom teacher, but these duties were not separately required of her.

18. Ms. Casazza was not required to attend faculty meetings, but when she did, she was paid additionally, on an hourly basis.

19. The programs in which Ms. Casazza was employed clearly required a flexibility in operation which would be impeded if instructors performing the functions assigned to her were granted tenure.

As to Joan Moore

1. Joan Moore was employed as a Supplemental/Compensatory Education Instructor from 1973 to date. She works approximately 25 hours per week.

2. Her duties were to teach perceptually impaired and emotionally disturbed children selected by the Child Study Team.

3. Ms. Moore provides information to the Learning Disability Specialist for purposes of selecting the children to be assigned to her.

4. The number of children taught by Ms. Moore varies from time to time, up to a maximum of 17.

5. Ms. Moore teaches each child individually, but in groups of three.

6. Ms. Moore evaluates her students' work periodically and reports to a regular classroom teacher who is primarily responsible for giving them pass-fail grades. Ms. Moore keeps attendance records, tests the children and meets with their parents when they request conferences. She is not scheduled for regular parent conferences.

7. Ms. Moore attends Child Study Team meetings monthly, but she does not attend general staff meetings.

8. Ms. Moore is observed by supervisory personnel and is given a written evaluation every year. These evaluations are similar to those given other Title I, Supplemental/Compensatory Education Instructors, but they are not as frequent or thorough as for regular teachers.

9. Ms. Moore participates in workshops, orders supplies and signs in and out every day, together with all other special

education teachers.

10. She is paid on an hourly basis and receives extra pay for extra time. She also receives some sick leave, insurance and pension benefits, but these items have been separately negotiated or are voluntarily given her by the respondent.

11. Ms. Moore is advised orally in May of each year of her re-employment for the following year as a Supplemental/Compensatory Education Instructor. Her status is clearly explained to her each year, together with the limited year-to-year duration of her employment.

12. Ms. Moore acknowledged that she has always been aware that she was not assigned to a regular classroom, that her duties involved remedial small group instruction, and that she was employed at a specific hourly rate of pay.

As to Mary McEwan

1. Mary McEwan was employed as a Supplemental Instructor from October 1975 through June 1979, and as a Title I teacher from October 10, 1979 through December 21, 1979. Her working hours varied between 15 and 20 per week.

2. Mary McEwan's function as a Supplemental Instructor involved remedial work and perceptual instruction to impaired and handicapped children, who had previously been tested and classified for such instruction by a child study team. She filled the gaps between functions performed by the children's regular classroom teacher and their special education teacher.

3. Mrs. McEwan was responsible for an average of 12 to 16 children, but she taught them individually or in groups of two, as warranted. The number of instructional hours per child varied, depending on need.

4. Ms. McEwan planned schedules for each child, together with their regular classroom teacher. She submitted written reports on their progress, did grading for inclusion in their report cards, met with their parents and prepared lesson plans.

5. She did not attend general faculty meetings, but met with other supplemental and Title I instructors.

6. Ms. McEwan was observed by a Supervisor, who was a Learning Disability Specialist, once a year.

7. Ms. McEwan did not have a regular roster of children. Some would be removed from her group during the year and others would be added, as they were evaluated.

8. As a Title I teacher for three months in 1979, Ms. McEwan taught only reading or math, and she worked with five or six children in a group, meeting with them one hour a-week. She was not observed by a Supervisor in her Title I duties.

9. Ms. McEwan was paid on an hourly basis. She received no holiday pay, sick pay or other related benefits. When she was first employed and on the occasion of each annual renewal, she was aware that her responsibilities were special and different than regular teachers.

As to Elaine Nicholas

1. Elaine Nicholas was employed by the respondent from September 1969 through June 1980 as a Supplemental Instructor, which employment was renewed from year to year.

2. It was stipulated that Elaine Nicholas' duties, responsibilities, compensation and benefits were essentially the same as Mary

McEwan's. The only difference was that in some years, she was responsible for more students than 12 to 16.

As to Beverly Katz

1. Beverly Katz was employed by the respondent from October 1973 through June 1980 as a Supplemental Instructor, which employment was renewed from year to year.

2. It was stipulated that Beverly Katz's duties, responsibilities, compensation and benefits were essentially the same as Mary McEwan's and Elaine Nicholas'. She taught a maximum of 15 hours per week during each year.

As to Claire Kingsley

1. Claire Kingsley was employed as a Compensatory Education Instructor from November 28, 1977 through May 1978, and in combination as a Title I-Compensatory Education Instructor from September 15, 1978 through June 13, 1980. During the earlier portion of the above dates, she worked 12 and one-half hours per week. This has now increased to 25 hours per week.

2. Mrs. Kingsley's students are those who fail or fall below State minimum levels, local levels, or those who are recommended for remedial work by their regular teachers. These children are pretested and come from different grades.

3. Mrs. Kingsley teaches her children in nine half-hour blocks of time during each day, and she handles between three and seven children at a time, either in groups or individually.

4. At the present time, Mrs. Kingsley has 33 such students and she teaches primarily mathematics and reading. She prepares their lessons and evaluates her students either monthly or bi-monthly. These evaluations are given to the children's regular teachers for insertion into their records.

5. The children taught by Mrs. Kingsley are not classified, such as those who would be put into special education classes.

6. Mrs. Kingsley does not attend regular staff meetings unless a special subject matter pertinent to her teaching is involved.

7. Mrs. Kingsley is observed by her Principal and Supervisors in the Mathematics and Reading Departments. She receives an evaluation once each year.

8. Each year at the end of April, Mrs. Kingsley receives a termination letter, followed by a re-employment letter in May, June or July.

9. She is paid on an hourly basis, on vouchers that she submits. She receives some benefits given to her as a result of negotiation or voluntarily by the respondent.

10. Mrs. Kingsley is aware that her wages are derived from Federal and State programs, and that the availability of such funds fluctuates from year to year.

11. Mrs. Kingsley submits separate vouchers for faculty meeting time, extra work or parent conferences that are required of her.

Additional FINDINGS OF FACT are derived from the testimony of respondent's witnesses: Thomas Kavanaugh, Director of Special Education and Supervisor of the Supplemental Instruction program; Gerald DelCorso, Administrative Assistant to the Superintendent and Coordinator of State and Federal grants; Edward Callison, Principal at Hoover School; and Donald Angelica, Supervisor of Personnel, responsible for employment and evaluation of nontenured personnel.

1. There are substantial differences between the duties required of regular staff member teachers and Title I, Supplemental/Compensatory Education Instructors, as follows:

(a) A regular teacher has required homeroom duties and additional duties after school. A Supplemental Instructor does not.

(b) Compilation of a plan book is required of regular teachers, without input to or from anyone else. Supplemental Instructors may do this in conjunction with a child study team.

(c) Regular teachers are responsible for a 180-day term for each child in their class. A Supplemental Instructor can be assigned for a short time, which may not necessarily be the entire term.

(d) A regular special education teacher must have a special certification as "Teacher of the Handicapped." A Supplemental Instructor does not require this.

(e) The final and ultimate responsibility for designing an instructional plan rests with the Child Study Team where Supplemental Instructors are involved. In such cases, the Supplemental Instructor may have input, but they do not have the final responsibility.

(f) In the case of Supplemental Instructors, their records are submitted to the Child Study Team rather than directly input into each child's permanent record.

(g) Regular teachers are required to automatically attend all meetings. Supplemental Instructors may do this, but are not required to do so. They also will be paid additionally for such attendance.

(h) Regular parent-teacher conferences are required of teaching staff members. This is optional in the case of Supplemental Instructors.

(i) The students assigned to Title I, Compensatory/Supplemental Education Instructors are initially evaluated and specially assigned for remedial work, separate and apart from any regular classes of which they may be members.

(j) The ultimate responsibility for assignment of grades does not rest with the Title I, Supplemental/Compensatory Education Instructors, although they may have optional input into the compilation of these grades.

(k) Each of the Title I, Supplemental/Compensatory Education Instructors, who are the subject of this appeal, receive individual termination notices at the end of each school year informing them that, due to possible fluctuation in funding and changing needs, they cannot assume that they will be employed for the coming year. Then, when the funding is committed and programs are planned for the coming year, employment notices are sent to the petitioners, informing them that the employment is only to the end of the coming school year, or earlier.

(l) The respondent clearly informed each of the petitioners, each year, of the length and conditions of their employment.

(m) An important element of difference between regular teaching staff members and the petitioners is that the regular teacher has the ultimate responsibility for students' grades, evaluations, reports and promotions. A Title I, Supplemental/Compensatory Education Instructor may contribute to the above or do a great deal of it, but she does not have the ultimate responsibility.

(n) In most cases, the starting and ending dates of employment for the petitioners are different and of shorter duration, than those of regular teaching staff members, who are in attendance from the first day of school until the last each year. See Exhibits J-1 and R- 27.

LEGAL DISCUSSION

For purposes of arriving at a determination in this matter, the basic principle laid down by the Appellate Division in Point Pleasant Beach Teachers Ass'n v. Callam, 173 N.J. Super. 11 (App. Div. 1980) is most pertinent. The nature of the employment tendered and accepted, the terms, conditions and duties of the employment and the conduct of the parties must be studied. Since Point Pleasant Beach, other cases have been decided involving the same subject matter. Some of these cases have dealt with Title I teachers and others have been concerned with Supplemental or Compensatory Education Instructors. The facts and circumstances of each case have differed, but the standards of Point Pleasant Beach have prevailed, regardless of the variations.

One such case, closely related to the matter at hand, is Claire Bisgay, et al. v. Bd. of Ed. of the Tp. of Edison, 1980 S.L.D. ____(Commissioner of Education, decided September 8, 1980). The Commissioner there determined that the petitioners, Supplemental Instructors, were not entitled to benefits similar to those sought in this case, and he stated as follows:

> . . . pupils are screened by the local child study team and an educational program is designed by a learning disabilities consultant in accordance with each pupil's individual needs. The supplemental teacher is then required to implement the individualized educational program as designed by the learning disabilities teacher consultant on a small group individual basis. The supplemental instruction afforded to each child is removed from the regular classroom setting; however, the overall responsibility for decision making with respect to each child's educational achievement by and large ultimately remains that of the learning disabilities teacher consultant and his or her regular classroom teacher. . . in any event the ultimate goal to be achieved in affording educationally handicapped pupils supplemental instruction is to have them return to their regular classroom on a full time basis. . . . those persons who serve as supplemental teachers actually assist the regular classroom teacher by providing such remedial instruction for certain limited periods of time during the school day in accordance with an educational plan developed, not by the supplemental teacher, but rather by a specially certificated learning disabilities teacher consultant.

See also Hamilton Township Supplemental Teachers Ass'n et al. v. Bd. of Ed. of the Tp. of Hamilton, 1980 S.L.D. ___ (State Board of Education, decided October 1, 1980). There the State Board reemphasized the observations made by the Appellate Division in Point Pleasant Beach, where importance was accorded certain elements that differentiated Title I teachers from regular teachers, such as annual hiring on an as needed and hourly pay basis, individual submission of written requests for employment each year, differences in evaluation procedures and primary duties as tutors giving individual remedial aide to the children. The State Board also emphasized the essential character of the supplemental instructors' job, which is temporary and variable, depending upon the needs of the children in the district from time to time.

In Anderson v. Bd. of Ed. of Summit, 1980 S.L.D. ___ (State Board of Education, decided December 5, 1980). The State Board upheld the Commissioner's conclusion that Supplemental Instructors did not possess a degree of regularity and permanence sufficient to constitute them teaching staff members within the meaning of the tenure laws. In so doing, the State Board referred to the absence of written employment contracts, a shortened work day and work year, a lesser degree of responsibility and payment of compensation on an hourly basis.

Petitioners cite Lorenz v. Bd. of Ed. of the Tp. of Burlington, 1980 S.L.D. ___ (State Board of Education, decided December 3, 1980), in support of their claim that they should be characterized as regular teaching staff members. There, the State Board affirmed the concept that the functions performed by the teachers is of greater consequence than the source of funds used to pay them, and agreed with the generally recognized principle that permits the granting of tenure and other related benefits to teachers whose terms of employment, duties and responsibilities are substantially the same as regular teaching staff members. However, the standards for measurement of those factors, as stated in Point Pleasant Beach, are not changed by the specific findings in Lorenz.

The petitioners in Point Pleasant, like those in the instant matter, were primarily assigned teaching responsibilities in individual remediation outside of and supplemental to the relatively large graded classroom environment. They were paid

hourly and were basically free from extra duty assignments. In many respects, however, they also performed many duties functionally similar to regular classroom teachers.

Another case which discussed the parameters of classifying teachers as regular staff members is Kuboski v. Bd. of Ed. of the Borough of South Plainfield, 1978 S.L.D. 322, in which the Commissioner stated:

> . . . Those persons employed to perform duties to supplement the regular instructional program of the school's professional teaching staff members are not entitled, even if fully certified, to all the benefits or protection afforded regular teaching staff members unless they perform all of the principal duties and assume all of the principal responsibilities of regular teachers. . . . This determination is grounded upon the general principle that significant differences exist between supplemental or compensatory education teachers who perform duties often in one-to-one relationship or on a per-pupil basis, and those professional teaching staff members entrusted with the prime responsibility for classroom instruction, education planning and curriculum development. Tenure entitlement and an entitlement to the designation of 'teaching staff member' occurs in the latter instance and it does not occur in the former instance.

The foregoing authorities and legal principles can be applied in the case at hand with equal force to each of the three concerned areas of employment, Title I, Compensatory and/or Supplemental Instructors. This is true because of the similarities that exist in the claims of all six petitioners, regardless of the source of funding used to pay them.

On the question of the petitioners' claims for pro rata compensation, sick leave, State health insurance coverage and other benefits on the same basis as regular teaching staff members, irrespective of their entitlement to tenure, petitioners are precluded, by virtue of the voluntary and freely accepted year-to-year terms of their employment, the expectations of their employer and the respondent's need for flexibility in operation, which would be impeded if the petitioners were granted tenure. This view is amply supported by applicable case law. See Garretson v. Bd. of Ed. of the

Borough of Middlesex, 1980 S.L.D. ___ (Commissioner of Education, decided November 3, 1980); Kearny Education Ass'n, et al. v. Bd. of Ed. of Kearny, 1980 S.L.D. ___ (Commissioner of Education, decided August 27, 1980); Jersey City Education Ass'n v. Bd. of Ed. of Jersey City, 1980 S.L.D. ___ (Commissioner of Education, decided August 26, 1980); Claire Bisgay, et al. v. Bd. of Ed. of the Tp. of Edison, supra; Hamilton Tp. Supplemental Teachers Ass'n et al. v. Bd. of Ed. of the Tp. of Hamilton, supra.

Therefore, based upon the foregoing discussion, findings of fact and examination of the law, it is **CONCLUDED** that:

A. Although each of the petitioners functioned in many respects in the same way as regular teachers, there are many substantial areas where the terms of employment, conditions, duties and responsibilities performed by and expected of them differed substantially from those of regular teaching staff members.

None of the petitioners have met the precise conditions laid down in the statute for the acquisition of tenure; none of them have been ultimately responsible for designing the instructional plan; none of them had the final responsibility for assignment of grades; none of them were automatically required to attend regular staff meetings and hold regularly scheduled parent-teacher conferences. They all handled the children assigned to them in individual remedial work, outside of and supplemental to the regular classroom environment. Although they have been evaluated by superiors, those evaluations were not as frequent or as thorough as required of regular teaching staff members. Each of the petitioners was clearly aware of the year-to-year, non-guaranteed nature of their employment, which was accepted by them on the terms on which it was offered. The conduct of the respondent clearly indicated to each petitioner that she was being employed each year in a manner intentionally designed by the Board to afford it a flexibility in operation which would be imperiled if the respondent were forced to grant tenure to these employees.

In the case of Helen M. Casazza, two or three of the negative elements recited above were not present during the months that she taught in the pilot/experimental class. However, the unique nature of this temporary program demonstrates the need of the Board for flexibility in operation with the use of non-tenured personnel as set forth above.

None of the petitioners are therefore, entitled to be considered regular teaching staff members. The petitioners did not substantially satisfy and meet all the precise conditions that would have entitled them to such status.

B. Petitioners are not entitled to tenure, pro rata compensation, sick leave, State health insurance coverage, and the other benefits they requested, on the same basis as regular teaching staff members.

It is, therefore, **ORDERED** that:

A. The appeals of Nancy L. Reed, Joan Schnuer, Elisa Nesnay, Beth Linkletter, Louise Rubenstein and William J. Zitelli are **DISMISSED,** with prejudice, by virtue of their withdrawal prior to the prehearing conference.

B. The appeal of the Bergenfield Education Association is **DISMISSED,** with prejudice, in accordance with the parties' stipulation to that effect on August 28, 1980.

C. The appeals of Martha Bertish, Jamie K. Milestone, Ella J. Thomas, Karen Snyder, Linda Rosenthal, Constance Bellia, Virginia Atfield and Marion Franz are **DISMISSED,** with prejudice, based upon their withdrawal by representation of counsel at the beginning of the hearing.

D. That the appeals of Claire M. Kingsley, Elaine Nicholas, Mary McEwan, Beverly Katz, Helen M. Casazza and Joan Moore are **DISMISSED,** with prejudice, as to all relief requested, for the reasons hereinabove set forth.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, FRED G. BURKE,** who by law is empowered to make a final decision in this matter. However, if Fred G. Burke does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **FRED G. BURKE** for consideration.

April 1, 1981
DATE

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

April 3, 1981
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

April 7, 1981
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

db

EXHIBITS

Number	Description
J-1	Stipulated dates of Title I, Supplemental or Compensatory employment of each petitioner (omitting contract employment).

Re Helen M. Casazza

P-1	Philosophy
P-2	Blank form of daily record sheet
P-3	Monthly progress report
P-4	Memo to Title I parents
P-5	Order form
R-1	Letter 7/7/79
R-2	Letter 4/12/79

Re Joan Moore

P-6	Behavior check-list
P-7	Academic check-list
P-8	Narrative report
P-9	Blank form, evaluation of support personnel
P-10	Memo 2/2/77
P-11	Letter 5/30/80
R-4	Letter 4/12/79
R-5	Letter 4/17/79

OAL DKT. NO. EDU 3298-80

Re Mary McEwan

R-7	Letter 4/12/79
R-8	Letter 4/16/79

Re Elaine Nicholas

R-10	Letter 4/12/79
R-11	Letter 4/15/79

Re Beverly Katz

R-13	Leter 4/12/79
R-14	Letter 4/15/79

Re Claire M. Kingsley

R-16	Letter 4/13/78
R-17	Letter 5/25/78
R-18	Letter 7/19/78
R-19	Letter 4/12/79
R-20	Letter 7/7/79
R-21	Letter 4/11/80
R-22	Letter 5/30/80
R-24	Page from Policy Manual, September 1979, Paragraphs 4095 and 4096
R-25	Page from Policy Manual, September 1979, Paragraph 4020
R-26	Booklet/Agreement between Bergenfield Board of Education and Bergenfield Education Association 1979-81
R-27	List of school year beginning and ending dates, 1968-69 through 1979-80

BERGENFIELD EDUCATION ASSOCIATION ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law.

The Commissioner observes that exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Petitioners' primary exceptions to the initial decision by the Honorable Arnold Samuels, ALJ argue that the remaining petitioners to the matter herein controverted are regular teaching staff members because their duties show only minor differences to those required of other staff designated as tenure eligible regular teaching staff members.

The Board's primary exceptions affirm the findings of Judge Samuels based on the merits of the case while maintaining that the Judge erred in not invoking N.J.A.C. 6:24-1.2, the "90-day rule."

Petitioners' reply exceptions rely on Casazza v. Board of Education of the Borough of Bergenfield, decided April 3, 1981, to sustain the argument that the 90-day rule not be invoked.

The Commissioner agrees with the arguments advanced by the Board. He finds that Judge Samuels erred in not determining that the 90-day filing requirement should be invoked. Bernards, supra; Riely, supra The Commissioner finds petitioners' reliance on Casazza inappropriate to the facts and circumstances in the present case. With the noted exception to the Court's failure to invoke N.J.A.C. 6:24-1.2, the Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

The Commissioner agrees with the withdrawal of the appeals of various petitioners by their own action or through counsel and as stipulated for the appeal of the Bergenfield Education Association.

The appeals of remaining petitioners Kingsley, Nicholas, McEwan, Katz, Casazza and Moore are dismissed with prejudice for the reasons as stated.

IT IS SO DIRECTED.

COMMISSIONER OF EDUCATION

May 18, 1981

Pending State Board

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5486-80

AGENCY DKT. NO. 430-8/80A

IN THE MATTER OF:

ROBERT W. PHILBIN,
Petitioner
v.
BOARD OF EDUCATION OF THE BOROUGH OF PITMAN, GLOUCESTER COUNTY,
Respondent.

Record Closed: February 19, 1981
Received by Agency:

Decided: April 6, 1981
Mailed to Parties:

APPEARANCES:

For the Petitioner: **Steven R. Cohen,** Esq. (Selikoff & Cohen, P.A.)

For the Respondent: **Steven W. Suflas,** Esq. (Archer, Greiner & Read)

BEFORE **ERIC G. ERRICKSON,** ALJ:

STATEMENT OF CASE:

Petitioner Philbin, a teacher employed by the Respondent, Pitman Board of Education (Board) appeals from an action whereby the Board refused to reemploy him in September 1980 after he had been on leave of absence from January through June 1980 to pursue full time academic studies at a New Jersey college. He alleges that the Board's

refusal to reemploy him in September 1980 violated the tenure and seniority rights which he had acquired in employment prior to his leave. The Board, conversely, asserts that its refusal to reemploy him was a legal exercise of its discretionary authority under the terms of both petitioner's leave and the expressed terms of the negotiated agreement then in effect between the Board and the Pitman Education Association.

PROCEDURAL RECITATION:

Petitioner filed the Petition of Appeal together with an application for emergent relief, pending completion of the litigation, pendente lite, before the Commissioner of Education on August 29, 1980. The matter was transferred to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. After the Answer was filed on September 22, 1980, oral argument on the application for emergent relief was scheduled and heard on September 26 at Cherry Hill. In compliance with an order of the undersigned, dated October 2, 1980 and approved by the Commissioner granting the requested emergent relief, petitioner was reinstated by the Board, pending a final determination, to a teaching position with salary and attendant emoluments retroactive to September 1, 1980.

A plenary hearing on the merits was conducted at Pitman on November 26, 1980. Post hearing briefs and memoranda were submitted, completing the record on February 19, 1981.

UNCONTROVERTED FACTS:

The following uncontested facts reveal the context of the dispute:

Petitioner, who is certified as a teacher of music and had been employed by the Board continuously as a teacher of instrumental and vocal music since 1970, requested a leave of absence from January 16 through May 30,1980 to pursue full-time college studies in environmental science. (J-3) After discussing the proposed leave with the

Superintendent, he agreed to extend the request for leave to June 30, 1980 in the interests of minimal changes of assigned teaching staff. The Board unanimously approved the following resolution on October 17, 1979:

> That Robert Philbin, Elementary Music Teacher be granted a leave of absence without pay, effective January 15, 1980. Said leave to be in accordance with the provisions in 7-6 Extended Leave of the Agreement.
> (J-4)

On October 19, 1979, the Superintendent notified petitioner as follows:

> At its regular meeting on October 17, 1979, the Board of Education approved granting a leave of absence without pay effective January 16, 1980. Said leave is to be in accordance with the provisions in 7-6 Extended Leave of the P.E.A.-Board Agreement.
>
> Best wishes as you complete your program course requirements.
> (J-5)

Thereafter, on February 2, 1980, the Board, because of then present and forseeable declines in pupil enrollment, eliminated four teaching staff positions.
(J-7)

On May 1, 1980, petitioner wrote the Superintendent to confirm that he would be returning from his leave of absence ". . .ready and available for teaching assignment on September 1, 1980." (J-7) On June 10, 1980, petitioner again wrote the Superintendent as follows:

> As you know, I have indicated that I will be ready and available for teaching assignment beginning September 1, 1980, as I am returning to the Pitman Schools from my leave of absence.
>
> I would like to request at this time a change of assignment to exclusively instrumental teaching duties, grades 4-8, beginning in September.
>
> I would also like to request a change of base school from the Middle School to Memorial School. There are certain conflicts of which I am sure you are aware which might be minimized by such a change, and which change of base school will, I believe, benefit the students which will be assigned to me. . . .
> (J-8)

On June 25, however, the Board, by unanimous vote, passed the following resolution:

> That the request of Robert W. Philbin (on extended leave of absence for second half of 1979-80 school year) for re-employment for 1980-81 school year shall be denied for the following reasons: (1) one full time elementary music position was eliminated by resolution adopted February 20, 1980; and (2) the terms of the 1977-1980 Teachers Agreement, Article 7-6-1, provide that after a leave of absence the Board of Education is not bound ". . . to re-employ the person nor return him to his previous position. . . ."
>
> (J-10)

The Superintendent then notified petitioner, by letter dated June 10, 1980, as follows:

> Please be advised that the Pitman Board of Education reviewed your request to return as a teacher of music for the ensuing school year 1980-1981.
>
> At a regularly scheduled meeting on June 25, 1980, the Board of Education passed a motion denying your request for reemployment. The reasons provided for such denial were:
>
> 1. The elimination of a full-time elementary music position for the coming year.
>
> 2. The Board of Education under the terms and conditions of granting you a leave of absence was not bound to subsequently reemploy you. . . .
>
> (J-11)

To this the Superintendent responded that petitioner's letter did not accurately reflect their conversation. He declined, however, to indicate what the inaccuracies were. (J-15)

The Board's policy on extended leave during all relevant periods covered by this dispute provided that:

> Any tenure teacher may apply for leave of absence for a period of one year (maximum) for the following reasons: service in the Peace Corps, VISTA or Teacher Corps, for teaching fellowships, scholarships, military service, prolonged illness, temporary transfer of spouse and similar activities as approved by the Board. The granting of such leave of absence does not bind the Board to reemploy the person nor return him to his previous position except when stated otherwise by Law.
>
> The Board may grant an extension or renewal of such leave upon written application for the same.
>
> A teacher on extended leave will not be given credit on the salary guide for the time spent "on leave" nor will time spent on extended leave count toward accumulation of credit toward sabbatical leave time. Upon returning, the teacher will be restored to the same position on the salary guide that he occupied at the start of the leave period.
>
> Sick leave may not be accumulated during the period of extended leave; however, previously unused sick leave time will be restored when the teacher returns to active status.
>
> The teacher, as specified above, shall be given professional consideration in filling vacancies that may occur after he notifies the Board that he desires to return to active service.
> (J-17)

Petitioner, despite the Superintendent's June 10 letter, communicated with the Superintendent by letter dated August 13, 1980, requesting that he be notified of his assignments and salary for the ensuing academic year. (J-12) Thereupon, the Superintendent advised petitioner to meet with him or converse with him by telephone at an early date. After speaking with the Superintendent by telephone, petitioner memorialized his impressions of part of their conversation as follows:

> . . . You stated at that time that the purpose of that meeting could be served by our telephone conversation, and that that purpose was to reiterate the position stated in the letter to me from the Board of Education stating that my job would not be renewed. In short, I did not have a job to return to, and that the terms of my leave of absence did not state that I would be returning to Pitman to teach.

> I asked about the reduction-in-force that was undertaken by the Board, and that there were two teachers less senior to me in the system's music department was not disputed by you. I also stated that tenure law supersedes contract language, and you continued to refer me to Section 7-6 of the current contract as to why my contract had been terminated by the Board.
>
> You also stated that there would be no point to my reporting for the in-service on September 2 as I had no official position or function, as I am not now a teaching staff member. You further stated that if I did appear on school property action would be taken; to wit, that I would be removed as a disorderly person, presumably by the Pitman Police Department. . . .
>
> (J-14)

TESTIMONY OF WITNESSES:

The Board President, whose deposition testimony was, by agreement, entered into evidence, testified that it was the Board's custom to notify tenure teachers in April of their salary for the ensuing year. She testified that, although petitioner had acquired tenure in the district, the Board believed it was not obligated to reemploy him in September 1980 because of a reduction in force and the express wording of Paragraph 7-6-1 of the negotiated agreement under which petitioner had requested and been granted an extended leave. This view of petitioner's status was also expressed by the Board's Personnel Committee Chairman in deposition testimony.

The Superintendent testified at the hearing that he had conferred with petitioner early in the 1979-80 school year concerning his request for extended leave. He testified that since petitioner's request came too late for a sabbatical leave, he advised him that he could apply for leave under Paragraph 7-6-1 of the agreement which expressly provides that:

> . . .Any tenure teacher may apply for leave of absence for a period of one year (maximum) for the following reasons: service in the Peace Corps, VISTA or Teacher Corps, for teaching fellowships, scholarships, military service, prolonged illness, temporary transfer of spouse and similar activities as approved by the Board. The granting of such leave of absence does not bind the Board to reemploy the person nor return him to his previous position except when stated otherwise by Law. . . .

The Superintendent testified, however, that he warned petitioner that if he applied under this provision, he would incur a high risk that the Board, because of its past differences with petitioner, could opt not to reemploy him in September 1980. The Superintendent testified that at that meeting, he encouraged petitioner to pursue his studies but specifically pointed out to petitioner the language of the agreement and stated to him: . . .I think you are going to have a tough time gaining reemployment here. . . . (J-1 at p. 28)

The Superintendent testified that when petitioner contacted him by his letters in May and June 1980, he considered that he was in fact applying for reemployment rather than returning from leave with full tenure and seniority rights to continued employment.

The Superintendent testified also that at the time petitioner went on leave, he had greater seniority than any music teacher then employed by the district or at the time he filed the appeal in August 1980.

Petitioner testified that he had served the Board in various teaching assignments as a vocal, instrumental and general music teacher. He testified that when the Superintendent cautioned him about risk of nonreemployment, he commented that Paragraph 7-6-1 preserved his rights of tenure and seniority. He testified that he based that conclusion on the wording of 7-6-1, which specifies that the granting of an extended leave does not bind the Board to reemploy the person nor return him to his previous position ". . .except when stated otherwise by law." (J-17) (Emphasis supplied.)

Petitioner testified that after the Superintendent advised him by letter in June that he would not be reemployed, he conferred with him and asserted that he had the legal right to continued employment. He testified that he was then told that if he appeared on school property in September, he would be evicted as a disorderly person.

Petitioner testified that he relied on his understanding that a provision in the negotiated agreement could not render of no effect the statutory protection under the teacher tenure act. In this regard, he testified:

> . . .My understanding of the leave of absence is you take a leave of absence from the job with the understanding that [at] the termination of that leave you return to the job. . . . (Tr. 45)

FINDINGS OF FACT:

On the basis of a preponderance of the credible evidence, I **FIND** the following to be facts to be considered together with those uncontroverted facts previously set forth:

1. Petitioner, during September 1979, initiated a proposal that he be granted a leave to continue on a full-time basis his studies in environmental science from January 15, 1980 and ending May 31, 1980.

2. The Superintendent encouraged petitioner to pursue those studies which petitioner had begun in 1977 with a view to gaining certification in an alternate subject matter area. The Superintendent did, however, caution petitioner that under Paragraph 7-6-1 of the negotiated agreement, the Board was not obligated to reemploy him should he be approved for such a leave.

3. When the Superintendent objected to May 31 as the end date of the proposed leave, petitioner and the Superintendent amicably agreed, in the interests of less disruption, to revise the end date to June 30, 1980.

4. Both the Board and the Superintendent interpreted Paragraph 7-6-1 to obligate the Board to consider petitioner's request to return to active employment in September 1980. The Board did consider his request to return to active employment.

5. Both the Board and the Superintendent interpreted Paragraph 7-6-1 to give the Board full discretionary authority over whether petitioner should be returned to active employment after the termination of his extended leave. The Board exercised its discretion by denying his request to return to a teaching position in September 1980.

6. At the time petitioner's leave began on January 15, 1980, he, as a tenured teacher, had greater seniority than any other music teacher employed by the Board. His seniority at that time also exceeded the seniority of any other music teacher employed by the Board at the beginning of the 1980-81 school year.

DISCUSSION AND CONCLUSIONS:

At issue here is whether the Board, after approving petitioner's extended leave without pay effective from January 15, 1980 through June 30, 1980, was obligated to honor his request to return him to active teaching duty or whether the terms of Paragraph 7-6-1 of the negotiated agreement gave the Board discretionary authority to refuse to do so.

A local board of education is a quasi-municipal entity empowered by the Legislature to do only those things which it is either required to do or permitted to do by statutory fiat. The Legislature, in its wisdom, has clothed local boards with discretionary authority to approve or to refuse to approve requests for extended leaves of absence of teaching staff members. Petitioner made such a request. I **CONCLUDE** from the evidence in the record that at no time during his discussion with the Superintendent or in his written request for a leave did petitioner signify that he was resigning or that he waived any rights emanating from his acquired tenure and seniority entitlements. This conclusion is in harmony with the words of the Court in West Jersey Title v. Industrial Trust Co., 27 N.J. 144, at pp. 152-153 (1958), wherein the Supreme Court of New Jersey stated:

> . . .Waiver is the intentional relinquishment of a known right. . . . It is a prerequisite to waiver of a legal right that there be "a clear unequivocal and decisive act of the party, showing such a purpose or acts amounting to an estoppel on his part.". . .
>
> . . .Waiver presupposes a full knowledge of the right and an intentional surrender. Waiver cannot be predicated on consent given under mistake of fact. . . .

I further **CONCLUDE** that at all times, petitioner sought only the Board's authorization of an extended leave. The Board, clothed as it was with discretionary authority to approve such a leave, granted his request for a leave for a specific period of time. Petitioner, thereafter, in timely fashion, notified the Board in May and again in June of his intention to return to active employment in September 1980. This conclusion is amply supported by the fact that he requested and the Board granted his extended leave for a specific term.

The Appellate Court in Blinn v. Pub. Emp's. Retirement System Trustees, 173 N.J. Super. 278, at pp. 278/279 (App. Div. 1980) stated:

> We are convinced that the grant of a leave of absence to a state employee does not terminate the employment relationship between the state and the employee and that, during the term of such leave of absence, the employment relationship continues-albeit in an inactive status. The phrase "leave of absence" itself "connotes a continuity of the employment status," Roche v. Board of Review, 156 N.J. Super. 63, 65 (App. Div. 1978); Bowers v. American Bridge Co., 43 N.J. Super. 48 (App. Div. 1956), aff'd o.b. 24 N.J. 390 (1957). . . . It is simply an authorized temporary absence from active service which, in the normal course and all other things being equal, implies the right of the employee to return to active employment in the employer's service at the conclusion of such leave of absence. Were it to be equated with a discontinuance or termination of employment, a leave of absence would be a meaningless term, signifying nothing. (emphasis supplied.)

The Board, in the instant matter, thus authorized a temporary leave of absence which, as in Blinn, supra, connoted a continuity of employment status. Thus, it was implied that petitioner had the right to return at the end of the approved temporary leave.

It is well settled that a provision in a negotiated agreement can neither directly nor by indirection, render the provisions of a statute null and void. As was stated in Nancy Weller v. Board of Education of the Borough of Verona, 1973 S.L.D. 513 at p. 521:

> . . .In the Commissioner's view, the statutes in N.J.S.A. 18A are so explicit with respect to their delegation of authority, that they take preference over the more general provision of the New Jersey Employer-Employee Relations Act. . . .

See also Saffore v. Atlantic County Insurance Co., 21 N.J. 300 (1956); Margaret A. White v. Board of Education of the Borough of Collingswood, 1973 S.L.D. 261.

I **CONCLUDE** that the wording of Paragraph 7-6-1 of the negotiated agreement, in that it appears to vest the Board with unilateral authority to terminate a tenured employee on extended leave, is inconsistent with the Legislative concept, as well

as the ordinary meaning of a leave. It is likewise inconsistent with the protection conferred on tenured teachers by the Legislature and the State Board of Education in the tenure statutes and in N.J.A.C. 6:3-1.10. Such statutes and rules of the State Board affecting the Board and its employees and the agreements negotiated under N.J.S.A. 34 must exist as harmonious provisions. In this instance, Paragraph 7-6-1 was out of harmony with the statutes and rules.

I further **CONCLUDE** that petitioner was entitled, by reason of his tenure status and greater length of seniority than any other of the Board's music teachers, to return to active employment in September 1980. While the Board, through nescience, assumed on the basis of provisions in Paragraph 7-6-1 that it had authority to refuse to employ him for 1980-81, it had no legal authority to do so about the certification of tenure charges, pursuant to N.J.S.A. 18A:6-9 et seq.

DETERMINATION:

In consideration of the conclusions previously set forth herein, it is **DETERMINED** that petitioner, who by order of the Commissioner was returned to active duty by the Board with benefits retroactive to September 1, 1980, is entitled by reason of his tenure and seniority rights to continued employment in that position or another comparable teaching position. It is so **ORDERED.** Mary Ann Popovich v. Board of Education of the Borough of Wharton, 1975 S.L.D. 737.

It is further **ORDERED** that the Board and the majority representative of its teachers shall, in timely fashion, renegotiate the terms of Paragraph 7-6 in order to insure that its extended leave provisions are in harmony with the rights of tenure teachers set forth in the statutes and the rules of the State Board of Education. By so doing, the Board and its teachers will avert further costly and disruptive litigation.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, FRED G. BURKE,** who by law is empowered to make a final decision in this matter. However, if Fred G. Burke does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

OAL DKT. NO. EDU 5486-80

I hereby **FILE** my Initial Decision with **FRED G. BURKE** for consideration.

April 6, 1981
DATE

Eric G. Errickson
ERIC G. ERRICKSON, ALJ

Receipt Acknowledged:

April 6, 1981
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

April 8, 1981
DATE

Elizabeth J. Longyear Esq.
OFFICE OF ADMINISTRATIVE LAW

bm

EXHIBITS IN EVIDENCE:

J-1 Deposition of Borchetta, Oberfrank, Griffith, dated November 4, 1980

J-2 Deposition of Philbin, dated November 5, 1980

J-3 Philbin to Borchetta, dated September 26, 1979

J-4 Minutes of Board (Excerpt), dated October 17, 1980

J-5 Borchetta to Philbin, dated October 19, 1979

J-6 Minutes of Board (Excerpt), dated February 20, 1980

J-7 Philbin to Borchetta, dated May 1, 1980

J-8 Philbin to Borchetta, dated June 10, 1980

J-9 Motion at Board Meeting, dated June 10, 1980

J-10 Minutes of Board, dated June 25, 1980

J-11 Borchetta to Philbin, dated June 30, 1980

J-12 Philbin to Borchetta, dated August 13, 1980

J-13 Borchetta to Philbin, dated August 14, 1980

J-14 Philbin to Borchetta, dated August 18, 1980

J-15 Borchetta to Philbin, dated August 21, 1980

J-16 Philbin to Borchetta, dated August 22, 1980

J-17 Excerpt of Negotiated Agreement

J-18 Interrogatories-Answers by Board

J-19 Interrogatories-Answers by Petitioner

J-20 Initial Decision EDU Dkt. No. 1998-80

R-1 Borchetta to Philbin, dated December 21, 1979

R-2 Borchetta to Philbin, dated January 10, 1980

ROBERT W. PHILBIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PITMAN, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law.

The Commissioner observes that no exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

Petitioner shall continue in the employment of the Board as a tenured employee in a position suitable to his field of certification and seniority rights.

IT IS SO DIRECTED.

COMMISSIONER OF EDUCATION

May 21, 1981

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3390-80
AGENCY DKT. NO. 256-5/80A

IN THE MATTER OF:

PATRICIA DERILLO AND
MARY ANN DE SARNO,
Petitioners
v.
BOARD OF EDUCATION OF
THE BOROUGH OF CARTERET,
Respondent.

Record Closed: February 23, 1981
Received by Agency: April 6, 1981

Decided: April 1, 1981
Mailed to Parties: April 8, 1981

APPEARANCES:

Stephen B. Hunter, Esq. (Klausner & Hunter) for Petitioner

John Malone, Esq. (O'Dwyer, Malone & Conover) for Respondent

BEFORE **ERIC G. ERRICKSON,** ALJ:

Petitioners Derillo and De Sarno, tenured teaching staff members employed by the Carteret Board of Education (Board), allege that the Board illegally refused to allow them to use accumulated unused sick leave time of thirty-five (35) and thirty-one (31) days, respectively, prior to April 16, 1979, the date their Board-approved maternity leaves began. The Board denies that its actions were illegal or improper and asserts that the Commissioner of Education is without jurisdiction over the dispute.

PROCEDURAL RECITATION:

After the pleadings were filed in May and June of 1980, the Commissioner transferred the matters as contested cases to the Office of Administrative Law pursuant to N.J.S.A. 52:14F-1 et seq. The cases have since been treated as one consolidated case. At a prehearing conference conducted at Trenton on September 3, 1980, the parties gave Notice of Motion and Cross-Motion for Summary Decision. Thereafter, all relevant facts were incorporated into a Stipulation of Facts with appended exhibits submitted prior to briefing, which was concluded, completing the record on February 23, 1981. The matter is ripe for summary decision as a matter of law.

RELEVANT FACTS:

The following are stipulated to be the facts which establish the context of the dispute:

On November 27, 1979, Petitioner Derillo requested a maternity leave for the period April 16, 1980 through June 30, 1981. She additionally requested to use thirty-five (35) accumulated sick leave days commencing February 19, 1980. (Exhibit A) The Superintendent, on January 11, 1981, notified her that her maternity leave request was granted, effective April 16, 1980. He denied her further request for use of accumulated sick leave days beginning February 18 but advised that she was free to submit certification from her physician to document the period of actual physical disability. (Exhibit B) Petitioner Derillo secured and submitted a certificate from her physician dated January 29 which stated, in toto, the following:

> Mrs. Derillo is a maternity patient of mine. Her disability will begin on 2/19/80. (Exhibit C-2)

The Superintendent then advised Petitioner Derillo, on February 13, as follows:

> ***additional medical documentation must be provided by you before I can present your request for sick leave to the Board of Education. This is necessary because your physician has failed to offer any statement and/or explanation as to how your medical condition and/or problem will prevent you from performing your normal duties or will require your absence from your teaching position for the period of sick leave which has been requested.

> Therefore, in order for your request to be processed would you kindly submit to me a further statement from your treating physician which will explain your physical disability which is anticipated in more detail. (Exhibit D)

Thereafter, on February 20, petitioner's physician supplied an additional certificate here set forth in its entirety:

> Mrs. Derillo is a maternity patient of mine. Her length of disability should be from 2/19/80 to 4/15/80. During this period she will be unable to perform her normal duties due to her pregnancy. (Exhibit E)

Essentially, the same communications (Exhibits H, I, J, K, M) were exchanged by Petitioner De Sarno and the Superintendent with the exception of minor variations in dates and the texts of the two certifications submitted by her doctor in January and February 1980, as follows:

> This is to certify that Mrs. Mary Ann De Sarno is a maternity patient under our care and will be disabled as of February 25, 1980. (Exhibit J-2)

> Please be advised that Mrs. Mary Ann De Sarno is a maternity patient under my care; and her expected date of delivery is March 25, 1980.
>
> As a result of her pregnancy, she will be unable to work as of February 25th until April 16, 1980. (Exhibit L)

To these submissions, the Superintendent sent identical letters dated February 28 to petitioners Derillo and De Sarno, as follows:

> This letter is to inform you that the medical certification received in my office does not explain in any respect the medical aspects of disability as it relates to pregnancy delivery, and puerperium.
>
> Therefore, I am submitting to you a further request for medical documentation, pursuant to the controlling contractual provision which entitles the Board to this information.
>
> Enclosed is a check list which should be executed immediately by your physician and returned to me. Until this form is returned to my office, I can not certify your absence as personal illness. (Exhibits F-1, M)

The check list referred to in Exhibits F-1 and M calls for diagnosis, remarks and explanation of "***anticipated disability due to complications of pregnancy, or complications during delivery and/or the post partum period.***" (Exhibit F-2) No evidence is in the record that this form or any other additional medical certification was furnished by Petitioners Derillo or De Sarno who gave birth on April 12, 1980 and March 25, 1980 respectively.

Petitioner Derillo nor Petitioner De Sarno have not been permitted by the Board to use their respective thirty-five (35) or thirty-one (31) days of accumulated sick leave for any portion of the period prior to April 16, 1979.

The form in Exhibit F-2 was developed in 1979 by the Superintendent with the advice and participation of Board Counsel. No member of the Board participated in its formulation. While the Board has adopted no policy, rule, or regulation concerning the use of accumulated sick leave for the period of pregnancy disability, there is a policy in its negotiated agreement which provides, among other things, the following:

> ***2. A pregnant employee, prior to ceasing her duties, may apply for and receive a maternity leave. Application for such maternity leave shall be filed with the superintendent 60 days prior to the commencement of such leave. It shall specify the date upon which it is desired that such maternity leave shall commence and the date upon which the employee desires to return to her duties. The Board may require the employee to produce a certificate from a physician to support the requested leave period. In the event the Board disputes the length of the requested leave period, a request shall be made to the Middlesex County Medical Society for the appointment of an impartial physician whose findings and conclusions shall be binding upon both the Board and the employee.
>
> 3. If the physician's certificate provided by the employee or the report of the impartial physician does not support the length of the requested leave period, the Board may deny such leave or modify the length of time requested. If the physician's certificate produced by the employee or the advice of the impartial physician supports the length of the requested leave period, the Board shall grant such leave except if the granting would substantially interfere with the administration of the school. Upon granting of such leave, the term may be extended or reduced based upon medical reasons upon application by the employee to the Board for such extension or reduction. Such application shall be supported by a certificate of a physician. In the

> event of a dispute concerning the physician's certificate, the matter shall be referred to the County Medical Society for determination as set forth above. If there is no dispute with respect to the application for extension or reduction based upon medical reasons, such leave shall be extended or reduced provided it shall not interfere with the administration of the schools.*** (Exhibit G)

The Board itself, between November 1979 and February 28, 1980, did not consider petitioners' requests to use sick leave for pregnancy related disability. Nor did the Board or its agents ever discuss what specific information they believed would be required before allowing a teacher to utilize accumulated sick leave because of pregnancy related disability.

DISCUSSION AND CONCLUSIONS:

The Board argues that the Commissioner lacks jurisdiction to determine this dispute by reason of certain provisions in the negotiated agreement between the Board and its employees. In this regard, the Board makes reference in its Brief to subject matter in the negotiated agreement which has not been entered in evidence in this proceeding. Reliance on documents not in evidence would be singularly improper.

The one negotiated provision which is in evidence is under the heading MATERNITY LEAVE PROPOSAL. (Exhibit G) This exhibit sheds little light on the instant dispute since it does not go into specifics in the key matters of use of accumulated paid sick leave entitlement. Nor is it specific as to such important aspects as maternity leave with pay or without pay or the content of physicians' certificates submitted when requesting leave. It does provide, however, in the event of a dispute over the length of a maternity leave certified as necessary by a physician, for the appointment of an impartial physician, by the county medical society to render findings and conclusions binding on the parties. (Exhibit G)

Having reviewed the record herein and the numerous relevant decisions issued by the Courts and the Commissioner in recent years, I **CONCLUDE** and **DETERMINE** that the Commissioner holds jurisdiction over the subject matter of this dispute. That the issue arises under education law is apparent when one considers the statutory provisions for use of sick leave incorporated in the statutes N.J.S.A. 18A:30-1 through 5. Further evidence of his jurisdiction over such a dispute is found in case law wherein the

Commissioner has rendered decisions on subject matter contexts not unlike that presented herein. Board of Education of the Township of Cinnaminson v. Laurie Silver, 1976 S.L.D. 739; Delores Shokey v. Board of Education of the Township of Cinnaminson, 1978 S.L.D. 918; Lillian Hynes v. Board of Education of the Town of Bloomfield, 1980 S.L.D. ____ (decided June 30, 1980, aff'd State Board December 5, 1980); Judy Schulz v. Board of Education of the Town of Bloomfield, 1980 S.L.D. ____ (decided April 28, 1980, aff'd State Board December 3, 1980)

That a board of education may not discriminate against a pregnant teacher by denying her the right to use accumulated sick leave for the period prior to and following childbirth was conclusively established by the courts in Castellano v. Linden Board of Education, 158 N.J. Super. 350 (App. Div. 1978); 79 N.J. 407 (1979). The Appellate Court, therein, enunciated the following:

> ***The Board's concept that pregnancy is not an illness or injury in the usual sense of those words and thus must be excluded from sick leave benefits is far too restrictive and literal and not in accord with the cearly enunciated policy of this State against discrimination on account of sex. Sick leave benefits are intended to alleviate economic losses resulting from inability to work because of disability. This salutary purpose would not be furthered by excluding pregnancy-related absences merely because the condition may not be an illness by strict definition. In this regard, it is worthy of comment that the Temporary Disability Benefits Law, N.J.S.A. 43:21-29, as amended by L. 1961, c. 43, in providing compensation for disability resulting from accident or sickness not compensable under the Workers' Compensation Law, deems pregnancy "to be a sickness during the 4 weeks immediately preceeding the expected birth of child and the 4 weeks immediately following the termination of pregnancy," See N.J. Bell Tel. Co. v. Board of Review, 78 N.J. Super. 144 (App. Div. 1963), aff'd 41 N.J. 64 (1963).*** (at p. 362)

Similarly, in that case on appeal, the Supreme Court at 79 N.J. 412 stated:

> ***We agree that the continuity concept is a legitimate goal for a Board to consider. However, it cannot be adhered to blindly at the expense of the civil rights of teachers. The policy of a mandatory one-year maternity leave may have been well intentioned. In purpose and effect, though, it discriminates against teachers because of their sex. It is therefore illegal and void.
>
> The nonallowance of the use of accumulated sick leave during complainant's absence due to childbirth suffers from the same

> fault. A woman giving birth to a child becomes physically disabled and unable to attend to her teaching duties for that reason.***

The Board, in the instant matter, did not and does not contest the right of petitioners to be absent and to use their paid sick leave for a period one month prior to and one month after the dates of childbirth. Instead, the single issue presented herein is whether the Board, as a contingency to authorizing use of sick leave for the period exceeding thirty days before delivery, could legally require that specifics of disablement be set forth in the doctors' certifications.

A board has statutory authority, when sick leave is claimed, to require that a physician's certificate be filed. N.J.S.A. 18A:30-4. In his interpretation of what may reasonably be required when women claim sick leave because of pregnancy, the Commissioner, in Cinnaminson, supra, stated:

> ***The question is whether the difficulties of this [pregnancy] period should be also classified as "illness or injury" for sick leave credit.
>
> The Commissioner determines that they must be if, in conformity with the statutory authority (N.J.S.A. 18A:30-4), there is a physician's certificate which specifically attests to the condition as "disabling" prior to the beginning of the ninth month of pregnancy or after a period of one month following the birth of a child, but that, for the orderly conduct of the schools and the general welfare of employees, a less specific certificate of birth expectancy may suffice in the two month interim.*** (at p. 746)
>
> ***Accordingly, and commensurate with the reasoning set forth, ante, the Commissioner directs the Board to afford sick leave credit to respondent for the period of absence prior to the birth of her child and for one month (twenty working days) thereafter. This direction is predicated on a determination that the "physician's certificate" of record suffices for this limited period. The Commissioner holds, however, that in the context of the Board's requests for specific certification of disability the certificate lacks the specificity that is necessary for sick leave credit as otherwise requested beyond such period.
>
> Finally, and for clarity in future similar matters, the Commissioner observes that there may be disagreement between the physician of an employee and a school physician over certification of disability. In such instances the Commissioner recommends that the opinion of a third physician, mutually agreeable to the parties, be sought and that the parties agree to abide by his decision.***
> (Emphasis supplied) (at p. 747)

A careful reading of Cinnaminson, supra, a decision quoted with favor by the court in Castellano, supra, leads to the conclusion that the Commissioner has recognized that more detailed certifications of disability may be required for periods in excess of thirty days before and after childbirth. The Commissioner, therein, referred to a certificate which lacked "the specificity that is necessary for sick leave credit as otherwise requested beyond such [thirty day] period." That reference was to a doctor's certificate which stated:

> Mrs. Laurie Silver, a former obstetrical patient of ours, delivered on November 5, 1974. She was discharged from the hospital on 11/9/74. We allow our patients six weeks from their date of discharge to return to work. Therefore, her return to work date was December 22, 1975. (sic) Due to the Christmas holiday, she returned to work on January 6, 1975. Mrs. Silver was due to deliver on 10/19/75 (sic) therefore, her last day to work should have been September 6th, 1975 (sic). Due to her feeling able to work, she worked until October 28, two weeks before she had the baby. (1976 S.L.D. 738 at p. 741)

The doctor's certification in Silver, supra, and those submitted by petitioners herein are strikingly similar in that they fail to delineate any identifiable complication, ailment, symptoms or disabling conditions which prevented the women from carrying out their normal teaching duties. Given the statutory right to require a doctor's certificate and the precedent and guidance set forth in Cinnaminson, supra, I **CONCLUDE** that the Board and its Superintendent had every right to require detailed doctors' certifications of any conditions, complications, or symptoms which rendered petitioners disabled up to a period one month before they expected to give birth. Such detailed certificates were not submitted by petitioners or their physicians in compliance with reasonable requests.

The polite and respectful language of the Superintendent's letters asking for "medical aspects of disability as it relates to pregnancy" did not, as petitioners suggest, constitute harassment. Nor did the actions of the Board or its Superintendent constitute sexual harassment or discrimination based on sex pursuant to N.J.S.A. 18A:6-6. A judicious approach to the expenditures of public funds, when authorizing paid sick leave, demands that such requirements as were made of petitioners should be made of any man or woman, regardless of type of disability prior to granting a request to use paid sick leave over an extended period.

Given the fact that petitioners had ample opportunity but failed to present reasonably detailed evidence of their disability, I **CONCLUDE** that their charges are baseless wherein they allege that the Board or its Superintendent acted in bad faith, arbitrarily or in contravention of their statutory rights. I further **CONCLUDE** that the fact that the Board did not review petitioners' requests until after this action was filed is in large part attributable to petitioners' own failure to respond to the Superintendent's reasonable requests for adequately detailed doctors' certifications to support their claims of disability.

DETERMINATION:

In consideration of the conclusions set forth, above, it is **DETERMINED** that petitioners are not entitled to the relief they seek in the form of an order directing the Board to allow them to utilize their accumulated sick leave for periods in excess of thirty days prior to their approved maternity leaves. Accordingly, Petitioners' Motion for Summary Decision is **DENIED.** Summary Decision is entered in favor or the Board. The Petition of Appeal is **DISMISSED.**

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, FRED G. BURKE,** who by law is empowered to make a final decision in this matter. However, if Fred G. Burke does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **FRED G. BURKE** for consideration.

April 1, 1981
DATE

Eric G. Errickson
ERIC G. ERRICKSON, ALJ

Receipt Acknowledged:

April 6, 1981
DATE

Seymour Lee Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

April 8, 1981
DATE

Elizabeth J. Lawson Sp
OFFICE OF ADMINISTRATIVE LAW

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PATRICIA DERILLO AND MARY ANN DE SARNO, PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF CARTERET, MIDDLESEX COUNTY, RESPONDENT.	:	DECISION

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law.

The Commissioner observes that exceptions were filed by petitioners pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Petitioners except to the determination of the Honorable Eric G. Errickson, ALJ denying them the use of accumulated sick leave days for periods in excess of thirty days prior to their approved maternity leaves. Petitioners argue that physicians' excuses of sufficient specificity have already been submitted and rely on a decision of the State Board of Education, Lillian Hynes v. Board of Education of the Township of Bloomfield, Essex County, decided June 30, 1980.

The Commissioner agrees; he finds Hynes dispositive of this controverted matter. The determination of the Court is herewith set aside. Accordingly, the Board shall remit to petitioners the salary requisite to the use of thirty-one and thirty-five days of accumulated sick leave respectively. Petitioners' request for interest on the monies therein is denied. Otherwise, petitioners' Motion for Summary Decision is granted. Summary Decision for the Board is denied.

COMMISSIONER OF EDUCATION

May 21, 1981

Pending State Board

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1956-80
AGENCY NO. 82-3/80A

IN THE MATTER OF:

THE TENURE HEARING OF HOWARD E. KIM, SCHOOL DISTRICT OF THE TOWNSHIP OF HOWELL, MONMOUTH COUNTY

Record Closed: February 25, 1981
Received by Agency: 4/9/81

Decided: April 8, 1981
Mailed to Parties: 4/13/81

APPEARANCES:

Jan L. Wouters, Esq. (Bathgate, Wegener, Wouters & Neumann, Attorneys) for the Petitioner, School District of the Township of Howell

Joseph F. DeFino, Esq. (Morgan & Falvo, Attorneys) for the Respondent, Howard E. Kim

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

Written charges against Howard E. Kim, a teacher with tenure status, were made on February 20, 1980 and certified to the Commissioner of Education by resolution of the School District of the Township of Howell. The respondent filed an answer with the Commissioner of Education on April 16, 1980.

The matter was transferred to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

The undisputed facts are as follows:

(1) Howard Kim was employed as a tenured music teacher, K to eighth grade, at the Land O'Pines School for ten years. (1 TR 11), 2 TR 22)

(2) Respondent's initial request for a sabbatical leave, dated January 3, 1977 was not approved by the petitioner. (J 1), 1 TR 13)

(3) By letter dated April 26, 1978, Howard E. Kim wrote Dr. Sidney Zaslavsky and requested a sabbatical leave from September 1978 through January 1979. Attached to this letter was a written program outlining how the respondent planned to use the sabbatical leave. This program provided:

1. Graduate school, Trenton State College. I will study under Prof. S. Austin, who is the graduate study coordinator at Trenton State College, and I will do individual research study under Prof. Austin's supervision. The following areas will be studied:

   a) comparitive study of major music literature (Eastern & Western);

   b) comparitive analysis of music theory;

   c) trends in American music;

   d) new teaching technique and methods in contemporary music literature.

2. College of Music, Seoul National University. The above same areas (a, b, c, d), will be covered as follows:

   a) attend class lectures at the College of Music;

   b) consult with teachers at the College of Music;

c) consult with and study under Professor Lab, Uhn-Young, who is the foremost composer, conductor and theorist of Eastern music.

d) research and study at Capital Library in Seoul, Korea where valuable reference material is kept.

3. In order to revise and add to the present music curriculum of the Howell Township Schools, I plan to gather and obtain the following experience and actual items:

a) visit with at least ten foreign embassies and consulate offices;

b) take films and pictures of actual classroom studies and activity;

c) obtain sheet music for use in the Howell Township school system to emphasize and demonstrate techniques;

d) arrange to have a performance in the Howell School System of actual stage presentation (this would be done when the participants were in this Country and were available to be in Howell).

e) Arrange and edit the above materials according to practical use in each grade level in order to broaden the student's outlook and knowledge; (This material can be used over and over again). (J 4)

(4) Dr. Zaslavsky recommended to the Board of Education that it grant a sabbatical leave to Mr. Kim. (1 TR 21)

(5) By memorandum dated May 24, 1978, Mr. Kim was informed that he had been granted a sabbatical leave for the period September 1, 1978 to

January 31, 1979. This memorandum stated that: "It is expected the commitments made in the proposals will be fulfilled and the indicated concrete benefit will accrue to the district". (J 5), (1 TR 22, 67-8)

(6) While on sabbatical leave, Mr. Kim was considered to be a full time employee. He received his salary and was entitled to sick leave. (1 TR 56-7)

(7) Respondent was expected to submit a report regarding the sabbatical leave. (1 TR 29, 67) Such a report is not required by the contract between the petitioner and its employees however, it was the practice of the petitioner to require such a report. (1 TR 68-9)

(8) The contract between the petitioner and its employees does not require that the teacher keep in touch with the petitioner during a sabbatical leave. (1 TR 38)

(9) Respondent admitted that he did not check with the various persons and institutions mentioned in his sabbatical leave application prior to its submission. (2 TR 44-5)

(10) Respondent admitted that he did not study under Professor Austin who retired in September 1978 nor did he attend any courses at Trenton State College during his sabbatical leave. (2 TR 41-2)

(11) No explanation was given as to what respondent did from the initiation of his sabbatical leave on September 1, 1978 to the time of his arrival in Korea in mid-October 1978. (2 TR 24)

(12) Respondent stated that immediately upon his arrival in Korea in mid-October 1978 he experienced digestive problems due to the food and water. (2 TR 24, 51, 53, 61-2)

(13) Respondent stated that he had a language problem even though he was born in Korea and had to hire an interpreter. (2 TR 24, 50-1)

(14) Respondent stated that he was unable to visit the embassies and consulate offices because of monetary problems. (2 TR 47)

(15) Respondent stated that he was unable to enroll for courses at the National University because his application was not made in time and that he was unable to speak to Professor Lah Uhn Young since he had retired. (2 TR 24)

(16) Respondent stated that he did not arrange for any performances while he was in Korea. (2 TR 48) He stated that the Korean cirriculum could not be employed in Howell Township schools since the study of music is started at an earlier age and at a more intensive level in Korea. (2 TR 39, 49)

(17) Respondent stated that while he was in Korea he took films and pictures of classroom activities (2 TR 25-27); observed approximately fifty music classes and visited six to twelve schools (2 TR 51-2); studied at the Capital Library in Seoul (2 TR 25); collected books and material for use in the Howell School system (2 TR 48-9), (R 4); and spoke with various teacher at the National University of Korea. (2 TR 24) He submitted to the petitioner a report on the Korean education system on October 17, 1979. (J 33), (R 5), (1 TR 38-9)

(18) Respondent had his interpretor do some of his observations and submit reports to him during the periods of his illnesses. (2 TR 56-8)

(19) On December 6, 1978 respondent was injured when the bus he was in overturned. (2 TR 56)

(20) As a result of the bus accident, respondent was in the hospital for ten days and in a clinic for approximately one week. (2 TR 54-6)

(21) While in Korea, respondent did not notify the petitioner regarding his illnesses. (2 TR 64)

(22) On his way home, respondent stopped in Japan for approximately one week but does not have any specific recollection of what occurred there. (2 TR 59-60)

(23) Respondent arrived in the United States on or about January 4, 1979. This was before the end of his sabbatical leave. (2 TR 31, 62)

(24) Respondent had his wife write a letter, dated January 18, 1979, to Dr. Zaslavsky in which he asked for a leave of absence until April 1, 1979. (J 9), (2 TR 58)

(25) The January 18, 1979 letter stated:

> "Due to four illnesses, however, which lasted for an accumulated period of six weeks, I was incapacitated, and unable to accomplish all of the objectives which I had set out to do. . . . On December 6, I was also involved in an automobile accident which brought back a reoccurence of a shoulder problem for which I had been treated here in New Jersey. . . ." (J 9)

(26) The letter of January 18, 1979 was Mr. Kim's first communication with the petitioner since he was on the sabbatical leave. (1 TR 28)

(27) On January 23, 1979, Mr. Litowinsky responded and asked for a report regarding the sabbatical leave. Also he asked if Mr. Kim wanted a leave with or without pay and stated that a doctor's certificate would be necessary. (J 10), (1 TR 66)

(28) Both Dr. Zaslavsky and Mr. Litowinsky felt that they had the right to request a doctor's certificate pursuant to the authority set forth in N.J.S.A. 18A:30-4 but were unable to show that a doctor's certificate was required pursuant to the provisions of the contract between the petitioner and its employees (1 TR 40-1, 51), (J 32)

(29) By letter dated January 26, 1979, respondent asked for an extended leave of absence from February 1, 1979 to June 30, 1979. He gave the petitioner two options regarding how to handle this leave. Option one was two month sick leave with pay and three months without pay, and option two was five months leave without pay. (J 12)

(30) After returning from Korea, respondent did not ask for any sick leave time for any period within his sabbatical leave. (1 TR 63) Petitioner did not have any way to determine if the respondent used any sick days during his sabbatical leave. (1 TR 59)

(31) A letter from Dr. Bershling a chiropractor, was submitted by the respondent. Dr. Bershling stated that he supported Mr. Kim's request for a leave of absence since he felt that respondent's condition required additional treatment and his present health procluded him from continuing his normal duties. (J 13)

(32) By letter dated February 5, 1979, Walter Litowinsky stated that he was confused as to what occured during respondent's sabbatical leave and asked for a chronological listing of what occurred while Mr. Kim was in Korea. He stated that a physician's certificate was necessary and that the letter from the chiropractor was not acceptable. (J 14)

(33) By letter dated February 10, 1979, Mr. Kim stated that he was too ill to prepare a report and questioned the need for a doctor's certificate. He indicated that he had an appointment with a medical doctor. (J 15)

(34) Dr. Edward D. Fiore, by letter dated February 21, 1979, stated that Mr. Kim should be granted a medical leave of absence until he could determine the extent of his injuries. He stated that his neurological studies of Mr. Kim were incomplete as of that date. (J 16)

(35) Mr. Litowinsky testified that Dr. Fiore's letter was unacceptable since it did not state that respondent could not perform his duties. (1 TR 74)

(36) By letter dated February 26, 1979, Jan L. Wouters attorney for the petitioner, informed Mr. Kim that the petitioner would not act on his leave of absence until he answered certain questions regarding his sabbatical leave. (J 17) These questions were answered by Mr. Kim in his letter of February 27, 1979 which was prepared by the respondent's wife. (J19), (2 TR 59)

(37) By letter dated March 22, 1979, Jan L. Wouters told Mr. Kim that the petitioner was requiring a medical examination by an independent physician (J22) but the respondent was never told the name of this physician nor was an appointment made for him. (1 TR 52)

(38) By letter dated March 22, 1979, Jan L. Wouters informed Howard E. Kim that he would forfeit his sabbatical leave unless certain information was submitted to the petitioner within fourteen days. (J 23)

(39) Robert A. Fall, attorney for the respondent, stated that the fourteen day period set forth in J 23 was inadequate and questioned the need for an independent medical examination. (J 24)

(40) On several occasions, respondent through his attorney requested a meeting with the petitioner to discuss the matter of his request for an extended leave of absence. (2 TR 12), (J 26) Such a meeting was scheduled on several occasions but never took place. (J 28), (J 29), (R 1), (R 2), (R 3)

(41) Sometime in February 1979, respondent became dissatisfied with the delays as to his medical treatment in New Jersey. He called the president of the National University of Korea and asked for an invitation as a visiting professor so that he could qualify for priority medical treatment. This request was granted. (2 TR 32, 34, 38-39)

(42) Respondent stated that in February 1979 he was ill and could not teach. (2 TR 69)

(43) Respondent returned to Korea in March 1979 and remained there until about July 4, 1979. (2 TR 35, 71, 79)

(44) While in Korea, respondent was considered to be a visiting professor and taught some courses in English and Music. In March 1979 he earned $125. (J 30) In April 1979 he earned $140 and in May 1979 he earned $520. (J 31), (2 TR 36)

(45) By letter dated February 26, 1979, the President of the National University informed Dr. Zaslavsky that he was inviting respondent to be a visiting professor for the period of March - June 1979. (J 20) This letter was received by Dr. Zaslavsky in the latter part of February 1979. (1 TR 32)

(46) Respondent never asked the petitioner for a leave of absence to teach in Korea during the Spring of 1979. (TR 33-4, 78-9)

(47) Mr. Kim did not inform the petitioner that he was going back to Korea in the Spring of 1979. (2 TR 73) Mr. Kim's attorney was aware that he was going back to Korea. (2 TR 20)

(48) Petitioner found out that Mr. Kim went back to Korea either during the summer or fall of 1979. (1 TR 35-6)

(49) The petitioner never took any formal action on respondent's request for a leave of absence. (2 TR 21, 31)

(50) Petitioner ceased to pay Mr. Kim a salary on February 15, 1979 and did not pay him a salary for the rest of the school year.(2 TR 3) (Correct year noted in respondent's brief, p. 2)

CHARGE I

This Charge alleges that respondent engaged in conduct unbecoming a teacher and gross insubordination in that he willfully and intentionally misrepresented to the petitioner the exact nature of his activities during his sabbatical leave. The facts presented at the hearing clearly show there was no willful or intentional misrepresentation by the respondent. Mr. Kim did not submit periodic reports but did report on January 18, 1979 to the petitioner that he was ill, had an accident in Korea, and was unable to accomplish all of his objectives. (J-9) When requested to give specific information, Mr. Kim generally complied but clearly did not attempt to elaborate beyond the specific questions posed to him by the petitioner.

I **CONCLUDE** that the petitioner has not proven Charge I and it is dismissed.

CHARGE II

This Charge alleges that the respondent engaged in conduct unbecoming a teacher and gross insubordination in that he willfully and intentionally failed to take the courses and attend the institutions of learning set forth in his sabbatical leave proposal. At the end of the hearing the respondent moved to dismiss this charge and I stated that I would consider the motion in my initial decision. (2 TR 87-90)

It is clear that Mr. Kim did not check to make sure that the Professors and courses would be available to him prior to the submission of his sabbatical leave request. Although a prudent person might have done so, his failure to take this action does not constitute unbecoming conduct or willful insubordination. The facts clearly show that he could not comply with all of the provisions of his proposal for reasons beyond his control.

Although a prudent person might have periodically contacted the petitioner to inform it of his problems fullfilling the program during his sabbatical leave, such periodic reports were not required. Mr. Kim voluntarily informed the petitioner that he did not comply fully with the program upon his return to New Jersey. (J 9)

I **CONCLUDE** that the petitioner has not proven Charge II and it is dismissed.

CHARGE III

This Charge alleges that the respondent was engaged in conduct unbecoming a teacher and gross insubordination in that he willfully and and intentionally failed to report for work at the conclusion of his sabbatical leave, February 1, 1979.

The facts clearly show that Mr. Kim requested a leave of absence starting February 1, 1979 through April 1, 1979. (J 9), J 12) The petitioner delayed acting on this request pending their investigation of what occurred during the sabbatical leave as well as receipt of a doctor's certificate. In none of the correspondence between Mr. Kim and the petitioner was the respondent requested to resume his teaching duties on February 1, 1979 nor was his request for a leave ever formally denied by the petitioner.

Petitioner has not shown that Mr. Kim engaged in unbecoming conduct or gross insubordination when he did not resume his teaching duties on February 1, 1979 and I **CONCLUDE** that Charge III is dismissed.

CHARGE IV

In this Charge, it is alleged that Mr. Kim engaged in conduct unbecoming a teacher and gross insubordination in that he willfully and intentionally misrepresented to the petitioner the reasons for his request for an extended leave of absence.

Although Mr. Kim's actions as shown by the facts do not constitute gross insubordination, he obviously did not act in a rationale or reasonable manner. No one can fault Mr. Kim's concern about his health. However, once he decided to return to Korea, he should have notified the petitioner. Such a notification would have avoided much of the confusion caused by his action. This confusion appears to be the major reason why charges were filed against the respondent.

There is no doubt that Mr. Kim returned to Korea primarily for medical treatments. His total salaries for the three months did not even pay for his airfare to Korea. However, no adequate reason was given for his failure to inform the petitioner and, I **CONCLUDE**, that respondent's action was conduct unbecoming a teacher.

CHARGE V

This Charge alleges that respondent engaged in conduct unbecoming a teacher and gross insubordination in that he willfully and intentionally failed to comply with the directives set forth in the letters of February 5, 1979 (J 14), February 26, 1979 (J 17) and March 22, 1979 (J 23).

Respondent did not supply petitioner with the report on his sabbatical leave required by letter dated February 5, 1979 due to his illness but he did respond to the specific questions raised in the letter on February 10, 1979. (J 15) Mr. Kim responded to the questions raised in the February 26, 1979 letter by his February 27, 1979 letter. (J 19) The letter of March 22, 1979 was answered by the respondent's attorney. (J 24)

It is clear that Mr. Kim did not readily and fully provide the information requested by the petitioner. In part his recalcitrant action can be explained by the fact that he was ill during this period of time. He did however, make a bonifide effort to clarify the situation by his attempts to meet with the petitioner.

I **CONCLUDE** that the petitioner has not proven Charge V and it is dismissed.

CHARGE VI

This Charge alleges that respondent engaged in conduct unbecoming a teacher, gross insubordination and abandonment of his position when he took a position with the University of Korea in the Spring of 1979 without the permission of the petitioner.

This Charge is similar to Charge IV and for the reasons given as to Charge IV, I **CONCLUDE** that Mr. Kim's conduct was unbecoming a teacher in that he failed to notify the petitioner as to the reasons why he returned to Korea and why he accepted the position with the University of Korea.

Based on the facts presented, I **CONCLUDE** that respondent's conduct as set forth in Charges IV and VI was unbecoming a teacher but that it does not justify his dismissal as a tenure teacher. However, respondent's conduct warrants a salary reduction. Therefore, I **ORDER** that Mr. Kim be reinstated, as of the date of the final decision in this matter, to his position as music teacher in the school district of the Township of Howell and that his salary be reduced in the amount of $1,000 per year.

No charges were certified against the respondent until February 20, 1980, and yet the petitioner ceased to pay Mr. Kim as of February 15, 1979 and did not pay him a salary for the rest of the school year. (2 TR 3) Respondent was not suspended as of February 15, 1979 and no legal justification was given for the petitioner's action. Therefore, I **CONCLUDE** that the petitioner is entitled to be paid his salary from February 15, 1979 through the end of that school year, less the amount of $785.00 which the respondent earned in Korea. (J 30), (J 31) I **ORDER** this payment be made to the respondent as of the date of the final decision in this matter.

This recommended decision may be affirmed, modified or rejected by t. **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, FRED G. BURKE,** is empowered to make a final decision in this matter. However, if Fred G. Burke does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **FRED G. BURKE** for consideration.

April 8, 1981
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

April 9, 1981
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

April 13, 1981
DATE

Ronald L Parker /gh
OFFICE OF ADMINISTRATIVE LAW

ij

ADDENDUM

EXHIBITS ADMITTED INTO EVIDENCE:

JOINT:

J 1 Letter from Howard E. Kim to Dr. Sidney Zaslavsky, dated January 3, 1977.

J 2 Unsigned draft letter addressed to the President of Seoul National University, Seoul, Korea.

J 3 Letter from Ilhi Synn to Dr. Sidney Zaslavsky, dated January 20, 1977.

J 4 Letter from Howard E. Kim to Dr. Sidney Zaslavsky, dated April 26, 1978.

J 5 Memorandum from Walter A. Litowinsky to Howard E. Kim et al, dated May 24, 1978.

J 6 Letter from Dr. Sidney Zaslavsky to the United States Ambassador, Seoul, Korea, dated May 30, 1978.

J 7 Letter from Paul Sadler to Dr. Sidney Zaslavsky, dated June 30, 1978.

J 8 Transcript of Graduate Credits of Howard E. Kim from Georgian Court College, Lakewood, New Jersey, dated August 18, 1978.

J 8a Letter from Howard E. Kim to Dr. Sidney Zaslavsky, dated October 9, 1978.

J 8b Letter from Dr. Sidney Zaslavsky, dated October 12, 1978.

J 9 Letter from Howard E. Kim to Dr. Sidney Zaslavsky, dated January 18, 1979, plus attachment.

J 10 Letter from Walter Litowinsky to Howard E. Kim, dated January 23, 1979.

J 11 Letter from Howard E. Kim to Richard Thompson, dated January 26, 1979.

J 12 Letter from Howard E. Kim to Walter Litowinsky, dated January 26, 1979.

J 13 Letter from Seymour C. Bershling, D.C., P.A. regarding Howard E. Kim, dated January 29, 1979.

J 14 Letter from Walter Litowinsky to Howard E. Kim, dated February 5, 1979.

J 15 Letter from Howard E. Kim to Walter Litowinsky, dated February 10, 1979.

J 16 Letter from Edward D. Fiore, M.D. regarding Howard E. Kim, dated February 21, 1979.

J 17 Letter from Jan L. Wouters to Howard E. Kim, dated February 26, 1979.

J 18 Letter from Howard E. Kim to Walter Litowinsky, dated February 26, 1979.

J 19 Letter from Howard E. Kim to Jan L. Wouters, dated February 27, 1979.

J 20 Letter from Ton-Kak Suh to Dr. Sidney Zaslavsky, dated February 26, 1979.

J 21 Letter from Robert A. Fall to Jan L. Wouters, dated February 28, 1979.

J 22 Letter from Jan L. Wouters to Howard E. Kim, dated March 22, 1979.

J 23 Letter from Jan L. Wouters to Howard E. Kim, dated March 22, 1979.

J 24 Letter from Robert A. Fall to Jan L. Wouters, dated March 28, 1979.

J 25 Letter from Jan L. Wouters to Robert A. Fall, dated May 23, 1979.

J 26 Letter from Robert A. Fall to Jan L. Wouters, dated July 26, 1979.

J 27 Letter from Howard E. Kim to Richard Thompson, dated September 24, 1979.

J 28 Letter from Jan L. Wouters to Howard E. Kim, dated October 15, 1979.

J 29 Letter from Jan L. Wouters to Howard E. Kim, dated January 11, 1979.

J 30 Wage Voucher for Howard E. Kim from Kyungpook National University.

J 31 Wage Voucher for Howard E. Kim from Kyungpook National University.

J 32 Copy of article 25 of the negotiated agreement between the Howell Township Board of Education and the Howell Township Education Association regarding extended leaves of absences.

J 33 Face page of a report dated October 17, 1979 prepared by Howard E. Kim together with a copy of the Table of Contents.

J 34 Interrogatories propounded by Joseph F. DeFino and answered by Dr. Sidney Zaslavsky on October 6, 1980.

FOR THE RESPONDENT:

R 1 Letter from Jan L. Wouters to Howard E. Kim, dated December 4, 1979.

R 2 Letter from Robert A. Fall to Jan L. Wouters, dated December 7, 1979.

R 3 Telephone message, dated December 13, 1979.

R 4 A music book printed in Korean.

R 5 A report prepared by Howard E. Kim, dated October 1 1979.

WITNESSES

For the Petitioner:

Dr. Sidney Zaslavsky
Walter A. Litowinsky

For the Respondent:

Robert A. Fall
Howard E. Kim

IN THE MATTER OF THE TENURE	:	
HEARING OF HOWARD E. KIM,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION
TOWNSHIP OF HOWELL,	:	
MONMOUTH COUNTY.	:	
	:	

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law.

The Commissioner observes that exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Board excepts to the determination by the Honorable Beatrice S. Tylutki, ALJ that there was no willful or intentional misrepresentation by respondent in making application for his sabbatical. The Board argues that respondent's failure to determine the availability of the courses that he would take or the professor, under whom he planned to study during sabbatical leave, went far beyond the actions of a prudent person. The Board argues that, had such facts been known, the sabbatical leave would not have been granted. The Board alleges that such action constitutes conduct unbecoming a teacher.

The Board contends further that respondent's claim of inability to return to work because of illness after his sabbatical did not preclude his return to Korea and assuming the duties there of a visting professor with a Korean institute of higher learning until his return in July 1979. (Tr. II-35, 71, 79)

Finally, the Board contests the award of back salary made by the Court to respondent for the period February 15, 1979 to the end of the school year. The Board argues that respondent effectively abandoned his position by returning to Korea and teaching there. The Board disagrees with respondent's entitlement to any back salary for that period and requests clarification of the imposition by the Court of a salary reduction of $1,000 per year.

Respondent's reply exceptions refute those of the Board, affirm the findings of Judge Tylutki but disagree with the propriety of the imposition of the monetary penalty. Respondent contends that such penalty is excessive.

The Commissioner cannot agree with respondent and alternatively finds the arguments of the Board persuasive. The Commissioner observes that a board of education bears heavy responsibility in the awarding of sabbatical leaves to determine if the request lies within the conditions prevailing in the negotiated agreement between the board and the teacher organization. Such is true because the award of a sabbatical is based on full or partial remuneration to the teacher for a period of released time from teaching duties. Such absence from duty is invariably based on the premise that the teacher activity during leave will eventually be of value in the school system as well as of educational merit to the individual teacher. The Commissioner determines that it is not within the realm of duties of a board of education to challenge the accuracy and probity of a teacher request for sabbatical leave other than as noted above. In the opinion of the Commissioner, the teacher carries the primary responsibility to file with the Board an accurate plan that meets the criteria established for sabbatical time entitling the teacher to salary for activities during time released from teacher duties. In the present case respondent failed to do so for no reason apparent in the record. Respondent contends that the entire case herein would have been obviated had the Board acted promptly on his request for an extended leave of absence and justifies his return to Korea accordingly. The Commissioner cannot agree.

Where conflicting evidence is offered on any issue and there is sufficient evidence contained in the record to reasonably support the findings made, the Commissioner will defer to the judgment of the hearer on questions of credibility since he/she had the opportunity to hear and observe the witnesses and so was in a better position to assess credibility. Cf. Close v. Kordulak Bros., 44 N.J. 589, 599 (1965); Parker v. Dornbierer, 140 N.J. Super. 185, 188 (App. Div. 1976)

A thorough examination by the Commissioner of the record herein does not reveal to him sufficient evidence to justify respondent's return to Korea and consequent unavailability for teaching duties for the Board for an approximate five-month period. The Commissioner determines that such unauthorized absence constitutes conduct unbecoming a teacher.

The Commissioner has previously considered matters with similar circumstances. In In the Matter of the Tenure Hearing of Nancy Patras, School District of the Township of Woodbridge, 1978 S.L.D. 726 the Commissioner said:

> "***The Commissioner is mindful that conflicts arise between family and professional responsibilities from time to time. Such conflicts should not, however, interrupt nor interfere with the orderly

conduct of the educational process. Given all of the facts and circumstances, the Commissioner finds that respondent used poor judgment in taking such leave from her position without proper authorization. Respondent had the duty and obligation to serve the pupils assigned to her charge. The Board had every expectation that she would indeed attend to her assigned duties and responsibilities. As the Commissioner observed In the Matter of the Tenure Hearing of Catherine Reilly, School District of the City of Jersey City, Hudson County, 1977 S.L.D. 403 when he stated:

> '***The Commissioner has held that pupils are required to be in regular attendance in the public schools. {Citation omitted} No less a requirement should be made upon the teachers who are to serve the pupils required to be in attendance pursuant to the compulsory education statutes of this State.***' (Emphasis supplied.) (at 414)***"
>
> (at 731)

Patras was absent from October 31, 1976 to November 29, 1976 which, because of calendar circumstances, constituted absence from assigned duties of fourteen (14) days. Therein, the Commissioner found such conduct unbecoming a teacher but determined that the fourteen-day absence viewed in relation to the teacher's extensive plans for the absence to assist the education of children did not rise to the level to warrant dismissal.

In the present matter the Commissioner finds respondent's absence to be spread over a five-month period much in excess of that in Patras. Nor is there any evidence herein of concern by the teacher for the pupil activity in the school district during his absence. The Commissioner determines that such extensive unexcused absence on the part of respondent warrants dismissal of the teacher from his tenured position. Accordingly, the determination of the Court herein is set aside. The Commissioner directs that respondent be released from the employ of the Board as of the date of this decision. The Commissioner finds no authority for the award of back salary from February 15, 1979 to the end of the school year while respondent was residing in Korea. Such award is herewith set aside. Salaries paid to respondent while in the employ of the Board during the 1980-81 school year were properly made for services rendered.

COMMISSIONER OF EDUCATION

May 27, 1981

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 0014-80

AGENCY DKT. NO. 318-8/79A

IN THE MATTER OF:

ANNA MARIE CHINNIS,

Petitioner,

v.

BOARDS OF EDUCATION OF THE LOWER CAPE MAY REGIONAL SCHOOL DISTRICT, THE LOWER TOWNSHIP ELEMENTARY SCHOOL DISTRICT, THE WEST CAPE MAY ELEMENTARY SCHOOL DISTRICT AND THE CAPE MAY CITY SCHOOL DISTRICT, CAPE MAY COUNTY,

Respondents.

Record Closed: February 26, 1981

Received by Agency: 4/10/81

Decided: April 9, 1981

Mailed to Parties: 4/14/81

APPEARANCES:

John E. Collins, Esq., Counsel for Petitioner

George James, Esq., for the Respondent Lower Cape May Regional Board

John F. Callinan, Esq., for the Respondent Lower Township Elementary Board

Eric D. Gaver, Esq., for the Respondent West Cape May Elementary Board

John L. Ludlam, Esq., for the Respondent Cape May City Board

BEFORE **LILLARD E. LAW**, ALJ:

Petitioner alleges that she was simultaneously employed as a secretary to the Child Study Team (CST) by the Boards of Education (Boards) of Lower Cape May Regional (Regional), Lower Township Elementary (Lower), West Cape May Elementary (West Cape May) and Cape May City (Cape May). Petitioner asserts that her termination of employment by any or all Boards violated her tenure rights pursuant to N.J.S.A. 18A:17-2(b). Petitioner requests immediate reinstatement to her position of employment with all back pay and emoluments withheld from her. The respondent Boards admit that petitioner was employed in a cooperative arrangement, however, individually deny any employment relationship with petitioner. In the alternative, the respondent Boards assert that petitioner's employment was properly abolished by the dissolution of the cooperative arrangement between the Boards.

Petitioner filed a verified Petition of Appeal before the Commissioner of Education, dated July 5, 1979, pursuant to N.J.S.A. 18A:6-9. Thereafter the matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

On February 14, 1980, a prehearing conference was held and the issues to be determined were set forth as follows:

1. By virtue of the established, maintained and implemented cooperative arrangements between the Respondent Boards for special education services pursuant to N.J.S.A. 18A:46-1 et seq., did a de facto jointure commission exist between October 1, 1972 and July 1, 1977 pursuant to N.J.S.A. 18A:46-24, et seq.

2. On or about July 1, 1977 was the alleged de facto jointure commission dissolve or did it retain its identity with a subsequent body?

3. By virtue of her employment history, did petitioner acquire a tenure status as a secretary?

4. If so, with whom, and is her tenure status transferrable in the event:

   a. one member withdraws from the de facto jointure commission and establishes its independent C.S.T.?

   b. more than one member withdraws and more than one independent C.S.T. is established?

   c. in the event that the de facto jointure C.S.T. is dissolved and one or more former participants form an independent C.S.T..?

5. Did petitioner take any action which terminated her rights she might have acquired through her other employment?

Subsequently, in June 1980, the parties submitted stipulated facts in the instant matter which are set forth herein post. A hearing was set down for September 24, 1980, however, it was adjourned with the consent of all parties for the purpose of settlement discussions. Thereafter, a Settlement conference between the parties was conducted on November 10, 1980 at the Cape May County Court, Cape May Courthouse, New Jersey. No settlement having been reached, the parties thereafter filed Briefs and Memoranda of Law on cross motions for Summary Judgment.

STIPULATIONS

The following Stipulation of Facts were agreed upon and adopted by the parties:

1. On or about October 1, 1972, and continuing until June 30, 1977, petitioner was employed as a secretary to the Child Study Team of an educational entity known as the Cooperation Committee.

2. The Cooperation Committee was formed by the four respondent Boards of Education on or about September 18, 1970 for the purposes of

coordinating their curricula and providing Child Study Team Services to the pupils of the four school districts; no prior approval was received from the Commissioner of Education for the provisions of Child Study Team services on a joint basis.

3. The Lower Township Elementary School District, the West Cape May Elementary School District and the Cape May City School District are elementary school districts which send their pupils to the Lower Cape May Regional School District for their secondary education.

4. The Cooperation Committee formed by the four respondent Boards of Education was comprised of two representatives of each board of education as well as the chief school administrator of each participating school district.

5. The Cooperation Committee was charged by respondent Boards of Education with the responsibility for, inter alia, recruiting, selecting and employing a Child Study Team to provide evaluation and diagnostic services to the pupils of the four participating school districts.

6. The respondent Boards of Education agreed that one participating district would be designated as the administering district for the Cooperation Committee Child Study Team each school year for payroll purposes.

7. The Lower Cape May Regional Board of Education served as the administering district for the Cooperation Committee Child Study Team for the 1972-73 school year.

8. The Lower Township Board of Education served as the administering district for the Cooperation Committee Child Study Team for the 1973-74, 1974-75 and 1975-76 school years.

9. The Cape May City Board of Education served as the administering district for the Cooperation Committee for the 1976-77 school year.

10. The four respondent Boards of Education agreed that the designated administering district should pay the expenses of the Cooperation Committee and its Child Study Team, said expenses to be shared among the cooperating districts on the basis of each district's percentage of the total average daily enrollment of the preceding school year.

11. The four respondent Boards of Education agreed that the Cooperation Committee and the administering districts would follow the tenure laws as promulgated in Title 18A of the New Jersey Statutes.

12. During the time period October 1, 1972 through June 30, 1977, petitioner was employed by the Cooperating Committee Child Study Team in excess of four consecutive calendar years.

13. During the time period July 1, 1973 through June 30, 1976, petitioner served a total of three consecutive calendar years in the employ of respondent Lower Township Board of Education as the administering district of the Cooperation Committee Child Study Team.

14. The Cooperation Committee Child Study Team was dissolved by the four respondent Boards of Education as of June 30, 1977.

15. Petitioner was employed as a Child Study Team secretary by Respondent Lower Township Board of Education during the time period July 1, 1977 through June 30, 1979.

16. After the dissolution of the Cooperation Committee Child Study Team, respondent Lower Township Board of Education provided, and continues to provide, limited child study team services to the pupils of respondent West Cape May Board of Education on a limited courtesy basis, no payment, this arrangement was not authorized by the Commissioner of Education.

17. After the dissolution of the Cooperation Committee Child Study Team, respondent Lower Cape May Regional Board of Education provided psychological and social worker services to the pupils of respondent

Cape May City Board of Education on a per-case basis at $275 per case, by voucher, during the 1977-78 and 1978-79 school years; this arrangement was not authorized by the Commissioner of Education.

18. On or about April 21, 1976 the Lower Township Board of Education, the then administrative agency for the Cooperation Committee, notified petitioner that her employment contract would terminate as of June 30, 1976.

19. On or about February 7, 1977 petitioner was notified by the Board of Education of the City of Cape May, the then administrative agency for the Cooperation Committee that her employment would terminate on June 30, 1977.

20. On or about May 17, 1977 petitioner advised the Lower Cape May Regional School District that she had accepted a position with the Lower Township Elementary Board of Education commencing July 1, 1977.

21. On or about April 23, 1979, petitioner was notified by respondent Lower Township Board of Education that a contract of employment for 1979-80 would not be offered to her.

22. No de facto jointure existed subsequent to July 1, 1977. (J-1)

The following constitutes, in chart form, a listing of the administering districts for the Child Study Team for the period of July 1, 1971 through June 30, 1977:

School Year	Administering District
1971-72	Lower Cape May Regional
1972-73	Lower Cape May Regional
1973-74	Lower Township
1974-75	Lower Township
1975-76	Lower Township
1976-77	Cape May City

(J-1) (P-4)

Petitioner asserts that she served more than three calendar years as secretary to the Coooeration Committee C.S.T. She also asserts that she served three consecutive calendar years in the employ of the Lower Township Board of Education as administering district for the C.S.T. Subsequent to a one year hiatus, when she was in the employ of Cape May City, she served an additional two years as a Lower Township secretarial employee.

Petitioner contends that the facts in the instant case are similar to those in Bisson v. Boards of Education of the Borough of Alpha et al., 1978 S.L.D. 187. In that case, four boards of education entered into an informal arrangement to provide their pupils with special services mandated by N.J.S.A. 18A:46-1 et seq. As in the instant case, the four boards employed a joint Child Study Team with one board designated as the administering district. She observes the fact that the four boards of education in Bisson, did not obtain prior approval from the Commissioner of Education for their joint special services team pursuant to N.J.S.A. 18A:46-24 and 25, which require such approval before local school districts may join together to provide special education services. The Commissioner held in Bisson, supra, that the respondent school districts had formed a de facto jointure commission, since they had failed to obtain his approval for their cooperative arrangement. The Commissioner held that "such failure does not impair the rights which may have accrued to the persons employed for the special services team which has been found herein to constitute a de facto jointure commission pursuant to N.J.S.A. 18A:46-25 et seq." Bisson, at 194.

Petitioner argues that since the facts surrounding the creation of the Cooperation Committee Child Study Team in the instant case are identical to those in Bisson, it must also be held herein that a de facto jointure commission was created by respondents. The only additional fact in the instant case, which was not present in Bisson, was the dissolution of the Child Study Team by the respondents as of June 30, 1977. In Bisson at 194, the Commissioner clearly held that "petitioner *** acquired a tenure status of employment with the jointure commission, and that petitioner's tenure rights were violated by his termination of employment." Petitioner contends, therefore, that she obtained tenure with the Cooperation Committee Child Study Team (de facto jointure commission) when she completed three calendar years of service in October 1975. Petitioner submits that the remaining question, which was not addressed in Bisson, is whether or not her tenure rights survived the dissolution of the de facto jointure commission by the four respondent Boards of Education in 1977 and refers to Stipulation 14 of the parties herein which reads as follows:

"The Cooperation Committee Child Study Team was dissolved by the four Respondent Boards of Education as of June 30, 1977." (J-1)

Petitioner argues that just as the initial creation of the C.S.T. was done without the Commissioner's authorization, that his approval was not obtained prior to its dissolution.

Petitioner notes that N.J.S.A. 18A:46-28 reads in its entirety as follows:

"In accordance with rules of the State Board:

a. A contracting district may withdraw from the commission;

b. An additional district may become a contracting district for the commission;

c. An additional district shall become a contracting district for the commission when so directed by the commissioner, pursuant to N.J.S. 18A: 46:15b or N.J.S. 18A:46-15c;

d. A contracting district shall withdraw from the commission when directed by the commissioner pursuant to N.J.S. 18A:46-15c."

Petitioner contends that it was the Legislature's intent in enacting this statute that a district should not be permitted to unilaterally withdraw from the jointure commission. The Legislature explicitly stated that such withdrawal should be "in accordance with rules of the State Board." Petitioner observes that a perusal of the New Jersey Administrative Code, and in particular N.J.A.C. 6:28-7.1 et seq., that the State Board of Education has not fulfilled its mandate to promulgate rules governing the withdrawal of school districts from jointure commissions. The absence of such rules, however, should not be interpreted as the extending of a carte blanche to such districts to withdraw at will from jointure commissions. She asserts that it is well established in New Jersey Education Law that, if the Commissioner's approval is necessary for the creation of an entity, it is similarly necessary for the dissolution of that same entity. Stephens v. Board of Education of the Township of Mount Olive, 1963 S.L.D. 215. N.J.A.C. 6:28-8.4 requires that, prior to the approval of jointure commissions, "the Commissioner of Education with the approval of the State Board of Education shall

determine if such programs are needed, are appropriate and are not in conflict with existing or planned local, county or state programs." Under the rationale of Stephens, when a determination of need must by made by the Commissioner prior to the creation of a position or program, then only the Commissioner has the authority to determine when the need for such a position or program no longer exists.

Petitioner asserts that in the instant case, the Legislature has mandated that a school district may only withdraw from a jointure commission "in accordance with rules or the State Board." N.J.S.A. 18A:46-28. Although the State Board has not promulgated explicit rules governing the withdrawal of districts from jointure commissions, it has adopted rules requiring its approval, as well as the Commissioner's approval, of the determination of the need for such commissions. N.J.A.C. 6:28-8.4. Conversely, only the Commissioner and State Board have the authority to determine when such need no longer exists. Petitioner argues that under the holding in Stephens a jointure commission may not be dissolved without their approval.

Petitioner again refers to the Commissioner's decision in Bisson where she argues that the underlying rationale of that decision is found in the following paragraph:

> "In the instant matter, each of the four named Boards complied, through the arrangement it had, with the provisions of the State Board rules. What the four Boards did not do, however, was to secure the prior approval of the Commissioner. Such failure does not impair the rights which may have accrued to the persons employed for the special services team which has been found herein to constitute a de facto jointure commission pursuant to N.J.S.A. 18A:46-25 et seq." (emphasis added) Bisson, supra. at 194.

In the instant case, the respondent Boards of Education did not secure prior approval of the Commissioner and State Board for either the creation or the dissolution of the de facto jointure commission. It must be held that such failure did not impair the tenure rights acquired by petitioner as secretary to the C.S.T. She asserts that since the de facto jointure commission was not legally dissolved, petitioner must be held to have tenure in the Lower Township School District where she continued as C.S.T. secretary after the illegal dissolution of the de facto jointure commission in 1977.

Petitioner notes that in Bisson, at 192, the Hearing Examiner recommended two alternative bases for decision. His first recommendation was that the petitioner

therein enjoyed tenure status with the de facto jointure commission and that he should be reinstated to his position with an assessment against each board of education for twenty-five percent of his backpay. The Commissioner of Education affirmed this recommendation and drafted his opinion accordingly. Therefore, there was no need for the Commissioner to address the Hearing Examiner's second alternative recommendation. The Hearing Examiner had recommended that, if the petitioner was held not to have tenure in the jointure commission, then "petitioner has at the very least acquired a tenure status in the employ of the Pohatcong Board." Bisson, at 10. It is noted that the Pohatcong Board of Education served as the administering district for the jointure commission and that the petitioner served for seven years in its employ.

In the instant case, petitioner served for three full calendar years (1973-74, 1974-75 and 1975-76) in the employ of the Lower Township Board of Education as administering district for the Child Study Team; she then returned for two additional years (1977-78 and 1978-79) as secretary to the independent Lower Township Child Study Team. Petitioner asserts that as the facts in Bisson supported the petitioner's entitlement to tenure in Pohatcong, the facts herein support petitioner's claim for tenure in Lower Township. She contends that she obtained tenure in Lower Township at the end of the 1975-76 year pursuant to N.J.S.A. 18A:17-2(b)(1). Through no fault of her own, her employing district for 1976-77 became the Cape May City Board of Education. (P-18) Since no C.S.T. existed in Lower Township during 1976-77, her termination on April 22, 1976 (P-20) was analogous to a reduction in force. Her position as C.S.T. secretary was abolished by the Lower Township Board of Education as of June 30, 1976. She asserts that when Lower Township subsequently re-created a C.S.T. secretarial position for the 1977-78 year, petitioner was entitled to re-employment by virtue of her tenured status based on her prior service between July 1, 1973 and June 30, 1976.

Petitioner asserts that her termination and subsequent re-employment by the Lower Township Board of Education may not be cited as a break in her continuous service for tenure purposes. Makowski et al. v. Board of Education of the Township of Woodbridge, 1980 S.L.D. _____ (decided April 28, 1980). In Makowski, supra the Administrative Law Judge (whose opinion was affirmed by the Commissioner) noted that the petitioners' contracts were not renewed due to the respondent's budgetary restraints. However, the petitioners were subsequently rehired. The Administrative Law Judge stated:

> "It is not suggested here that the Board acted in bad faith in regard to its stipulated reasons for petitioners' nonrenewals being that of budgetary restraints. I accept the stipulation that the reason of budgetary restraints to be legitimate for notices of nonrenewals and effective nonrenewal in this case. (sic) I cannot accept, however, that such effective nonrenewal by the Board negates petitioner's prior employment for purposes of tenure." Makowski, supra (slip opinion at page 7)

In Makowski, the petitioners were non-renewed and rehired prior to their obtaining tenure. In the instant case, petitioner contends that she obtained tenure in the Lower Township district and was subsequently non-renewed and rehired. In such a situation, the break in her employment in Lower Township cannot be used to defeat her tenured status. Petitioner asserts that when a tenured secretary's position is abolished, she retains an entitlement to a newly created position and she retains her tenured status in the school district. Vanderbeck v. Board of Education of the Borough of Hamburg, 1976 S.L.D. 970. Petitioner argues that should the Administrative Law Judge determine that petitioner does not enjoy a tenured status in all four respondent districts, he must at the least hold that she is a tenured employee of the Lower Township Board of Education and that her termination was illegal.

The Boards, individually and collectively, deny that any employment relationship ever existed between them and petitioner during the period the Cooperation Committee Child Study Team functioned between September 1971 through 1977. Each Board argues that the affairs of the Cooperation Committee were conducted independently of the affairs of the individual respondent Boards and existed as an independent entity separate and apart from the individual respondent school districts.

The Lower Board contends that the Cooperation Committee constituted a de facto jointure commission pursuant to N.J.S.A. 18A:46-25. (The remaining Boards make no such consession). In support of its argument that the Cooperation Committee was independent of the respondent Boards, the Lower Board cites N.J.S.A. 18A:46-26 which provides, in part, as follows:

> "***Within the limited responsibilities of this Chapter and except as otherwise provided, the commission shall have and may exercise all of the powers of a board of education in carrying out the purposes of this Chapter." (Emphasis supplied)

The above quoted section grants to a jointure commission the same powers that an individual board of education would exercise and thus there can be no doubt that this cooperation committee, in the form of a jointure commission, should be regarded as an independent entity.

There is no question that the petitioner was employed by the entity on October 1, 1972 and that this employment continued until June 30, 1977. There is also no doubt that the four respondent Boards of Education agreed that the Cooperation Committee would follow the tenure laws promulgated Title 18A of the New Jersey Statutes. (J-3, Stipulation No. 11). The Lower Board concedes that petitioner obtained a tenure position by virtue of fulfilling the requirements of N.J.S.A. 18A:17-2(b)(1), in that she sustained a period of employment for three consecutive calendar years with the Cooperation Committee.

The respondent Lower Board contends that any tenure or any other rights which petitioner may have acquired were done so while she was employed with an independent entity, namely the de facto jointure commission, and that none of these rights and privileges were acquired from any of the individual four respondent Boards. The Lower Board contends that the hiring process of the petitioner and other employees of the Cooperation Committee, as well as the terms and conditions of employment for said employees, was solely the responsibility of the Cooperation Committee and that none of the individual respondent school districts per se had any control over the hiring process. This position is supported by the documents which created the Cooperation Committee wherein paragraphs 3 and 4 of the document provide as follows:

> "In order to do this, the Committee is charged by the several boards with the responsibility for recruiting, selecting and employing a Coordinator of Curriculum Improvement, a Child Study Team, and other such personnel as may be necessary to carry out the responsibility of the Committee.
>
> All personnel employed under the direction of the Cooperation committee shall be under the direct supervision of the chief school administrator of the employing district who shall be the spokesman for the administrative council which shall be composed of the chief school administrator of each of the cooperating districts."
> (See R- 1)

The Lower Board contends that the above quoted sections make clear that the hiring process was conducted by the Cooperation Committee itself and that none of the

individual respondents acted alone or was responsible for petitioner's employment from October 1, 1972 until June 30, 1977.

The Lower Board asserts that the fact that petitioner was placed on the payroll records of the various individual respondents during this time period does not mean that she was employed by that particular respondent school district. This process was done strictly for administrative purposes as is shown in paragraph seven of the document creating the Cooperation Committee which provides as follows:

> "For the purpose of meeting legal requirements and for purposes of payroll, pension and related benefits, one of the cooperating districts shall be designated as the employing district for all personnel employed at the direction of the Cooperation Committee. All expenses of approved cooperative ventures shall be paid by this district and these expenses shall shared by the cooperating districts on the basis of each districts on the basis of each district's percentage of the total average daily enrollment of the preceding school year. This responsibility shall be assumed for a period of two years and shall then be assumed by another of the cooperating districts."

This position is consistent with the respondent's position that the petitioner's hire and the terms of her employment were contracted by the Cooperation Committee acting as an independent entity, and that she was carried on the payrolls and records of the individual respondent school districts solely for bookkeeping purposes. At no point during this particular time period was it ever intended that the petitioner would be considered an actual employee of any one of these individual respondent school districts.

The Boards contend that the rights and privileges which petitioner accumulated were with the Cooperating Committee acting as an independent jointure commission and were not accumulated with any one of the individual respondent school districts.

The Lower Board argues further that the subsequent dissolution of the de facto jointure commission did not entitle petitioner to carry over her accumulated time to her employment with the Lower Township Elementary School District. It asserts that the dissolution and the Lower Board's actual withdrawal from the Cooperating Committee become effective on July 1, 1977. Thereafter, the Lower Board established its own C.S.T. and proceeded to employ petitioner commencing July 1, 1977 and continuing until June 30,

1979. The Lower Board maintains that the rights and privileges which were attained during petitioner's employment with the Cooperation Committee were not transferable to it because the Lower Board ceased to operate in the manner of a jointure commission. To hold otherwise, it contends, would run contrary to the provisions of N.J.S.A. 18A:28-17 which provides that only teaching staff members may transfer their period of prior employment with a jointure commission when the functions are subsequently taken over by a local school district. It asserts that the terms of the statute is reserved only for teaching staff members and does not apply to secretarial or other support personnel.

The Lower Board asserts for those reasons stated above, petitioner had not been employed a sufficient period of time to have acquired a tenure status in its school district pursuant to N.J.S.A. 18A:17-2(b)

The Regional Board contends that any tenure claim asserted by petitioner in its employ should be dismissed on the grounds that the Regional Board offered petitioner employment upon the cessation of the Cooperating Committee, however, petitioner refused to accept the offered position.

Having carefully reviewed and considered the entire record in the instant matter I **FIND** that the Stipulations set forth hereinbefore are hereby adopted by reference as **FINDINGS OF FACT.**

This Court is constrained to observe that all boards of education in this State are required to provide classes and facilities for handicapped children pursuant to N.J.S.A. 18A:46-1 et seq. In so doing, two or more school districts may enter into an agreement to provide such classes and facilities as prescribed by law. N.J.S.A. 18A:46-24 provides as follows:

> "Any two or more districts may provide for facilities, examinations or transportation under this chapter under the terms of an agreement adopted by resolutions of each of the boards of education concerned setting forth the essential information concerning the facilities, examination or transportation to be provided, the method of apportioning the cost among the districts and of computing the proportion of the state aid to which each district shall be entitled, and any other matters deemed necessary to carry out the purpose of the agreement. No such agreements shall become effective until approved by the commissioner."

N.J.S.A. 18A:46-25 provides in full as follows:

> "When two or more boards of education determine to carry out jointly by agreement the duties imposed upon them in regard to the education and training of handicapped pupils the said boards may, in accordance with rules and regulations of the state board, and with the approval of the commissioner by the adoption of similar resolutions establish a jointure commission for the purpose of providing such services. Said commission shall, in accordance with rules of the state board, be composed of representatives of the respective boards of education, and shall organize by the election of a president and vice president."

The powers of such a jointure commission once properly established are enumerated in N.J.S.A. 18A:46-26, one of which is to:

> ***
>
> "c. Employ necessary principals, teachers and other officers and employees, who shall have the same rights and privileges as those who are similarly employed by local boards of education***.

In the instant matter the Boards assumed the authority of a jointure commission without adhering to the precise provisions of the referenced statutes. Notwithstanding such failure of the Boards to comply with the statutory mandate, I **FIND** that a de facto jointure commission was established by the respondent Boards and operated between September 1971 until July 1977. Bisson. Having arrived at such a finding, I **CONCLUDE** that petitioner had acquired a tenure status as a secretary with the jointure commission pursuant to N.J.S.A. 18A:17-2 (b).

The remaining issues to be determined is (1) whether the dissolution of the de facto jointure commission was, under the circumstances, properly dissolved and; (2) whether petitioner's tenure status was transferable to her subsequent employer, the Lower Township Board of Education?

It is undisputed that the Cooperating Committee was established without the proper statutory authorization by the Commissioner. Additionally, there is no showing that the Commissioner or the Cape May County Superintendent of Schools intervened, in any manner, during the period of operation of the Cooperating Committee from October 1, 1972 to June 30, 1977. During such period of operation, the Cooperating Committee functioned without acknowledgement or impediment of the Commissioner or his agents, providing the statutorily mandated instruction and facilities to the

handicapped pupils of the four (4) Boards. Upon the dissolution of the Cooperating Committee, each of the four (4) boards of education established and/or provided the required educational services for their respective handicapped pupils pursuant to N.J.S.A. 18A:46-1 et seq. No Board or Boards assumed the responsibility to continue the operation of the Cooperating Committee thereafter. In the absence of the Commissioner's acknowledgement or intervention of the de facto jointure commission, I **FIND** and DETERMINE that the dissolution of the Cooperating Committee was, under the circumstances, in good faith, proper and within the authority of the Boards of Education.

Petitioner's reliance upon the Commissioner's decision in Bisson to claim a tenure status with the Cooperating Committee jointure commission is well placed. This tribunal finds, however, a distinction between Bisson and the herein matter. In Bisson, the de facto jointure commission was in full force and effect at the time petitioner Bisson's employment was terminated and immediately thereafter. In the instant matter, the de facto jointure commission was dissolved and ceased to exist on or about to June 30, 1977, thereby, abolishing petitioner's secretarial position.

The undisputed facts in this matter clearly shows that prior to the cessation of the Cooperating Committee's operation, petitioner was offered a position with the Regional Board's C.S.T. (R-9) Prior to formal Board action on petitionr's application, petitioner advised the Regional Board that she had accepted a position with the Lower Board's newly established C.S.T. (R-10) (R-11) Petitioner knew, therefore, that the Cooperating Committee would cease to exist as of June 30, 1977 and that she would be employed by the Lower Board as a secretary to its newly established C.S.T. Absent a showing that the Lower Board, or any of the remaining Boards, assumed the operational control of the de facto jointure commission, I **FIND** that petitioners' tenure status was not transferable to the Lower Board or the other Boards upon the cessation of the Cooperating Committee. (N.J.S.A. 18A:28-17)

Given the facts as set forth above, I **CONCLUDE** that petitioner did not acquire a tenure status with the respondent Boards of Education herein and, in particular, the Lower Township Elementary School District.

I further **CONCLUDE,** therefore, that the herein Petition of Appeal is hereby **DISMISSED** in its entirety and that Summary Judgement is hereby entered for the four (4) respondent Board's of Education.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, FRED G. BURKE,** who by law is empowered to make a final decision in this matter. However, if Fred G. Burke does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **FRED G. BURKE** for consideration.

9 April 1981
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

10 April 1981
DATE

Seymour Lewis
DEPARTMENT OF EDUCATION

Mailed To Parties:

April 14, 1981
DATE

Ronald L. Parker Jr.
OFFICE OF ADMINISTRATIVE LAW

bm

ANNA MARIE CHINNIS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARDS OF EDUCATION OF THE LOWER CAPE MAY REGIONAL SCHOOL DISTRICT, THE LOWER TOWNSHIP ELEMENTARY SCHOOL DISTRICT, THE WEST CAPE MAY ELEMENTARY SCHOOL DISTRICT AND THE CAPE MAY CITY ELEMENTARY SCHOOL DISTRICT, CAPE MAY COUNTY,	:	DECISION
RESPONDENTS.	:	

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law.

The Commissioner observes that exceptions were filed in a timely fashion by petitioner pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Petitioner excepts to the determination of the Honorable Lillard E. Law, ALJ that she did not acquire a tenure status with the Boards of Education herein, particularly the Lower Township Elementary School District.

Petitioner contends that the de facto jointure commission was not legally dissolved because it was not approved by the Commissioner. Petitioner, however, accepts the formation of the de facto jointure commission although that, too, was not approved by the Commissioner. Petitioner cannot have it both ways.

Petitioner argues that Judge Law erred in distinguishing Bisson, supra, from the present case. The Commissioner does not agree for the reasons expressed by the Court.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

Accordingly, the Petition of Appeal is hereby dismissed and Summary Judgment is awarded the four (4) respondent Boards of Education.

COMMISSIONER OF EDUCATION

May 26, 1981

ANNA MARIE CHINNIS,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE LOWER CAPE MAY REGIONAL SCHOOL DISTRICT, THE LOWER TOWNSHIP ELEMENTARY SCHOOL DISTRICT, WEST CAPE MAY ELEMENTARY SCHOOL DISTRICT AND CAPE MAY CITY ELEMENTARY SCHOOL DISTRICT, CAPE MAY COUNTY,

RESPONDENTS-RESPONDENTS.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, May 26, 1981

For the Petitioner-Appellant, Selikoff & Cohen (John E. Collins, Esq., of Counsel)

For the Respondent-Respondent, Lower Cape May Regional, George James, Esq.

For the Respondent-Respondent, Lower Township Elementary Board, Perskie & Callinan (John F. Callinan, Esq., of Counsel)

For the Respondent-Respondent, West Cape May Elementary Board, Eric D. Gaver, Esq.

For the Respondent-Respondent, Cape May City Board, Ludlam & LaGrosse (John L. Ludlam, Esq., of Counsel)

The State Board of Education affirms the Commissioner's decision for the reasons expressed therein.

September 2, 1981

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. ——
AGENCY DKT. NO. 393-11/78

IN THE MATTER OF:

THE TENURE HEARING OF FRANKLIN JOHNSON, SCHOOL DISTRICT OF THE TOWNSHIP OF CHERRY HILL, BERGEN COUNTY

APPEARANCES:

William C. Davis, Esq., for Petitioner (Davis & Reberkenny, attorneys)

Steven R. Cohen, Esq., for Respondent

BEFORE **DANIEL B. MC KEOWN,** ALJ:

The Board of Education of Cherry Hill (Board) certified three charges of inefficiency to the Commissioner of Education for determination, pursuant to N.J.S.A. 18A:6-10, against Franklin Johnson (respondent), a teacher with a tenure status in its employ.

Though filed before the Commissioner, the matter was brought forward to the Office of Administrative Law for disposition by way of an initial decision, pursuant to N.J.S.A. 52:14F-1 et seq.

Prior to a recitation of testimony and documentary evidence elicited by the parties in support of their respective positions, it is reported here that the pleadings in the matter were joined February 5, 1979. A prehearing conference was conducted at the

Department of Education on April 17, 1979, at which time hearing dates were scheduled for July 1979. The record discloses that the scheduled July 1979 hearing dates were adjourned upon respondent's representation that certain motions were to be filed after he completed depositions of certain witnesses who were to testify in support of the charges. I requested a status report from the parties of the matter during November 1979. Counsel to respondent advised that his requested discovery from the Board was not completed, and he again advised of his intention to file certain motions. No motions were thereafter made or filed before me by counsel to respondent.

Five dates were set by me for hearing during October 1980, at the conclusion of which the parties filed briefs in support of their respective positions.

The Board first employed respondent as a teaching staff member at the commencement of the 1970-71 academic year. Respondent possesses certification to teach science, grades seven through twelve. He was initially assigned by the Board to teach seventh grade science, in which assignment he remained each academic year thereafter through the conclusion of the 1974-75 academic year. It was during this period that respondent acquired tenure in the Board's employ upon the recommendation from the school principal, Giacama Rosa (principal), that respondent's performance was sufficiently satisfactory to acquire tenure.

Respondent was assigned to teach science at the eighth grade level for the 1975-76 academic year, in which assignment he remained until the commencement of the 1978-79 academic year. He was reassigned to teach seventh grade science for the 1978-79 year until his suspension by the Board upon the certification of the charges against him.

Key events leading to the Board's determination to certify charges of inefficiency against respondent are these:

1. The principal submitted a letter, dated February 15, 1981, to the Board secretary which states:

> Mr. Franklin Johnson, [respondent] a tenured teacher assigned to the Heritage Junior School Science Department, is herein charged with inefficiency. The charge relates to his professional performance from September 1974 to

> the present date. Mr. Johnson has been evaluated and found to have exhibited serious and sustained deficiencies in the performance of his teaching duties. As his building principal, I am citing him on the following charges:
>
> Charge 1 Failure to demonstrate the management and teaching skills necessary to conduct an educationally effective classroom program.
>
> Charge 2 Failure to achieve a minimally acceptable level of rapport with his students and their parents, thereby causing an adverse impact on the orderly operation of his department and the school.
>
> Charge 3 Failure to respond adequately and in a professional manner to suggestions and recommendations initiated by his supervisors to improve his teaching proficiencies.
>
> An affidavit of evidence citing the particulars which form the basis of each charge is attached. [PA-3]

The principal's affidavit refers to and includes 15 documents in support of Charge 1; 9 documents in support of Charge 2; and 6 documents in support of Charge 3.

2. The Board secretary notified respondent by letter, dated February 16, 1978, that:

> On February 15, 1978, the Cherry Hill Township Board of Education, in caucus, directed me to send to you the letter of February 15, 1978, in order to advise you of the charge filed against you by Giacomo [sic] S. Rosa, Principal, Heritage Junior School. I enclose herewith a copy of that letter, together with the attached statements of evidence (affidavits) of Giacomo [sic] S. Rosa in support of said charge.
>
> Please be further advised that the aforementioned charge and statements of evidence were filed with me on February 15, 1978.
>
> You are further advised that the Board directed me to advise you that unless the inefficiencies contained in the charge are corrected within

> ninety days, the Board intends to certify said charges of inefficiency to the New Jersey Commissioner of Education pursuant to N.J.S.A. 18A:6-11.
>
> At the expiration of said ninety day period, the Board shall make a determination as to whether or not you have corrected the aforementioned inefficiencies and, depending upon that determination, shall take such further steps as it deems appropriate at that time. [PA-1]

3. The principal on February 24, 1978 met with respondent, respondent's department chairman and a representative from the Cherry Hill Education Association (Association) of which respondent is a member. The principal, according to a memorandum, dated February 27, 1978, that he prepared and submitted to respondent to memoralize the meeting of February 24, 1978, advised respondent that he would be provided with a written list of suggestions to help improve his performance; that unannounced observations of his classroom performance would be conducted; and that after each observation a conference would be conducted by the evaluator.

4. On March 1, 1978, the principal submitted to respondent a written list of twenty-one suggestions to help improve his performance. The suggestions addressed areas ostensibly to assist respondent in improving the areas of his perceived inefficiencies and included:

   * Use by respondent of greater student participation in class;
   * Less use of lecture-type instruction;
   * Encouragement of students to learn through discovery;
   * Use of appropriate instructional materials;
   * Employment of evaluation techniques to measure student learning;
   * More efficient use of classroom time;

* Emphasis on process skills;

* Establishment of classroom procedures so that students will clearly understand such procedures;

* Use of various teaching techniques;

* Employment of changes to instructional pace;

* The need to be consistent, fair and firm;

* Dealing with student misbehavior in appropriate manner;

* Adoption of a clear grading policy;

* Avoidance of disparaging statements in regard to student placement;

* Use of audio tapes to record instruction;

* Observation of other teachers in the classroom setting;

* Communication with parents; and

* Reviewing available literature as it relates to teacher-student relationship.

5. Respondent was, in fact, afforded more than the minimum ninety days required by law within which to correct the alleged inefficiencies. (N.J.S.A. 18A:6-11) Respondent's ninety-day period began on February 16, 1978, and normally would have expired ninety days hence. However, during April 1978 respondent was hospitalized and he did not return to his teaching duties until September 1978. The ninety-day period was, of course, suspended during his absence. It resumed during September 1978 and concluded on October 8, 1978. The principal advised the Board by letter, dated October 13, 1978, that the inefficiencies had not been corrected by respondent.

6. The Board certified the charges against respondent to the Commissioner on November 20, 1978.

Prior to February 15, 1978, when the principal initially filed the charges against respondent, respondent's classroom performance had been supervised by the principal and the department chairman. The department chairman testified that he has been employed as a teacher by the Board since 1960 and that since that time he has been the science department chairman. He explained that his job duties as department chairman include the supervision of teachers. The department chairman did, in fact, observe, evaluate, and supervise respondent on at least eight separate occasions prior to February 15, 1978. The department chairman observed respondent and prepared a written report on each observation: October 18, 1975; January 20, 1976; February 23, 1976; May 20, 1976; June 14, 1977; November 23, 1977; January 4, 1978, and January 24, 1978 (Pd). The department chairman observed respondent and prepared a written report on the observations after February 15, 1978; specifically, September 12, 1978, and September 21, 1978 (PB).

The Board at hearing relied upon the written reports of the department chairman's observations of respondent's performance as part of its proofs in support of the charges. The department chairman's testimony with respect to respondent's teaching performance was also elicited by the Board as part of its proofs in support of the charges (Tr. II and III - 286 to 444).

The department chairman, who is a Doctor of Optometry and has acquired graduate credits in education, does not possess a degree in the field of education, beyond the baccalaureate. The department chairman received a supervisor's certificate (N.J.A.C. 6:11-10.4) from the State Board of Examiners in July 1979, granting him equivalency status for his Doctor of Optometry degree for the requirements normally necessary to receive a supervisor's certificate. The department chairman was not in possession of a supervisor's certificate as required by the State Board of Education to supervise teachers at any time relevant to the matter herein.

The State Board requirement for one to supervise teachers to be in possession of a supervisor's certificate is clear on its face at N.J.A.C. 6:11-10.4(c), which states:

> Supervisor: This endorsement is required for supervisors of instruction who do not hold a school administrator's or principal's

> endorsement. The supervisor shall be defined as any school officer who is charged with authority and responsibility for the continuing direction and guidance of the work of instructional personnel. . . .

In In the Matter of the Tenure Hearing of John Martz, School Dist. of the Tp. of Franklin, 1976 S.L.D. 773, aff'd State Board of Education, 1976 S.L.D. 791, the Commissioner, addressing the same issue as presented herein where a "department chairman" without a supervisor's certificate supervises teachers, said:

> The Commissioner observes that the title 'department chairman' is not a title set forth in the New Jersey Administrative Code. The rule, N.J.A.C. 6:11-4.1(b), does allow persons who possess regular teachers' certificates with three years of appropriate teaching experience to serve as a teaching principal or teaching supervisor, within the scope of his certificate, in charge of not more than twelve teachers. In the Commissioner's judgment, this rule, historically referred to as the 'head teacher' rule, applies only to very small schoolhouses which have a faculty of not more than twelve teachers. Under this rule local boards of education were permitted to designate a teacher as a 'head teacher' because it was too costly to employ a school principal.
>
> In Herbert J. Buehler v. Board of Education of the Township of Ocean, Monmouth County, 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, the Commissioner was similarly concerned with the duties and responsibilities of a teaching staff member appointed to a position of department chairman. The Commissioner held '* * * that teachers should not be given such duties, basically supervisory in nature, unless the assignment is made by the employing board of education and defined succinctly within the framework of a job description or table of organization * * *' (at p. 442) He further made it clear that staff members assigned such duties shall be required to hold an appropriate supervisor's certificate when, acting as supervisors, they are '* * * charged with authority and responsibility for the continuing direction and guidance of the work of instructional personnel.' (cited from the twentieth edition of 'Rules Concerning Teachers Certificates,' at p. 443)
>
> The Commissioner's determination with respect to the necessity for such certification has not been altered in the interim since Buehler, supra. In the instant matter, however, the allegations against respondent by the department chairman rest primarily on the performance of duties by the chairman which were ministerial and not supervisory in nature. The chairman performed such duties, of a routine kind, at the direction of the principal and reported directly to him. In such circumstances the principal maintained his authority for supervision and a supervisor's certificate was not required for the department chairman. The Commissioner so holds.

> This holding is tempered, however, with a caution; namely, that charges against tenured teaching staff members which are concerned with a professional evaluation of teaching performance must of necessity require proof that those who bring them shall possess supervisor's certificates or be qualified to supervise instruction. A lesser qualification may not, in the Commissioner's determination, serve as a proper or legal preferment of such charges. [Id. pp. 788-89]

Respondent contends that the written evaluations prepared by the department chairman on his performance, which go beyond mere ministerial duties to the essence of the supervisory process, may not be considered competent evidence in support of the charges. The Board contends, to the contrary, that such observations are competent evidence on the assertion the department chairman, notwithstanding his lack of supervisory certification, was "qualified to supervise instruction" as stated in Martz, Id. p. 789. The Board reasons that the Commissioner stated in Martz that one who supervises teachers must "possess supervisor's certificates or be qualified to supervise." Ibid. The Board contends that the department chairman, by virtue of his experience in supervising teachers and his acquired graduate credits in education, must be considered to have been "qualified" to supervise.

The State Board rule, N.J.A.C. 6:11-10.4, is clear, as is the Commissioner's ruling in Martz. One who formally observes teachers and who prepares written evaluations of those teachers' performance based on his observations must be properly certificated as a supervisor pursuant to the State Board rule in order for such written evaluations to be credited as proof in support of charges of inefficiency against a teacher. Concerning the formal observations of respondent's performance prepared by the department chairman and his testimony presented by the Board in support of charges against respondent, such observations and testimony are hereby stricken and shall not be considered as legally competent evidence for or against the truth of the charges. N.J.A.C. 1:1-15.8. The Board's argument that the department chairman was "otherwise qualified" misses the thrust of the Commissioner's statement in Martz. The words "otherwise qualified" within the context of the total decision in Martz mean simply that for a person to supervise teachers, that person must be in possession of a supervisor's certificate or a certificate which includes authorization to be a supervisor. N.J.A.C. 6:11-10.4(c). I **CONCLUDE** the department chairman's testimony is not competent evidence herein.

The principal, however, is properly certified as school principal, which certificate simultaneously authorizes the holder to be a school principal and to supervise

teachers. N.J.A.C. 6:11-10.4(b). The principal conducted six formal observations of respondent's performance prior to February 15, 1978, and prepared written evaluations of his performance on such observations (Pd). Subsequent to February 15, 1978, the principal conducted observations of respondent's performance and prepared written evaluations thereupon on March 8, March 23, April 4, September 28, and October 6, 1978. Each observation was followed by a conference with respondent and the principal. Respondent seeks to have all testimony elicited from the principal with respect to his observations of respondent's teaching performance and the written evaluations prepared on those observations stricken on the theory that because the principal relied on the department chairman as the "supervisor" of respondent, the department chairman had to have influenced the principal with respect to the principal's assessment of respondent's performance. Respondent grounds his allegation, that the principal's testimony with respect to the observations and the written evaluations must be viewed as tainted by the department chairman's influence, on the following points:

1. The principal and the department chairman discussed respondent's perceived deficient performance prior to the filing of tenure charges;

2. The more probable than not occurrence that the department chairman, who was not certified nor qualified to supervise respondent, through his conversations with the principal did influence the principal to bring the charges;

3. The suggestion that respondent's change of assignment from eighth grade to a seventh grade science class for 1978-79, made at the time respondent was recuperating from his hospitalization during April 1978 and without informing respondent such change was made, that neither the principal nor the department chairman intended to afford respondent a fair opportunity to improve his performance; and

4. The department chairman's letter request to the President of the National Education Association (the parent association of the New Jersey Education Association, a member of which is the Cherry Hill Education Association, of which the department chairman is a member), by which he seeks advice on how to deal with his perceived ethical question of having to testify against respondent, also a member of the

Cherry Hill Education Association, in a tenure proceeding, which letter request was sent prior to the certification of charges.

Respondent's motion to strike the principal's observations and evaluations in addition to striking his testimony in support of the charges, on the preceding four grounds, is denied for these reasons:

First, the principal testified that four department chairmen are assigned to his school. The principal explained that his role is to supervise the department chairmen, all of whom are, in turn, responsible for the supervision of each teacher in their respective departments. Though the principal testified that he reserves unto himself the authority and responsibility to arrive at final yearly evaluations of all teachers assigned to his school, the fact remains that those final evaluations are based not only on his own independent observations and evaluations of each teacher's performance, but they also include the observations of each teacher as prepared by the department chairman. The principal's perception of those observations are formed on the basis of the written documents, conversations with the respective department chairman, and the principal's own independent observation and evaluation.

Even though it would be absurd to believe that the principal did not consult with the department chairman with respect to respondent's performance before and after the charges were filed, it would be equally absurd to strike the principal's observations, evaluations, and testimony on the asserted grounds of undue influence. A school principal is responsible for the total operation of the school to which he is assigned. The evaluation of a teacher's performance is in large measure a subjective process, even though some objective criteria can be established. Because a school principal has conversations with the parents of pupils assigned to a teacher, or the teacher's name is mentioned in a conversation the principal may have with another teacher, or the principal observes the teacher in a setting other than the classroom, there is insufficient reason, considering each point by itself or collectively, to impugn the integrity of that principal's evaluation of the performance of that teacher.

In In the Matter of the Tenure Hearing of Francis M. Starego, Borough Sayreville, Middlesex County 1967 S.L.D. 271, the Commissioner said: ". . . 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. . . ." (at p. 272)

Second, the record is void of any proofs offered by respondent that the department chairman significantly influenced the principal to proceed with the charges or that, absent any influence which may have occurred, the principal would not have proceeded with the charges. The principal himself advised the Board on February 15, 1978, that the charges he filed against respondent emerged from his concern for respondent's performance from the 1974-75 academic year. That the principal did indeed have concern with regard to respondent's performance is made manifestly clear by the principal's independent observations and evaluations prepared on October 22, 1975, January 5 and June 10, 1976, and June 16 and December 23, 1977. The evaluation on October 23, 1975, concludes with five specific recommendations for respondent to consider to improve his performance (Pa-6); on January 5, 1976, respondent was advised in a five-page evaluation by the principal that his performance "leaves a great deal to be desired" (Pa-9); on June 10, 1976, the principal advised respondent of "a continuing and serious decline in his [respondent's] teaching proficiencies" (Pa-16); on June 16, 1977, respondent was again advised in detail of his unsatisfactory performance (Pa-19); and finally, on December 23, 1977, respondent was advised by the principal of specific perceived deficiencies in his performance (Pa-23).

All these evaluations were prepared by the principal and based on the principal's observations. Other than the fact that the department chairman and the principal may have discussed their views on respondent's performance, respondent has offered no compelling reason in his second point why the principal's observations, evaluations and testimony in support of the charges should be stricken.

Third, it is true that respondent's assignment for 1978-79 was changed from an eighth to a seventh grade class (Pb-12). The assignment change was made near the conclusion of the 1977-78 year while respondent was absent from his duties, recuperating from his hospitalization. It is also true that the principal, rather than taking the initiative to notify respondent of the change by telephone, letter, telegram, or by courier, adhered to a past policy of the expectation that teachers would contact his office at the end of each year or during the subsequent vacation period to determine their assignments. Respondent did not inquire at the principal's office of his assignment for 1978-79. He discovered his reassignment when he reported for school in September 1978.

It is noticed that the assignment change was made because (1) a vacancy was created at the seventh grade level by a seventh grade teacher going on maternity leave,

and (2) respondent did teach seventh grade for five years and his performance had been adjudged satisfactory.

I find no malice, illwill, or unfairness attaching to respondent under these circumstances, even though his assignment was changed from eighth to seventh grade science during his ninety-day improvement period. Respondent testified he is certified to teach science, grades seven through twelve (Tr. IV-459). Such certification presumes one is equally capable of teaching eighth grade or seventh grade science, or any other grade level within the scope of the certificate. The principal had a reasonable basis to believe that if respondent were assigned to seventh grade, then that assignment, in which respondent had been successful earlier, could be of benefit to him.

Finally, the department chairman's letter request to the President of the National Education Association in regard to his perceived ethical question is, in my view, irrelevant to the proofs of the charges here. The department chairman's testimony, observations and evaluations of respondent's performance are not considered competent evidence in support of the charges.

Subsequent to respondent's having been given notice on February 16, 1978, of the allegations of inefficiency made against him by the principal to the Board, there followed the ninety-day period allowing respondent to improve the alleged areas of inefficiencies prior to the Board's certifying the charges to the Commissioner for determination. N.J.S.A. 18A:6-11. School authorities have the duty during the ninety-day period to assist a teacher in improving the areas in which they allege he/she may be inefficient, and at the conclusion of the improvement period, if no improvement is shown and the Board certifies the charges, the Board carries the burden of proof by a preponderance of the credible evidence to establish the truth of the charges. N.J.A.C. 1:1-15.1.

Here, the principal, it is found, offered assistance to respondent during the ninety-day period by observing his classroom teaching performance, preparing written performance evaluations on those observations, and conducting conferences with respondent after each observation. In fact, respondent was accompanied at each evaluation conference by his association representative. The principal afforded respondent a written list of twenty-one specific suggested methods of improving his performance (Pb-4); the principal observed and evaluated respondent's actual classroom performance and

conducted conferences on March 8-9 (Pb-5); March 23, 28 (Pd-7); April 2 (Pb-9); September 28 (Pb-16); and October 6, 1978 (Pb-17). In each evaluation and conference which followed, it is fair to state that the principal reduced to writing and orally communicated to respondent the inadequacy of respondent's classroom pupil management, his unsatisfactory lesson planning on a daily and weekly basis, and respondent's classroom demeanor which was seen to be the cause of student tensions, uncertainty, and a strained relationship to him. In fact, the principal advised respondent on September 28, 1978, in a written evaluation, that:

> Mr. Johnson's respondent performance during the 9/28 6th period class was unsatisfactory. His management techniques were ineffectual and led to loss of control. His plans and their implementation were unsatisfactory. At his rate of instructional coverage, Mr. Johnson's class will be exposed only to a superficial coverage of the program topics.

The principal on October 13, 1978, advised the Board Secretary:

> At the conclusion of the ninety day period which ended on October 8, 1978, I have reviewed the evaluation reports and associated information related to Mr. Johnson's performance as a teacher at Heritage. On the basis of those reports, I have concluded that Mr. Johnson has failed to demonstrate a satisfactory level of improvement in the areas cited by the charges. He continues to manifest serious deficiencies in and out of the classroom resulting in instruction which is inefficient and devoid of educational value to the students assigned to his classes . . . .

Respondent contends to the contrary, and has so testified with respect to the twenty-one suggested techniques for improvement of his performance as submitted to him by the principal, that he in fact complied with each and every written recommendation in an effective and efficient manner (Respondent's brief, at p. 14). Respondent testified that, as a result of the twenty-one suggestions made to him, he (1) instituted with students question-and-answer sessions, debates and discussions and student demonstrations; (2) he relied more on mimeographed excerpts from the textbook he distributed to students than on lecture-type instruction; (3) he encouraged students to learn through discovery by requiring them to prepare, conduct and analyze the results of their own experiments; (4) he asserts he did prepare through proper planning, appropriate instructional materials; (5) he administered to students several major tests in each marking period, as well as other evaluative tests as a means of employing evaluation techniques to measure student progress; (6) he used classroom time more efficiently by mimeographing certain excerpts from the testbook for distribution to the students; (7) he instituted

emphasis on process skills by requiring students to do independent experiments; (8) he instituted written rules and procedures for student behavior in his classroom; (9) he varied his teaching techniques; (10) he changed the pace of his instruction; (11) he did continue to rely on consistent, fair and firm policies with respect to student discipline, and he did, he asserts, communicate with parents; (12) he utilized a fair and explicit grading policy; (13) and that he adopted an attitude with his students which was intended to convey that he, as a teacher, is friendly, interested, and enthusiastic in regard to his responsibilities and to his students. It is noted here that it is agreed that respondent used audio tapes, observed other teachers, and reviewed available literature, as suggested earlier by the principal.

The issue here is a classic representation of the issues presented in an inefficiency tenure hearing. On the one side are the school authorities (here, one school authority - the principal), who are convinced that a teacher is inefficient in carrying out his assigned duties and responsibilities as those responsibilities relate to the students, i.e., the responsibility for each teacher to work with all students, yet with each, in a manner which will expose the students to a thorough and efficient program of education. On the other hand, the teacher testifies that every one of the alleged inefficiencies, if in fact they existed at all, has been corrected by due diligence and care; and that the charges, if certified for determination after they had been corrected, were certified because of a negative predisposition by the school authorities, or because of undisclosed malice or illwill.

However, in our organized system of public school education, boards of education have been legislatively authorized to make and enforce rules for the conduct of the operation of their schools. N.J.S.A. 18A:11-1. Boards of education have been historically recognized as having the power and duty to delegate to proper officers they employ the responsibility for carrying out their policies, written or unwritten.

Here, by virtue of the Board certifying the charges against respondent, based on the complainant having filed with it the letter, dated October 13, 1978, by the principal, one of its authorized officers, dated October 13, 1978, it is presumed that the standards respondent was to have failed to meet were considered by the Board to be the standards it expects its teaching staff members to attain and maintain. Furthermore, though the Board carries the burden of proof by a preponderance of the credible evidence to support the charges, once that burden has prima facie been met, it is respondent's duty

to come forward with sufficient credible, competent evidence to overcome the Board's proofs. (See, In the Matter of the Tenure Hearing of Dominic Pariai, School Dist. of the City of Elizabeth, 1974 S.L.D. 631, 634-635.)

I **FIND**, based on the proofs herein, that the Board has established by a preponderance of legally competent evidence—elicited through the principal—that respondent is inefficient, as charged. I further FIND that respondent has presented insufficient proofs in support of his position—that he is not inefficient—to overcome the preponderance of evidence presented by the Board.

A final matter remains. Respondent was suspended from his teaching duties during November 1978 when the Board certified the charges herein against him to the Commission. One-hundred-twenty days thereafter, the Board commenced regular salary payments to respondent, pursuant to the requirements of N.J.S.A. 18A:6-14. The salary rate resumed was the rate respondent would have received from 1978-79 had he not, in fact, been suspended. The Board has continued and continues respondent's salary to the present at the rate to which he was entitled in 1978-79. No salary increments as provided in the Board's teacher's salary policy have been granted respondent since his suspension. Respondent, relying for authority on the Commissioner's earlier ruling in In the Matter of the Tenure Hearing of Matilda Grabert, School Dist. of the Tp. of Egg Harbor, 1977 S.L.D. 163 and In the Matter of the Tenure Hearing of Walter Kiyer, School Dist. of the Borough of Haledon, 1974 S.L.D. 501, asserts that a teacher who is suspended pending an adjudication of tenure charges and whose salary is resumed as required by law if the matter is not decided within 120 days and where the matter is continued into subsequent school years must receive salary increments according to the Board's policy in each such subsequent year, so long as the matter has not been adjudicated.

I disagree. Though the statute N.J.S.A. 18A:29-14 authorizes boards of education to withhold salary increment for good cause, it requires the Board to notify the affected teacher within ten days of its determination to withhold such an increment. Notwithstanding the absence of such notification to respondent during the lengthy pendency of this matter, salary increments, in my view, are not automatic; increments must be earned by one who professes to be entitled to such increment. [See, Fitzpatrick v. Bd. of Ed. of Montvale, 1969 S.L.D. 4; Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288 (App. Div. 1960.)] Here, respondent was not allowed to "earn" an increment because he was suspended, pending a determination on the charges of inefficiency.

However, to rule that one is entitled to a salary increment from one year to the next, while tenure charges are pending, on the grounds that one's suspension precluded him from otherwise earning such an increment would be to apply an intention to the legislative will at N.J.S.A. 18A:29-14 which I cannot conceive was desired.

Respondent's motion to recover salary increments for 1979-80 and 1980-81 is hereby **DENIED.**

Having found that the charges of inefficiency against respondent have been proven true by a preponderance of credible evidence, it is hereby **ORDERED** that Franklin Johnson be and is dismissed as a teaching staff member from the employ of the Board of Education of Cherry Hill as of the date of his suspension.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, FRED G. BURKE,** who by law is empowered to make a final decision in this matter. However, if Fred G. Burke does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

AGENCY DKT. NO. 393-11/78

I hereby **FILE** my Initial Decision with **FRED G. BURKE** for consideration.

DATE

DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

May 21, 1981
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

May 26, 1981
DATE

OFFICE OF ADMINISTRATIVE LAW

plb

IN THE MATTER OF THE TENURE	:	
HEARING OF FRANKLIN JOHNSON,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION
TOWNSHIP OF CHERRY HILL,	:	
CAMDEN COUNTY.	:	
	:	

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law.

The Commissioner observes that exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Respondent excepts to the acceptance by the Honorable Daniel B. McKeown, ALJ of testimony and documentary evidence entered through Principal Rosa claiming that such was tainted by the opinions of the improperly-certificated Department Chairman Martin. Respondent argues that Judge McKeown erred in upholding the action of the Board maintaining respondent at the same annual salary level he was earning at the time of his suspension. Respondent cites Grabert, supra, in support of his contention. The Board's reply exceptions uphold the initial decision of the Judge and refute the exceptions filed by respondent.

The Commissioner cannot agree with respondent's contention that the testimony of the principal was tainted by that of the improperly-certificated department chairman. The Commissioner notes with approval that Judge McKeown barred the department chairman's testimony and observations as not being competent evidence. The Commissioner agrees with the Court's determination that the testimony of the principal be allowed. The Commissioner does not find evidence in the record to show that the department chairman exerted undue influence on the principal nor is there evidence to show malice by the principal toward respondent.

The Commissioner finds that Judge McKeown cites the determination by respondent, relying on Grabert,

> "***that a teacher who is suspended pending an adjudication of tenure charges and whose salary is resumed as required by law if the matter is not decided within 120 days and where the matter is continued into subsequent school years must receive salary increments according to the Board's policy in each such subsequent year, so long as the matter has not been adjudicated."

The Commissioner finds Grabert directly on point and determines that Judge McKeown erred by disagreeing therewith. The finding of the Court denying respondent's motion to recover salary increments for 1979-80 and 1980-81 is set aside. The Board shall award such increments accordingly as though respondent had not been suspended. Grabert, supra The Commissioner finds that the charges of inefficiency have been proven by a preponderance of credible evidence. Respondent is accordingly dismissed from the employ of the Board as a teacher as of the date of this decision.

IT IS SO DIRECTED.

COMMISSIONER OF EDUCATION

July 2, 1981

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5052-80
AGENCY DKT. NO. 353-7/80A

IN THE MATTER OF:

MARYELLEN MONACO,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF RIVER EDGE, BERGEN COUNTY,
Respondent

Record Closed: April 3, 1981
Received by Agency: 4/23/81

Decided: April 21, 1981
Mailed to Parties: 4/27/81

APPEARANCES:

Theodore M. Simon, Esq., for Petitioner, Maryellen Monaco
Irving C. Evers, Esq., for Respondent, Dr. John A. La Vigne, Superintendent of Schools

EVIDENTIARY DOCUMENTS:

P-1: July 7, 1976 La Vigne to Monaco letter
P-2: January 10, 1977 La Vigne to Monaco letter
P-3: April 21, 1977 La Vigne to Monaco letter
P-4: July 23, 1977 La Vigne to Monaco letter
P-5: September 28, 1977 La Vigne to Monaco letter

P-6: April 11, 1980 La Vigne to Monaco letter
P-7: April 18, 1980 La Vigne to Monaco letter
P-8: September 7, 1977 Board Minutes
P-9: 1977-78 School Calendar
P-10: Administrator's Record of Supervisory Visit, January 19, 1978
P-11: June 1978, Supplementary Payroll
P-12: September 1977, Supplementary Payroll (2 pages)
P-13: September 7, 1977 - September 30, 1977 Claim Form
P-14: June 1978 Claim Form

BEFORE **WARD R. YOUNG**, ALJ:

A Verified Petition was filed with the Commissioner of Education on July 16, 1980, alleging the Board violated the provisions of N.J.S.A. 18A:28-5 when it determined not to reemploy petitioner for the 1980-81 school year.

The matter was transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

At the prehearing conference held on October 29, 1980, it was agreed the sole issue was whether petitioner acquired tenure status as a teaching staff member.

A plenary hearing was held on January 6, 1981 and the record closed on April 3, 1981, deadline for petitioner to file a rebuttal brief.

The controversy is another in a series of disputes about whether a State Compensatory Education (SCE) teacher employed at an hourly rate of pay can obtain tenure.

Whether position title be supplemental, Title I, or as in this matter SCE tutor, the controlling principle was stated by the Appellate Division in Point Pleasant Beach Teacher's Ass'n v. Callam, 173 N.J. Super. 11 (App. Div. 1980), cert. den. 84 N.J. 469 (1980):

> Whether a professional employee of a board of education qualifies as a teaching staff member eligible for tenure depends upon the nature of the employment tendered and accepted. This determination can only be made after an examination of the terms, conditions and duties of the employment and a consideration of the conduct of the parties. (Id. at 17)

Maryellen Monaco was employed from September 1976 through June 1980 in River Edge and was properly certified as an elementary school teacher in the State of New Jersey. During the school years 1976-77, 1978-79, and 1979-80, she was a full-time teaching staff member and that time for tenure purposes is undisputed.

During 1977-78 petitioner was employed as an SCE tutor and compensated at the rate of $7.50 per hour (P-8). Although she characterized her services in both 1976-77 and 1977-78 as "supplementary to the classroom teacher" (Tr. 79/15), the Board did not dispute the applicability of her 1976-77 service for tenure. This court will, therefore, address only the disputed 1977-78 service.

Similarities of petitioner's 1977-78 service as an SCE tutor with regular full-time teaching staff members are as follows:

> Petitioner began her 1977-78 employment on September 6, 1977, with all other teachers through the invitation of the Superintendent (P-4) to attend orientation (also distinguished below).
>
> Her school day began and ended at the same time as regular full-time teachers. (Tr. 20/6). She was provided preparation time (Tr. 22/1), ordered supplies (Tr. 34/19), and took inventory at the end of the year (Tr. 35/8).
>
> Petitioner was required to keep a plan book and prepared daily lesson plans that were reviewed by the principal (Tr. 27/20-29/7 and Tr. 55/23-57/13).
>
> She attended the professional day upon approval of the principal and was compensated for same (Tr. 23/22-25 and Tr. 66/22-25). She attended staff meetings (Tr. 30/1) (also distinguished below).
>
> Petitioner was observed in a supervisory visit by the Superintendent, albeit on but one recorded occasion (P-10).

There were also the similarities of petitioner's 1977-78 service with teaching staff members best characterized as specialists in art, music, speech, library and physical education. Like them she was not assigned a home room station and is distinguished from regular classroom teachers who were (Tr. 20/22-21/8 and Tr. 93/18).

How is petitioner's 1977-78 service distinguishable from that of regular full-time teaching staff members?

> She was not paid for her Orientation Day attendance (Tr. 15/4 and P-13). She received an hourly wage, but did not receive health insurance or sick leave benefits, and no contributions were made in her behalf to the Teacher's Pension and Annuity Fund (P-4, P-5, Tr. 24/1-8 and Tr. 61/24-62/2). Her lunch period of one hour was unpaid. (Pb 2).
>
> Petitioner taught pupils on a one-to-one basis or in small groups of 2 to 4 (Tr. 19/7-9). Specific pupil instructional needs were based upon testing provided primarily by the Child Study Team (Tr. 26/22). The subject matter taught was reading and math (Tr. 37/7-10).
>
> She was not required to be present at Open House (Tr. 35/22) or to schedule parent conferences (Tr. 36/2 and Tr. 70/5). Her attendance at staff meetings was voluntary (Tr. 67/11).
>
> Four or five times during the year petitioner was reassigned to substitute for a classroom teacher and, on those occasions, pupils normally scheduled to be with her for remediation remained with their regular classroom teacher (Tr. 38/13-39/11 and Tr. 70/8-19).
>
> Petitioner was not assigned to any supervisory duties outside classes, such as on the playground, in the halls or lunchroom (Tr. 95/16).

The above-stated similar and distinguishing features of petitioner's 1977-78 service are hereby adopted as **FINDINGS OF FACT.**

Petitioner's role in curriculum planning and development is disputed and is only in dispute because of her involvement in a 1976-77 program for Wisconsin Design Word Attack Skills. (See Tr. 32/7-34/7 and Tr. 95/10). I do not find resolution of the dispute essential to determination of the substantive issue here in light of other **FINDINGS OF FACT.**

The Public School Education Act of 1975, N.J.S.A. 18A: 7A-1 et seq., mandates that education programs shall be thorough and efficient. The State Board of Education has promulgated rules setting forth statewide goals and standards of proficiency. See N.J.A.C. 6:8-2.1 and N.J.A.C. 6:28-3.2. It is undisputed here that supplemental instruction shall be provided educationally handicapped pupils in addition to the regular instructional program. N.J.S.A. 18A: 46-1, et seq. The controversy here is whether petitioner providing such supplemental instruction during the 1977-78 school year is to be credited with that time for tenure as a teaching staff member.

In Hamilton Tp. Supplemental Teachers Ass'n, et al. v. Bd. of Ed. of the Tp. of Hamilton, 1979 S.L.D. _____(November 30, 1979), the Commissioner stated that:

> The Commissioner finds that when programs are mandated by the Legislature (N.J.S.A. 18A:7A-5 and 6) and in rules promulgated by the State Board of Education (N.J.A.C. 6:8-2.1 and 6:28-3.2(b)), be there only one pupil in need of that educational opportunity, it must be offered by a board of education and the teacher(s) involved are entitled to the full protection of the tenure law. N.J.S.A. 18A:28-1 et seq.

The State Board of Education reversed the Commissioner in Hamilton Township, supra, (with the exception of one high school teacher) in a decision rendered on October 1, 1980. The State Board found Point Pleasant Beach, supra, controlling and cited the Commissioner's determination in Kuboski v. Bd. of Ed. of the Borough of South Plainfield, 1978 S.L.D. 322, in which he said:

> Those persons employed to perform duties to supplement the regular instructional program of the school's professional teaching staff members are not entitled, even if fully certified, to all the benefits or protection afforded regular teaching staff members unless they perform all of the principal duties and assume all of the principal responsibilities of regular teachers... This determination is grounded upon the general principle that significant differences exist between supplemental or compensatory education teachers who perform duties often on one-to-one relationship or on a per-pupil basis, and those professional teaching staff members entrusted with the prime responsibility for classroom instruction, education planning and curriculum developments. Tenure entitlement and an entitlement to the designation of 'teaching staff member' occurs in the latter instance and it does not occur in the former instance. (Id. at 332)

In Claire Bisgay, et al. v. Bd. of Ed. of the Township of Edison, 1980 S.L.D. _____ (September 8, 1980), the Commissioner denied accrual of time for tenure of petitioning supplemental teachers and said "The ultimate goal to be achieved in affording educationally handicapped pupils supplemental instruction is to have them return to their regular classroom on a full time basis." He said supplemental instruction "is analagous to the character and nature of employment services which, in effect, could be provided by appropriately certified substitute teachers . . . ."

In Hamilton Township, supra, the State Board excepted the case of one petitioner who taught in the high school, saying:

> She is assigned a schedule of rostered classes, works a full academic year (though fewer hours per day than ordinary teachers), teaches during all periods coinciding with the scheduled classes for all pupils, assigns and records report card grades, stands hall duty while classes pass and is regularly observed by the administration. In our view, these activities, which are common to the classroom teaching staff, establish such regularity of employment that this petitioner should be deemed a teaching staff member for purposes of obtaining tenure.

Determination of the controversy here must rest on the controlling principle of Point Pleasant Beach, supra, that is, "the nature of the employment tendered and accepted . . . after an examination of the terms, conditions and duties of the employment and a consideration of the conduct of the parties." (Id. at 17).

That petitioner was compensated at an hourly rate is of no consequence. Nor is the source of her compensation of consequence. In Lorenz v. Bd. of Ed. of the Tp. of Burlington, 1980 S.L.D. _____ (State Board of Education, December 3, 1980), the State Board affirmed that functions performed by teachers are of greater consequence than the source of funds used to pay them and affirmed a principle that permits the granting of tenure to teachers whose terms of employment, duties and responsibilities are substantially the same as regular teaching staff members.

Petitioner worked a full year and a full school day as did other teachers. Although she was not compensated for lunch hour or Orientation Day, she was paid for her attendance on professional day. She was required to keep a plan book; prepared daily lesson plans that were reviewed by the principal; was provided preparation time; ordered supplies; took inventory at the end of the year; attended staff meetings (voluntarily); and was observed in a supervisory visit by the Superintendent.

Like teachers of art, music, speech, library science and physical education petitioner was not assigned to a homeroom. Nor was she assigned to extra supervisory duties or required to schedule parent conferences.

The fact that she was occasionally relieved of her teaching duties during the year to substitute for absent teachers and the failure of the adminstration to assign extra duties or require parental conferences should not, in my opinion, be held to her detriment.

She was involved in curriculum planning in 1976-77, with probable if disputable carry-over into 1977-78.

Petitioner's classes were rostered and scheduled as were regular instructional classes, and her class sizes ranged from 1 to 5 pupils. It is noted here that, pursuant to N.J.A.C. 6:28-3.2(b)3, "Supplemental instruction for the educationally handicapped pupil may be given individually or in small groups, not to exceed three pupils." (Emphasis added.) It must also be recognized that about 15 different pupils were taught by petitioner each day and that she met with the same pupils from 2 to 3 times per week.

As objectively similar as the activities of this petitioner are to those of petitioner Mankukas, who prevailed in Hamilton Township, supra, they must, nevertheless, subjectively be distinguished from those of the classroom teaching staff in River Edge. The substantial and significant distinguishing feature of petitioner's service in 1977-78 is that she was not entrusted with the prime responsibility for classroom instruction, and her duties and responsibilities were therefore not substantially the same as regular teaching staff members in River Edge.

I FIND the principles of Point Pleasant Beach, supra, and the ratio decidendi of the Commissioner in Kuboski, supra, as applied to the evidence in this case necessitate a determination that petitioner Monaco is not entitled to the designation of teaching staff member during the 1977-78 school year.

I CONCLUDE, therefore, that petitioner's claim of 1977-78 service for tenure accrual is **DENIED.** The Petition of Appeal is hereby **DISMISSED.**

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, FRED G. BURKE,** who by law is empowered to make a final decision in this matter. However, if Fred G. Burke does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

OAL DKT. NO. EDU 5052-80

I hereby **FILE** this Initial Decision with **FRED G. BURKE** for consideration.

21 April 1981
DATE

WARD R. YOUNG, ALJ

Receipt Acknowledged:

23 April 1981
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

April 27, 1981
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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MARYELLEN MONACO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RIVER EDGE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law.

The Commissioner observes that exceptions were filed by petitioner pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Petitioner in her exceptions principally objects to the initial decision of the Honorable Ward R. Young, ALJ wherein Judge Young states "***that she was not entrusted with the prime responsibility for classroom instruction***". Petitioner goes on to disclaim the propriety of such reasoning and concludes that she was employed as a tenure-eligible regular teaching staff member for the 1977-78 school year. The Commissioner agrees with petitioner's objection to Judge Young's characterization of her service as not that of prime responsibility for classroom instruction, but cannot agree with her conclusion that she was a regular teaching staff member.

An examination of the record herein convinces the Commissioner that during the school year 1977-78 petitioner knowingly accepted a position as SCE tutor "***supplementary to the classroom teacher." (Tr. 79) She was not a contractual employee, was paid at an hourly rate and did not receive health insurance or sick leave benefits nor did she contribute to the Teachers' Pension and Annuity Fund. Petitioner taught pupils on a one-to-one basis or in small groups as needed. She was not assigned supervisory duties, was not required to attend Open House, parent conferences or staff meetings. The Commissioner finds such service characteristics to amply justify the application of the principles as stated by the Court in Point Pleasant Beach, supra.

For the reasons stated above, the Commissioner finds and determines that petitioner's position was not that of a regular teaching staff member during the 1977-78 school year. Accordingly, such time may not be counted toward tenure. The Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

June 10, 1981

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6072-80
AGENCY DKT. NO. 471-9/80A

IN THE MATTER OF:

WASHINGTON EDUCATION ASSOCIATION,
ON BEHALF OF PAUL C. ENNICO ET ALIA
v.
BOARD OF EDUCATION OF THE
BOROUGH OF WASHINGTON, WARREN COUNTY

Record Closed: March 30, 1981 Decided: April 27, 1981

Received by Agency: 4/29/81 Mailed to Parties: 4/30/81

APPEARANCES:

Arnold S. Cohen, Esq., for Petitioner

Robert L. Schumann, Esq., for Respondent

BEFORE **ELINOR R. REINER**, ALJ:

Petitioner, Washington Education Association, on behalf of Paul C. Ennico et alia, filed a Verified Petition with the Commissioner of Education, alleging that the Board of Education of the Borough of Washington (respondent or Board) placed improper letters of reprimand in petitioners' personnel files. Thereafter, on September 19, 1980, respondent filed an answer, contending that the failure to attend a regularly scheduled function was sufficient reason for respondent to place a letter of reprimand in the files of those

teachers not in attendance and not having a legitimate excuse for nonattendance. The matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held in this matter on November 20, 1980, at which time the following issues were isolated:

A. Were the letters of reprimand received by petitioners unjust?

(1) Was the failure to attend the "Honors Program" without a legitimate excuse sufficient reason for respondent to place a letter of reprimand from the Superintendent in the files of those teachers not in attendance?

(2) Did the Superintendent of Schools have authority to place a letter of reprimand in a teacher's file?

(3) Did the Superintendent of Schools act in an arbitrary and capricious manner in determining which teachers should receive a letter of reprimand?

At the hearing held in this matter on January 20, 1981, the parties agreed that the only issue to be resolved was issue A(1). In this regard, the parties stipulated to the following facts and documents:

(1) Petitioners are tenured teachers in Washington Borough.

(2) Petitioners did not attend the Honors Program given on May 27, 1980.

(3) Each petitioner received a letter dated June 19, 1980 from the Superintendent. (J-1 in evidence.)

(4) The Honors Program was a program initiated in the 1976-77 school year by the Washington Borough Board of Education. The program is designed to honor those students in Grades 3 through 6 who, for the entire school year, have earned Honor Roll designations or High Honors. The High Honors recipients

are those students who have earned straight A's for at least one marking period; the Honors recipients are those students who have attained a mark of at least "B" in the major academic subjects. The program is an evening program which is held in the school auditorium. It is attended by the Board of Education as well as all parents whose children are scheduled to receive the honors.

The function of the teacher is to call the name of his/her students who are receiving the honors, present the certificate to them and introduce them to the Superintendent of Schools, who then shakes the student's hand. In addition, High Honors Sixth-Grade students are expected to address the assembled teachers and parents on assigned subjects such as "integrity," "scholarship" and "knowledge." The teachers march in and out of the auditorium with the students, and following the program, there is an opportunity for the teachers, parents, Board members and students to interact with respect to the education of the children.

(5) Faculty Agenda of May 5, 1980. (J-2 in evidence.)

(6) Those teachers of children in Kindergarten or Grades 1 and 2 who did not participate in the Honors Program were not expected to attend. No such faculty member received a letter of reprimand.

(7) John Santo, who called in sick on May 27, 1980, did not receive a letter of reprimand, as he was not expected to be in attendance at the Honors Program.

(8) At a special meeting of the Board of Education held on June 17, 1980, the Board directed Patrick O'Malley, Superintendent of Schools, to issue the letter in question.

(9) No teacher was afforded a hearing or conference with the Superintendent of Schools, school principal or Board of Education before the insertion of the letter of reprimand in the teacher's file.

(10) There is no dispute that the teachers, having been given the opportunity to place a letter of explanation in their files, have done so.

Witnesses who testified at the hearing and documents considered in deciding this case are listed in the Appendix attached hereto.

Petitioners, in an attempt to demonstrate that the failure to attend the Honors Program was insufficient reason for respondent to place a letter of reprimand in the files of those teachers not in attendance, called Paul C. Ennico to the stand to testify. Mr. Ennico, indicating that this program had been initiated in the 1976-77 school year, stated that in the 1976-77 school year each teacher received notice of the program in the daily bulletin on the day of the event, and, as a result, participated in the practice session held that day. Teachers were also notified through the daily bulletin and directed to attend practice sessions in 1978 and 1979. However, this witness knew of no teacher who was instructed to attend the Honors Program or attended the practice on the day of the Honors Program in 1980. Moreover, although the present contract requires the teachers' attendance at the Honors Program, the contract in effect at that time did not refer specifically to the program.

On or about May 23, 1980, this witness, along with his fellow teachers, Ronald Singer, Craig Fallen and George Warne, attempted to see Mr. O'Malley, Superintendent of Schools. After being advised that O'Malley could not see them, Ennico telephoned the Board President and informed him that the teachers would not attend the Honors Program.

Ennico, a member of the negotiating team for the Association, stated that he attended every negotiating session until the final agreement was signed on June 10, 1980.

On cross-examination, Ennico admitted that he was aware of the awards program, had participated in prior years and had students slated to receive honors in 1980.

However, he had not attended the program in 1980, having instructed the Administration some four or five days prior to the event that he was not going to attend. He acknowledged that he had not been advised by the Administration that he was not expected to attend the program in 1980.

In answer to questions raised by this court, Ennico contended that the teachers had not been told to attend the program. Despite this fact, on May 27, 1980, in order to give the Administration the opportunity to make other arrangements and "save face," he attempted to advise Mr. O'Malley that the Association had decided that they would not take part in the Honors Program. When questioned as to why he bothered to so advise the Administration when he did not believe the attendance was required, the witness replied, "Yes, okay." In essence, he admitted that as a result of problems negotiating the contract, the Association had decided to take a stand and not attend. Basically, the non-attendance was used as a contractual weapon in order to arrive at some sort of agreement.

At the close of Mr. Ennico's testimony, petitioner indicated that the teachers would accept the testimony of Mr. Ennico as their own, with the proviso that each teacher would assume the stand and respond to two questions:

(1) Did they believe they were expected to attend the Honors Program in 1980?

(2) Why?

In so testifying, each of the petitioners, except as noted below, admitted that they had participated in the awards program in the past, had students slated to receive awards, were aware of the date of the 1980 program and had not been informed that it was not necessary for them to attend.

Craig Fallen, testifying as to these issues, indicated that he did not believe he was expected to attend the Honors Program since he had received no directive as in previous years and "felt any participation there would be null." On questioning by this court, the witness recounted that he accompanied Ennico when the latter attempted to see the Superintendent to inform him that even if the teachers were "invited, requested, required or mandated" to attend, they would not comply. Ennico informed him that he

telephoned a Board member to advise him that the teachers would not be in attendance. Fallen believed that the purpose of that call was simply to advise the Board that the Association had decided that if the teachers were asked to attend, they would not do so, inasmuch as they were working to rule and no such requirement appeared in the present contract.

Next to testify as to this issue was Ronald Singer, whose testimony paralleled that of Craig Fallen. He, too, felt it had not been necessary to attend the program in 1980 because no formal notification requiring their attendance had been made, as it was in the past. Claiming on cross-examination that he never actually participated in the past, he did admit that he had been in the district for 11 years, had students who were to participate in the 1980 program and was aware of the date of the 1980 program. He recalled that he attempted to inform Mr. O'Malley that it was probable that the teachers, if requested to attend, would not comply. According to this witness, when he went to see O'Malley, he did not know he was supposed to attend the Honors Program.

Mr. Warne, a teacher in the district for 20 years, also did not believe he had been expected to attend the Honors Program, because he had not been involved in the practice and preparation for the program nor was there a direct memo or bulletin advising the teachers that they were expected to attend. Acknowledging that the practice usually occurred on the day of the event, he admitted that some 5 or 10 days before the event, the members of the Association had voted not to attend, which fact was conveyed to the Administration some four days before the event.

Miss Friedman, a teacher in the district for six years, also testified that she did not believe she was expected to attend the Honors Program, inasmuch as she had not been directed to attend and the Association had voted to "work to rule." When asked by the court whether she would have attended the program if the Association had not so voted, the witness claimed she did not know, but thought she probably would have needed more direction.

Miss Cartel, a teacher in the district for 11 years, did not believe that she was expected to attend the program. Apparently, the Principal, Harry Tachovsky, had advised her that "You people aren't going to show up." Admitting on cross-examination that this comment was predicated upon knowledge of the Association's stand, the witness contended that the absence of instruction or direction from the Administration caused her

to believe that the Administration had accepted the fact that the teachers were working to rule.

Doris Hartmann, a teacher in the district for 20 years, did not believe she was expected to attend, because the Association was working to rule. Moreover, she had received no instructions, as she had in the past (specifically through the daily bulletin on the day of the event). She admitted, however, that her Association had advised the Administration prior to the day of the event that the teachers were not going to attend the program.

Ronald Roemmelt, a teacher in the district for 10 years, testified that, although the program was a scheduled event, he believed that the Administration did not expeet him to attend. Since the Honors Program had been initiated by the teachers and not the Administration, he felt at liberty not to participate in an event the teachers had instigated. Moreover, inasmuch as attendance was not required by the contract, he did not believe that the Administration expected him to attend.

Patricia Van Kirk, Janet Schafer, Elaine Carmen and Loretta Santo, teachers who had been in the district for over 10 years each, were called to testify. The sum and substance of their testimony was no different than the testimony of the other teachers. For the same reasons enunciated by the other teachers, they, too, did not believe that they were expected to attend the Honors Program.

In answer to questions posed by this court, and on cross-examination, Janet Schafer stated that when she voted at the Association's meeting not to attend, she didn't believe the Board or the Administration expected the teachers to attend.

Next to testify on behalf of petitioners was Ellen Cioffi, a teacher for six years, who indicated that she did not believe she was expected to attend the program because she had not been advised, as in the past, where to report. Since she received no further directions, she assumed that the Board had accepted the notice from the Association. She recalled that having attended the function in her role as a parent, she was greeted by the school principal the evening in question, but was not advised by him to work. Actually, she would not admit that on May 5, after receiving the faculty bulletin and prior to the Association meeting, she intended to attend as a teacher.

Devera Parks, a teacher in the district for 16 years, also indicated that she believed the Administration had accepted the Association's position, inasmuch as arrangements appeared to have been made without her. It was her assumption that otherwise she would have been instructed to attend the practice. In answer to whether, prior to the Association decision to work to rule, she believed the Administration expected the teachers to attend the program, she stated, "I didn't give it any thought." She could not "anticipate what the Administration was going to want her to do."

Rita Milson did not believe she was expected to attend because she did not participate in any practice and was "working to rule." Stating that if she had not been "working to rule," she still would not have attended because it was not in her contract, she admitted that even though it was not in her contract in prior years, she had participated. Recognizing that this year the Administration had been advised by the Association that they would not participate, prior to the day in question, she could not respond to whether, prior to the determination to "work to rule," the Board expected her to attend the program.

Terry Fisher agreed with the other teachers as to the fact that she was not expected to attend. She had been a teacher in the district for 14 years, and as the others, was aware and had participated in the program in prior years. However, this witness, unlike many of the other witnesses before her, admitted that prior to the Association meeting, she expected, as did the other teachers, to participate in the program.

The testimony of petitioners discussed above constituted the sum and substance of petitioners' case.

First to testify on behalf of respondent was Lois Caress, a member of the Board of Education of the Borough of Washington for seven years and President of the Board since 1980. It was her testimony that she received a telephone call from Mr. Ennico regarding the Science Fair, but not the Honors Program. However, Mr. O'Malley informed her prior to the date of the program, that he had been advised by Ennico that the teachers would not be in attendance. According to this witness, prior to notification that the teachers were working to rule, it was the expectation of the Board of Education that the teachers would attend the program.

Mr. O'Malley, Superintendent of Schools, testified on behalf of respondent. He indicated that with the exception of the faculty bulletin on the day of the program, the procedure used to inform the teachers and parents of the program in 1980 was substantially the same as the procedure employed in 1977, 1978 and 1979. Because he had been informed by Mr. Ennico that the teachers would not be in attendance, he explained that the faculty bulletin of May 27, 1980 did not contain any instructions to the teachers. However, there was no question in the Superintendent's mind that the teachers knew they were expected to attend. After outlining the active role that the teachers generally play in this program, he stated that it was the Board's view that this was a function that the teachers had attended in the past and had an obligation to attend in 1980.

On cross-examination, this witness indicated that while he may have stated to Ennico that he was sorry to hear that the teachers would not be in attendance, he had not advised Ennico that he expected the teachers to be in attendance nor that sanctions would be imposed if they were not in attendance. Moreover, he had not instructed the teachers that they were required to attend. No memos were sent to the teachers on the day of the event, because he had been advised that the teachers would not be in attendance. On questioning by this court, he stated that he had not advised Ennico during the telephone call that the teachers should be in attendance because he really did not believe that the teachers would not honor the program. According to this witness, the present contract requires that, as in the past, all evening activities be honored. (R-1, Exhibit C thereof, in evidence.)

Based upon the above review of the testimony, it is apparent that the critical factual issue for resolution is whether petitioners can fairly be said to have been under an obligation or enforceable expectation to attend the Honors Program given on May 27, 1980. It is not disputed that in prior years petitioners have attended and participated in the Honors Program. (In fact, petitioners played an integral part in the establishment of the program.) Moreover, since the inception of the program in 1976, petitioners were notified of the program in the daily bulletin on the day of the event and as a result, participated in the practice session held on that day. The situation that occurred in 1980 was somewhat different.

In May 1980, petitioners and respondent were involved in the negotiation of a contract for the 1980-81 school year. As a result of these negotiations, petitioners voted to comply strictly with the terms of their present contract. Inasmuch as the contract in effect at that time did not refer to the Honors Program, petitioners voted not to attend

the program scheduled for the evening of May 27, 1980. Although petitioners apparently would have this court believe that at the time that they took this action, they did not believe that they were expected to attend the program, this court cannot accept that conclusion. Petitioners had attended this event in the past and notice of the date of the event appeared on the faculty agenda of May 5, 1980. (R-1 in evidence, Exhibit E.) More to the point is that Paul C. Ennico, a member of the negotiating team for petitioners, as well as certain other teachers, attempted to see the Superintendent of Schools, Mr. O'Malley (he was later contacted by telephone) in order to inform him that the teachers had decided not to take part in the program and give him an opportunity to make other arrangements. When questioned as to why he bothered to so advise the Administration if he did not believe the attendance was required, Mr. Ennico in essence conceded that up to that point, he understood the attendance to be expected. Despite the fact that the court is of the opinion that the teachers had expected to attend the program at that time, the events which followed the teachers' determination to "work to rule" leave this court unable to conclude that the teachers were under an obligation to attend the program.

In essence, each of the petitioners admitted that they had participated in the program in the past, had students slated to receive awards, were aware of the date of the 1980 program and had not been informed that it was not necessary for them to attend. However, the testimony adduced at the hearing indicated that after Mr. Ennico informed the Superintendent that the petitioners would not attend this program, neither Mr. O'Malley nor any other member of the Administration advised the teachers verbally or in writing that they were under an obligation to attend the program. Clearly, the Superintendent did not advise Mr. Ennico, after the latter advised him of the fact that the teachers would not be attending the program, that he expected the teachers to be in attendance, nor that sanctions would be imposed if they were not in attendance. In addition, and impossible for this court to ignore, is the fact that the daily bulletin of May 27, 1980 did not, as in prior years, instruct the teachers as to their participation in the event and practice associated with it.

Respondent argues that notification to the teachers at that point would have been an act of futility. Respondent may even have been correct in that assumption. However, it does not appear to this court to be clear that the teachers could not reasonably have assumed that respondent had acquiesced in their determination not to attend the program. As a matter of fact, many of the teachers who testified claimed that they believed that the Administration had accepted the fact that they were "working to rule."

Inasmuch as there was no clear statement from respondent requiring the teachers' attendance at the program, the court, in sustaining the reprimand, would in fact be speculating as to what each teacher would have done had the obligation to attend been made clear to him. Since the Board failed to provide petitioners with the requisite directions, petitioners were not put to the test, and thus should not be penalized.

In this connection, the concept of proper notice prior to the action of reprimand permeates the litigated cases on the subject. See, e.g., Fitzgibbon v. Bd. of Education of the Township of Jefferson, 1977 S.L.D. 990, 996, aff'd by the State Board of Education, 1978 S.L.D. 1009, aff'd Dkt. No. A-2346-77 (App. Div. 1978); In the Matter of the Tenure Hearing of Helen Dolphin, 1978 S.L.D. 884, 889; cf Absecon Education Ass'n v. Bd. of Education of City of Absecon, EDU 428-12/78 (N.J. O.A.L. 1979), aff'd by the Commissioner of Education, Dkt. No. 15-80 (1980) (prior published policy of the Board of Education on point coupled with directive to attend the scheduled event). See also In the Matter of Ridgefield Board of Education, 6 N.J. P.E.R. § 11140 (1980) ("attendance at P.T.A. meetings was required and . . . the teachers had ample notice of this requirement . . . and there was an expectancy that a teacher would be reprimanded for failure to attend").

Clearly, the above conclusion demonstrates the necessity for a Board of Education to make it clear to a teacher what is expected of him. Without the proper directive from the Board of Education, it is obviously unfair to reprimand an employee. The conclusion stated herein should in no way be construed as sanctioning the action of petitioners in the instant case. It was clear from the testimony adduced at the hearing that the Honors Program was an important event to the Board of Education, the teachers, the parents and, most importantly, the students. The teachers' determination to use their attendance at this program as a weapon in the contractual negotiations created a situation in which only the students were short-changed. Certainly, the teachers should not be commended for using the students as "pawns" in their maneuvers.

Based on a careful consideration of the foregoing, including a review of the testimony and exhibits, and an assessment of the credibility and demeanor of the witnesses, I **FIND:**

(1) Stipulated facts and documents 1 through 10 (pages 2-4 supra) are adopted by reference as if each were set forth herein at length.

(2) In all prior years in which the Honors Program was held (1976-79), the teachers were notified of same through the daily bulletin on the day of the event, and participated in the practice session held on that day.

(3) Petitioners had participated in the Honors Program in prior years, had students slated to receive awards, were aware of the 1980 program and had not been informed that it was not necessary for them to attend.

(4) On or about May 23, 1980, certain of the petitioners advised respondent that the teachers would not attend the 1980 Honors Program. The Teachers' Association took this position as a result of problems then being encountered in negotiating a contract with respondent.

(5) Following the teachers' advice to respondent, that they would not attend the 1980 Honors Program, respondent did not take any action to either require the teachers' attendance thereat or to state that sanctions would be imposed for their non-attendance. Specifically, the daily bulletin for the date of the Honors Program did not refer to that function, as it had in all prior years.

(6) Whether the teachers' participation in the Honors Program in all prior years would otherwise constitute a "past practice" for purposes of assessing their contractual duty to attend in 1980, the absence of a notation about the event in the teachers' bulletin on the day in question is a deviation from such "past practice."

(7) Inasmuch as respondent's failure to include the event in the daily bulletin on the date of the 1980 Honors Program can be said to be as much a reflection of respondent's acquiescence in the teachers' position as avoidance of an exercise in futility, the court cannot conclude that the teachers under-

stood that they were required or expected to attend the event. Therefore, the court cannot say that the teachers failed to attend a regularly scheduled function at which their attendance was required. Hence, there was no just cause for placing the letters of reprimand in their files.

(8) In reaching the above finding, the court specifically finds that, notwithstanding its opinion on the merits of the case, the action of the teachers in "boycotting" the 1980 Honors Program is not to be condoned, and nothing in this opinion should be so construed.

Based upon the above discussion and findings of fact, it is, therefore, **CONCLUDED** that respondent's action in placing letters of reprimand in petitioners' personnel files was not justified.

Based upon the foregoing, it is, therefore, **ORDERED** that respondent's action be reversed, that the appeal be granted and that the letters of reprimand be removed from petitioners' files.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, FRED G. BURKE,** who by law is empowered to make a final decision in this matter. However, if Fred G. Burke does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

OAL DKT. NO. EDU 6072-80

I hereby **FILE** my Initial Decision with **FRED G. BURKE** for consideration.

DATE

ELINOR R. REINER, ALJ

Receipt Acknowledged:

April 29, 1981
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

April 30, 1981
DATE

Ronald L. Parker
FOR OFFICE OF ADMINISTRATIVE LAW

gyd

APPENDIX

EXHIBITS

J-1	Letter from Patrick J. O'Malley to Mr. Ennico, dated June 19, 1980.
J-2	Faculty Agenda for May 5, 1980 (4 pages).
P-1	Memo to faculty from Harry Tachovsky, re daily notice, dated May 12, 1977.
P-2	Memo to faculty from Harry Tachovsky, re daily notice, dated May 17, 1978.
P-3	Memo to faculty from Mr. O'Malley, re daily notice, dated May 30, 1979.
P-4	Memos from Mr. O'Malley to faculty, dated May 23, 1980 and May 27, 1980.
P-5	Portion of the contract ratified June 10, 1980, effective September 1980 (2 pages).
R-1	Exhibits A-F. (Previously attached to respondent's brief.)

APPENDIX

WITNESSES

FOR PETITIONER

Paul C. Ennico
Craig Fallen
Ronald Singer
George Warne
Diane Friedman
Barbara Cartal
Doris Hartmann
Ronald Roemmelt
Patricia Van Kirk
Janet Schafer
Terry Fisher
Ellen Cioffi
Devra Parks
Rita Milson
Elaine Carmen
Loretta Santo

FOR RESPONDENT

Lois Cariss
Patrick O'Malley

WASHINGTON EDUCATION ASSOCIATION, on behalf of PAUL C. ENNICO ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WASHINGTON, WARREN COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law.

The Commissioner observes that exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Respondent excepts to the determination by the Honorable Elinor R. Reiner, ALJ that a past practice was negated by the stance of the Education Association that its members were "working to the rule." Respondent protests Judge Reiner's determination that absence of notation about the event by the administration in the teachers' bulletin of May 27, 1980 constitutes a deviation from such past practice that would render it a nullity. Respondent argues that the Board cannot be expected to memorialize in a memo to teachers each and every duty expected of them by contract or past practice. Respondent relies on Ridgefield Park Board of Education, 6 NJPER 11140 (1980) and Fitzgibbon, 1977 S.L.D. 990, supra.

Petitioners' reply exceptions refute those filed by the Board and affirm the decision of the Court.

The Commissioner views with favor the exceptions filed by the Board. An examination of those exceptions, the entire record, the documents submitted in evidence, the testimony adduced and the initial decision resulting therefrom convinces the Commissioner that the Court erred in its conclusion wherein was said, ante,

> "***Despite the fact that the court is of the opinion that the teachers had expected to attend the program at that time, the events which followed the teachers' determination to 'work to rule' leave this court unable to conclude that the teachers were under an obligation to attend the program."

The Commissioner defers to the hearer on the question of credibility since she had the opportunity to hear and observe the witnesses. However, the Commissioner cannot agree with the conclusion therein. The Court established that the event scheduled for May 27, 1980 to honor pupils with superior academic achievement was the most recent of a series of similar events since the 1976-77 school year. It was further noted that the teachers themselves had "played an integral part in the establishment of the program" and had previously participated therein. (ante) The Commissioner cannot agree that the resultant past practice can be negated by the unilateral pronouncement of the Education Association. Nor does the Commissioner find it necessary that the Board memorialize by memo each and every expectation it holds of its staff as determined by negotiations or past practice. This does not gainsay that prudence on the part of administration would emphasize the need for a reminder to staff of any scheduled event but such published reminder, of itself, cannot obviate past practice.

The Commissioner, accordingly, sets aside the finding of the Court herewith and determines that the placement of the letter of reprimand in petitioners' files constituted a valid exercise of the Board's discretionary powers. Duffy et al. v. Board of Education of the Township of Brick, 1974 S.L.D. 111

IT IS SO DIRECTED.

COMMISSIONER OF EDUCATION

June 11, 1981

WASHINGTON EDUCATION ASSOCIATION, ON BEHALF OF PAUL C. ENNICO ET AL.,	:	
PETITIONERS-APPELLANTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WASHINGTON, WARREN COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, June 11, 1981

For the Petitioners-Appellants, Rothbard, Harris & Oxfeld (Arnold S. Cohen, Esq., of Counsel)

For the Respondent-Respondent, Schumann, Seybolt & Broscious (Robert L. Schumann, Esq., of Counsel)

The State Board of Education affirms the Commissioner's decision for the reasons expressed therein.

October 7, 1981

Pending New Jersey Superior Court

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE : DECISION
BOROUGH OF HADDONFIELD, :
CAMDEN COUNTY. :
:

The announced results of the balloting for three seats on the Board of Education for full terms of three years each at the annual school election held April 7, 1981 in the School District of the Borough of Haddonfield, Camden County, were as follows:

	At Polls	Absentee	Total
Charles E. Fox	781	9	790
Margot W. Litt	728	8	736
Fred H. Stapleford	740	8	748
Write-In Candidates			
John J. Aglialoro	431	4	435
David A. Stedman	424	5	429
Roy A. Clouser	469	5	474
John Branson	2	0	2
Stan Chmielewski	1	0	1
Don Goodman	1	0	1
Bob Bowman	1	0	1
Ken MacDonald	1	0	1
Margot Litt	1	0	1
Jelepis	1	0	1

Pursuant to a letter request from Ray Clouser and David Stedman dated April 10, 1981, the Commissioner of Education directed an authorized representative to conduct a recount of the ballots cast. The recount was conducted on May 1, 1981 at the warehouse of the Camden County Board of Election and the office of the Camden County Superintendent of Schools.

At the conclusion of the recount with two hundred eighty-nine (289) votes challenged, the tally stood as follows:

	At Polls	Absentee	Total
Charles A. Fox	780	9	789
Margot W. Litt	727	8	735
Fred H. Stapleford	739	8	747

Write-In Candidates

John J. Aglialoro	411	4	415
David A. Stedman	474	5	479
Roy A. Clouser	313	5	318

The Commissioner's representative reports that write-in votes beneath line 3 were not counted. The write-in windows below line 3 were not locked. Therefore, it was possible to vote for more than three (3) candidates by voting for persons on the ballot and also casting write-in votes. The instructions for casting a write-in vote (C-290) were displayed in each voting machine. In addition to the 289 contested votes, there was a general challenge for failure to include the appropriate mark next to the write-in name.

The Commissioner observes that all of the contested write-in votes which appear on the paper rolls of the respective voting machines are challenged by virtue of one or more of the following reasons:

1. The write-in votes did not contain a cross, plus or check to the left of the candidate's name.

2. Many write-in votes for particular candidates were written on other lines below line 3 of the paper rolls instead of lines 1, 2, or 3 to the left of the printed names of the formal candidates appearing on the ballot.

3. In certain instances the names of three write-in candidates appear on line 1 in the larger write-in slot to the left of the name of a candidate whose name was formally printed on the ballot.

The Commissioner observes that the sample ballot used to set up the voting machines did not contain any written directive to the voters regarding the manner in which write-in votes were to be cast by the voters. Moreover, it is clear that the first three write-in slots were the appropriate slots for individual write-in votes to be cast. These slots were located to the left of the names of each of the three candidates, respectively, printed on the official ballot corresponding with lines 1, 2 and 3 on the paper rolls of the voting machines. It is evident that the write-in slots, other than the first three on each voting machine, were not locked and therefore a number of voters used the wrong write-in slots to cast their write-in votes.

The Commissioner is constrained to observe that there were instructions to the voters which appeared on each voting machine regarding "Personal Choice 'Write-In' Vote" (C-290). The instructions were clearly printed in English and Spanish and read as follows:

> "To vote for a candidate of your personal choice, place finger of left hand, on small lever indicated. Pull lever to right, this will release window slides.
>
> "Pull to right the window slide of the designated office for which you desire to cast your vote. Paper will then be exposed for your write-in vote.
>
> "You must place an X after written name. It is also permissible to attach a sticker on the paper with a candidates name plus the X."

The Commissioner notes that the last paragraph of the above instructions to the voters is directive and not mandatory by law with respect to the necessity for the voter to place a cross, check or plus next to the name of a write-in candidate when casting votes on a voting machine. The controlling statutory language herein is set forth in N.J.S.A. 19:49-5 and reads as follows:

> "Ballots voted for any person whose name does not appear on the machine as a nominated candidate for office are herein referred to as irregular ballots. Such irregular ballot shall be written or affixed in or upon the receptacle or device provided on the machine for that purpose. No irregular ballot shall be voted for any person for any office whose name appears on the machine as a nominated candidate for that office; any irregular ballot so voted shall not be counted. An irregular ballot must be cast in its appropriate place on the machine, or it shall be void and not counted."

The courts have previously ruled that write-in votes cast on voting machines are deemed to be irregular ballots and may not be voided by virtue of the absence of a cross, plus or check next to the write-in candidate's name. See In re Borough of South River, 26 N.J. Super. 357 (Law Div. 1953); In re Klayman, 97 N.J. Super. 295 (Law Div. 1967).

In regard to those 7 write-in votes which were not counted by the Commissioner's representative because more than one name appeared in the write-in slot on line 1, the Commissioner concurs with said determination not to count these write-in votes in the tally.

Voters who cast their write-in votes in the manner described above could have illegally voted for more than three candidates inasmuch as it would have also been possible for them to depress the levers for the two candidates whose names were printed on the ballot appearing in positions 2 and 3.

Accordingly, after a careful review of the paper rolls containing the write-in votes cast on each of the respective voting machines, the Commissioner finds and determines that his representative correctly invalidated all of the contested ballots for the reasons hereinbefore set forth. The Commissioner hereby confirms the results of the recount herein and adopts the report of his representative as his own.

The Commissioner finds and determines that Charles Fox, Fred Stapleford and Margot Litt were duly elected to full terms of three years each on the Board as the result of the annual school election held in the School District of the Borough of Haddonfield, April 7, 1981.

COMMISSIONER OF EDUCATION

June 17, 1981

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7412-80
AGENCY DKT. NO. 529-10/80A

IN THE MATTER OF:

BARRY HAMLIN,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF DUNELLEN,
Respondent.

Record Closed: March 17, 1981
Received by Agency: 5/1/81

Decided: April 30, 1981
Mailed to Parties: 5/4/81

APPEARANCES:

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

Edward J. Johnson, Jr., Esq., for respondent

BEFORE **DANIEL B. MC KEOWN,** ALJ:

Barry Hamilin (petitioner), a teacher who has acquired a tenure status in the employ of the Board of Education of the Borough of Dunellen (Board), alleges the Board illegally denied him appointment to the position of head football coach by virtue of its appointment of a teacher, not otherwise employed by it, contrary to the provisions of N.J.A.C. 6:29-6.1, et seq. The Board denies the allegations.

The Commissioner of Education transferred the matter to the Office of Administrative Law as a contested case pursuant to the provisions of N.J.S.A. 52:14F-1, et seq. The parties agreed at a prehearing conference to the essential facts of the matter and further agreed to have the matter adjudicated on cross motions for summary decision.

The facts as stipulated are these:

1. Hamlin, with a tenure status, is properly certified as a teacher of Physicial Education and has been employed by the Board for the last ten years.

2. During the 1980 spring the Board posted an announcement for the position of 1980-81 head football coach. On or about July 24, 1980 Hamlin applied for that position after acquiring knowledge that the then head football coach was not to seek reappointment. Hamlin, who was an assistant football coach for the Board for at least the prior 10 years, was the only teacher from within the district who had applied.

3. The Board's athletic director interviewed Hamlin for the position of head football coach on or about August 1, 1980.

4. Hamlin had met the requirements at N.J.A.C. 6:29-6.3 for appointment to the position of head football coach.

5. DeVito, a certified teacher, not employed as a teacher by the Board but who had been engaged by the Board as assistant football coach for the prior 3 years was appointed to the position of head football coach by the Board on August 12, 1980.

6. Hamlin was notified by the high school principal on August 15, 1980 that DeVito was appointed head football coach.

7. The Superintendent applied to the Middlesex County Superintendent of Schools on August 25, 1980 for permission to appoint DeVito to the position of head football coach (R-1).

8. On September 17, 1980 Jean Sadenwates, a school program coordinator assigned to the Middlesex Township Superintendent of Schools office, authorized the appointment of DeVito on behalf of the Middlesex County Superintendent of Schools (R-2).

9. The Board received permission from DeVito's employing board by letter dated September 19, 1980 (R-3) to employ DeVito as head football coach. This approval was to have been granted by DeVito's employing board at a private session and by virtue of an absence of voiced disapproval.

10. DeVito, as head football coach for 1980-81 received a stipend from the Board in the amount of $1,874.

It is noticed that a tenative stipulation with respect to Hamlin's lack of alternative employment during the 1980-81 football season which was to have been related to his unsuccessful bid as head football coach was to be supported by Hamlin's affidavit. No such affidavit has been filed.

The rule in question, N.J.A.C. 6:29-6.3, prohibits a board of education from appointing in the first instance a person not certified as a teacher as a coach for any of its athletic teams. The same rule requires that every person appointed as a coach by the Board of Education be simultaneously employed by the Board as a certified full time teaching staff member. There are exceptions to these two general rules which exceptions are dependent upon established need.

An exception is made by which a board may employ certified full time employees of constituent and sending districts or of a Vocational school within the same county to work on a part time basis as coach in an interscholastic program provided the superintendent of schools certifies the existence of an emergency. A second general exception allows boards of education to employ as coaches certified and qualified full time teaching staff members of other school districts provided that:

1. The employing district can demonstrate annually to the county superintendent that an emergency situation exists;

2. The part-time position has been properly advertised within the district;

3. Both local boards of education are in agreement regarding such part-time employment;

4. Approval of the county superintendent shall be obtained prior to such employment by the local board of education.

(e) In addition, school districts shall also be permitted to employ holders of New Jersey certification not presently employed in a school district, provided that:

1. The employing district can demonstrate annually to the county superintendent that an emergency situation exists;

2. That the part-time position has been properly advertised within the district;

3. The district superintendent will provide a letter to the county superintendent attesting to the prospective employee's knowledge and experience in the sport which he/she will coach;

4. Approval of the county superintendent shall be obtained prior to such employment by the local board of education.

The facts in this matter fail to establish an emergency existed in the Dunellen school district for the selection of a certified teacher, other than one it regularly employs to be appointed to the position of head football coach. Even if such an emergency existed there was a failure of the Board and the Superintendent of Schools to secure the Middlesex County Superintendent of Schools certification that an emergency existed prior to the employment of DeVito. The Board appointed DeVito to the position of head football coach without the prior approval of DeVito's employing board. A condition precedent to a board of education employing someone from without the district to be an athletic coach is its certification it was unable to employ someone otherwise qualified within the district for that position. Hightstown Education Association v. Bd. of Ed. of East Windsor Regional School District, 1978 S.L.D. 537. Here, Hamlin is a certificated teaching staff member and he is otherwise qualified to be a coach at N.J.A.C. 6:29-6.3. He has been an assistant football coach in this district for least 10 years. He was ready,

willing and able to perform the duties of head football coach for this Board for the 1980-81 football season.

The Board's reliance on the provisions of the State Board rule which provides it may employ certified full time employees of constituents or sending districts to be a coach of one of their athletic teams is misplaced. The plain meaning of the word "emergency" within the context of the entire rule means simply that a certified full time teaching staff member in the Board's employ is not interested in a vacant position of athletic coach. In a situation such as here, where a qualified teacher in the Board's employ applies for a coaching vacancy the Board must appoint that teacher to the vacancy. No authority exists for the period to appoint a teacher, from without the district for that coaching vacancy. There is no room for subjective assessment of applicants' respective skills in the art of coaching in a situation where there are applicants from within the district and another applicant from without the district. Furthermore, N.J.A.C. 6:29-6.3(d) infers that even before a board of education solicits applications from without its own staff for coaching vacancies the County Superintendent of Schools must first certify to the existence of an emergency. It is established that no emergency existed herein. The Board of Education of the Borough of Dunellen did, in fact, violate the provisions of N.J.A.C. 6:29-6.3 through its employment of DeVito as head football coach for the 1980-81 football season.

Hamlin seeks relief in the form of the stipend he asserts he would have received had the Board appointed him to be its coach. This claim is based on the presumption that had the Board not assigned DeVito to the coaching position it would have assigned Hamlin and had the Board not violated the rule of the State Board of Education it would have had to appoint Hamlin as head football coach. The theory for relief is that a contract of employment was illegally denied Hamlin. However, Hamlin performed no services for the Board; there is no showing that Hamlin relied to his detriment on an anticipated coaching contract with the Board; nor is there any showing that Hamlin's position was substantially changed from the time he applied for the position compared to the time he was informed he was not selected. Consequently there is no basis for relief to be awarded on the anticipation of such an employment contract nor is there any basis in statutory law nor in the rules and regulations of the State Board of Education to grant financial relief as requested herein.

There is a basis, however, to grant equitable relief in a limited fashion to Hamlin on the theory that the Board knowingly prohibited Hamlin from the opportunity to be appointed head football coach. It is presumed that the Board had knowledge of the law and it is further presumed that the Board for whatever reason elected to go beyond the bounds of law. It appointed DeVito contrary in every respect to the State Board rules. Similarly it had before it an application for appointment to the same position from a fully certified and qualified teaching staff member in its own employ who had 10 years of football coaching experience. In my view equitable principles of fundamental fairness demand relief to be afforded Hamlin for his being barred to the controverted position. A fair amount in my view is 10 percent of the stipend it paid to the person it illegally employed, or $187.

The Board is directed forthwith to comply with N.J.A.C. 6:29-6.3 in all respects regarding its appointment of coaches and it is further directed to submit to Barry Hamlin an amount of $187 in satisfaction of the claim raised herein.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, FRED G. BURKE,** who by law is empowered to make a final decision in this matter. However, if Fred G. Burke does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

OAL DKT. NO. EDU 7412-80

I hereby **FILE** my Initial Decision with **FRED G. BURKE** for consideration.

April 30, 1981
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

May 4, 1981
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

May 4/1981
DATE

Ronald L. Parker/bb
OFFICE OF ADMINISTRATIVE LAW

bm

BARRY HAMLIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF DUNELLEN, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law.

The Commissioner observes that exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Board in its exceptions to the initial decision by the Honorable Daniel B. McKeown, ALJ objects to the finding by the Court that the Board was in violation of the provisions of N.J.A.C. 6:29-6.3. The Board argues that it simply had two applicants for the position of head football coach and that based on recommendations of the administration it hired DeVito, the better qualified candidate. The Commissioner cannot agree. He finds that the Board did, in fact, violate N.J.A.C. 6:29-6.3 by hiring an applicant from outside the district in spite of the valid application for the position from its employee whom it had employed for the prior ten years in an assistant coaching position. Consequently, the Board did not have two qualified applicants for the position; it had but one, its own teacher whose willingness to serve obviated the invocation of an emergency situation. In that respect the Commissioner affirms the findings of the Court herein. Judge McKeown further determined that petitioner has no basis to be tendered the financial relief requested of the salary he was denied by the illegal action of the Board in appointing an out-of-district candidate to the position of head football coach. Judge McKeown determined, by standards not explained in the decision, that, although he deemed there existed no basis for the full relief requested for the entire salary of $1,874, petitioner was nevertheless entitled to equitable relief of ten percent of the total salary or $187. The Commissioner, though agreeing with petitioner's entitlement to relief, does not agree with the percentage allotment fashioned by the Court. In that respect the Commissioner notes with approval the exceptions filed by petitioner in which he pleads to be made whole. The Commissioner further notes his reliance on Elizabeth Rockenstein v. Board of Education of the Borough of Jamesburg, 1975 S.L.D. 191, aff'd State Board 199, aff'd N.J.

Superior Court Appellate Division 1976 S.L.D. 1167. Therein a wrongfully nonrenewed, nontenured teacher was reinstated with full back pay.

Accordingly, the Commissioner herewith sets aside the ten percent relief fashioned by the Court and determines that petitioner is entitled to the full financial relief requested, or $1,874. The Board of Education of the Borough of Dunellen is directed to pay petitioner the total sum of $1,874 and is further directed to comply with N.J.A.C. 6:29-6.3 in the appointment of its coaches.

COMMISSIONER OF EDUCATION

June 15, 1981

BARRY HAMLIN,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF DUNELLEN, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, June 15, 1981

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

For the Respondent-Appellant, Edward J. Johnson, Jr., Esq.

We believe Petitioner-Respondent was entitled to appointment as head football coach during the 1980-81 school year, and affirm the decision of the Commissioner of Education in that respect. We also believe there should be mitigation of damages. We, therefore, recommend that Barry Hamlin be awarded the stipend differential; that is, the stipend which the head coach position carried, less the stipend which the assistant coach position carried, for the 1980-81 school year.

S. David Brandt and P. Paul Ricci opposed in the matter.

October 7, 1981

BARRY HAMLIN, :

PETITIONER-RESPONDENT, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE BOROUGH OF DUNELLEN, MIDDLESEX COUNTY, : DECISION

RESPONDENT-APPELLANT :

:

Decided by the Commissioner of Education, June 15, 1981

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

For the Respondent-Appellant, Edward J. Johnson, Esq.

The State Board denies motions for Reconsideration. The October 7, 1981 decision of the State Board of Education in this matter is hereby clarified to the extent that mitigation shall not be required since Petitioner-Respondent was not employed as assistant football coach for the Dunellen School District during the 1980-81 school year.

November 10, 1981

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 1686-81

AGENCY DKT. NO. 84-3/81A

IN THE MATTER OF:

THE APPLICATION OF THE BOARD OF EDUCATION OF THE WEST MORRIS REGIONAL HIGH SCHOOL DISTRICT

Record Closed: May 18, 1981 Decided: May 27, 1981

Received by Agency: May 29, 1981 Mailed to Parties: May 29, 1981

APPEARANCES:

David B. Rand, Esq., for Board of Education, West Morris Regional, petitioner
(Schenck, Price, Smith & King, attorneys)

Alfred J. Villoresi, Esq., for Ronald R. Batistoni, petitioner
(Villoresi and Buzak, attorneys)

Richard A. Friedman, Esq., for New Jersey Education Association, participant
(Ruhlman and Butrym, attorneys)

BEFORE **STEPHEN G. WEISS**, ALJ:

This matter was commenced on March 30, 1981 by a filing with the Commissioner of Education by the Board of Education of the West Morris Regional High School District (hereafter "Board") of a Petition for Declaratory Ruling pursuant to N.J.S.A. 52:14B-8 and N.J.A.C. 6:24-2.1. Simultaneous with its filing, the Board

requested that the matter be brought on promptly. To that end an Order to Show Cause was signed by me on April 1, 1981, the day following transmittal of the case to the Office of Administrative Law. That Order required the Board and Ronald R. Batistoni to appear before me on April 3, 1981 for the purpose of addressing themselves to the question of why a declaratory ruling should not be entered in accordance with the contents of the Petition and the appropriate governing rules.

On the return date of the Order to Show Cause, appearances were made on behalf of the Board and Batistoni by their respective counsel. Both argued in support of the relief sought in the Petition. In view of the substantial nature of the question involved (a one-year waiver of tenure benefits under N.J.S.A. 18A:28-6) the court directed counsel to advise the New Jersey Education Association, the New Jersey School Board Association and the New Jersey Association of School Administrators of the pendency of the case.

The Petition, as noted, raises the question of whether or not the benefits accorded a public school employee in the area of tenure may, under the particular circumstances involved in this case, be waived for a period of one school year. The parties have entered into a Stipulation of Facts which forms the underlying basis for the court's consideration of the case. That Stipulation describes the underlying circumstances as follows:

The Board operates and administers a Type II regional public school district covering grades 9 through 12. On July 1, 1979 Ronald R. Batistoni, previously tenured in his employment by the Board as a teacher and vice-principal, and holding appropriate certification as a principal, was appointed principal of West Morris Central High School. At the time of his appointment Batistoni served as the vice-principal of that school and was tenured in that position. Pursuant to N.J.S.A. 18A:28-6, Batistoni will be entitled to claim tenure as a principal in the event that he performs the duties of that position through June 30, 1981, the completion of two years in the position to which he was promoted on July 1, 1979.

At a public meeting of the Board held on March 17, 1981, the Superintendent of Schools recommended that Batistoni's service as principal terminate prior to his obtaining tenure and that he be reassigned to the position of vice-principal. Although the moving papers contain no specific references to the underlying basis for the

Superintendent's recommendation, there is a strong likelihood that the Superintendent had come to the conclusion that, in his judgment, Batistoni's performance as principal was not of such a nature as to justify his being given tenure in that position. On the other hand, the Stipulation contains reference to the fact that during his many years of service in the school district as a teacher and administrator, prior to his promotion to principal, Batistoni had received superior evaluations.

In any event, in view of the situation which had developed by virtue of the Superintendent's "negative" recommendation, the Board, in March 1981, determined by resolution not to renew Batistoni as principal and reassigned him to the position of vice-principal effective for the 1981-82 school year. Following that action Batistoni, through counsel, entered into negotiations with the Board in order to attempt to preserve his opportunity to remain as principal. Thus, according to the Stipulation, through counsel Batistoni represented to the Board that, notwithstanding the provisions of N.J.S.A. 18A:28-6, he would not claim any tenure rights to the position of principal if the Board extended his "probationary period" as principal for the 1981-82 school year (July 1, 1981 through June 30, 1982). Batistoni further represented, through counsel, that he would enter into a written contract with the Board which would specifically articulate his representations and provide expressly that he voluntarily, knowingly and without coercion or duress, had determined to waive and relinquish any and all tenure rights or claims which he might have to the position for one additional probationary year.

By resolution dated March 31, 1981, the Board determined to authorize its President and its Secretary to enter into an agreement with Batistoni containing the representations adverted to above. However, the resolution further provided that both the Board and Batistoni would mutually join in a request for a declaratory ruling from the Commissioner of Education pursuant to N.J.A.C. 6:24-2.1 with respect to the legality and the enforceability of such agreement.

Pursuant to the court's request, the New Jersey Education Association (hereafter "NJEA"), the New Jersey School Boards Association and the New Jersey Association of School Administrators were all contacted by counsel for the Board with respect to their potential involvement in the case. In response to that invitation, the NJEA, by consent, has joined as a "participant" pursuant to the provisions of N.J.A.C. 1:1-12.6, has submitted briefs and has been accorded the right to argue orally.

In a letter to counsel dated April 16, 1981 with a copy to the court, the Assistant Executive Director and General Counsel for the New Jersey School Boards Association, David W. Carroll, Esq., indicated that after careful consideration his Association had "decided to decline the invitation to appear as amicus curiae." No response to the court's invitation was ever received from the New Jersey Association of School Administrators.

At oral argument on the return date of the Order to Show Cause the court conducted a prehearing conference. At that time the issues to be determined were agreed upon as follows: (1) whether or not the matter was one which appropriately may be treated as a declaratory action under the rule and under the statutes; and (2) assuming that the matter was properly to be so heard, whether Batistoni voluntarily, knowingly, and without coercion or duress, could legally waive his statutory entitlement to tenure under N.J.S.A. 18A:28-6 in the circumstances of the case. A third issue, which for all practical purposes was subsumed under the second, was whether or not the Board has the authority to enter into a contract such as that proposed with Batistoni or, on the other hand, whether it would be ultra vires the power of the Board.

At the direction of the court, counsel have filed briefs in support of their respective positions, as well as entering into the Stipulation of Facts. Specifically, I am in receipt of briefs on behalf of the Board and Batistoni in support of the argument that this is a proper declaratory ruling proceeding and that Batistoni and the Board may under the circumstances lawfully enter into the contract which then would be enforceable. The NJEA, as a participant, has filed a brief in opposition and a reply brief which maintains that the requisite adversity between the parties is not present and, therefore, a declaratory ruling would not be appropriate. The NJEA also argues, of course, that the protection of tenure cannot, as a matter of public policy, be waived.

With respect to the threshhold issue, the court is of the opinion that a declaratory ruling proceeding under the circumstances of this case can be maintained. Although there are only two "parties" to the case (the NJEA is merely a participant), and both seek the identical result, the provisions of N.J.S.A. 52:14B-8, when read in conjunction with N.J.A.C. 6:24-1.2, appear to me reasonably to support a conclusion that at least in the present circumstances a declaratory ruling petition may be entertained.

Indeed, N.J.S.A. 52:14B-2, which defines "contested case," includes within that definition proceedings like this in which the legal rights, duties, obligations, privileges, benefits or other legal relations of specific parties are required by constitution or statute to be determined by an agency decision, determination or order addressed to them or disposing of their interests after opportunity for a hearing. The statutory provision involved in this case clearly is one which is of concern to the Commissioner of Education, and the applicability of that statute to the circumstances set forth in the Stipulation of Facts cannot be denied. In view of the importance of the issue to the immediate parties, at least, and perhaps to several hundred other school districts in the State, I believe that an Initial Decision on the merits ought to be rendered.

Accordingly, the court now will address the substantive issue of whether or not, under the circumstances of this case, the statutory benefit set forth in N.J.S.A. 18A:28-6, which Batistoni would enjoy with respect to obtaining tenure in the position of principal as of June 30, 1981, may be waived by him for a period of one school year while the Board has an opportunity further to evaluate his performance in that senior administrative capacity. The case law with respect to that issue is not especially voluminous, particularly in this State. A decision which often is cited for the proposition that tenure cannot be waived by one holding the position is Lange v. Bd. of Ed., Borough of Audubon, 26 N.J. Super. 83 (App. Div. 1953). There, an individual was a principal for 13 years between 1914 and 1927 when she voluntarily assumed a position as Supervisor. She served in that capacity for 17 years until it was abolished. Lange was then returned to a teaching position. Thereafter, in 1951, a vacancy arose in a principal's position and an application for that position was submitted by Lange. No applicant had tenure or seniority as a principal. When Lange's application was rejected, an appeal was filed with the Commissioner, who ruled against the appeal, and the State Board affirmed. In rejecting the claim the appellate court reviewed the development of the Tenure Law and determined that the "surrender" by the appellant of her principal's position in 1927 constituted a waiver of whatever rights she may have acquired to it. At the time Lange gave up her principal's position, the statutes did not provide for tenure as a principal. When the statute later was amended to extend tenure protection to that position, the appellant could not claim its benefits since it was to operate prospectively only. Further, the court considered the transfer from principal to supervisor to be tantamount to a dismissal as principal, and the performance of the new duties as supervisor for 17 years

and as a teacher for another seven years presented circumstances which clearly dictated against the tenure claim. Indeed, at the very outset of its opinion, the court strongly hinted that it could have disposed of the case on the basis of laches alone.

Thus, although the Lange case is cited for the proposition that one may not waive tenure while keeping a position, an examination of the facts in that case leads me to conclude that the comment was dictum and the case is of little value to the instant matter.

The court has not been cited to any other New Jersey decision which would be dispositive one way or the other. Although the NJEA points to the recent decision by the Commissioner of Education in Carney v. Bd. of Ed. of Summit, 1980 S.L.D. ____, decided September 22, 1980, a review of the Carney decision leads me to conclude that it plainly does not support the proposition that tenure may never be waived.

A statute which is argued by the NJEA to present an analogous situation to tenure is the military credit provision contained in N.J.S.A. 18A:29-11. In a case construing that statute, Whidden v. Bd. of Ed. of Paterson, 1977 S.L.D. 1312 (App. Div. 1977), the court held that the petitioner was entitled to be credited with additional salary for prior military service since there was nothing in the statute which indicated that this right could be waived. In my view, Whidden is not dispositive either. The court there was not directly faced with the same sort of waiver question or fact situation involved here and obviously did not have an opportunity to consider its applicability to the tenure context. Further, the court in Whidden made reference to the decision of the New Jersey Supreme Court in the Englewood case (Bd. of Ed. of Englewood v. Englewood Teachers, 64 N.J. 1, 7 (1964)) and an examination of the particular citation reveals that the proposition relied upon is not the same as the one involved in the instant case. However, Englewood does lead into consideration of a major argument put forward by the NJEA; namely, that the developing case law in the labor relations area clearly militates against a finding that tenure can be waived. Thus, in State v. State Supervisory Ass'n, 78 N.J. 54 (1978), the court held that certain statutory imperatives could not be modified by a collective bargaining agreement as they are terms and conditions set by law. Tenure is plainly such a statute. See also Red Bank Reg. Ed. Ass'n v. Red Bank Reg. High School Bd. of Ed., 78 N.J. 122 (1978). The NJEA argues that if tenure cannot be waived by a contract produced by the collective negotiations process, surely it cannot be waived by a so-called "voluntary" contract made by an individual with the employer board.

On the other hand, the Board and Batistoni insist that the labor cases have no meaningful bearing on their situation - that waiver with advice of counsel of a statutory benefit by an individual, for one year, is perfectly acceptable if it is made knowingly and without coercion and does not contravene some overriding public policy.

Both sides have addressed decisions in other states which touch upon the issue. The Board and Batistoni cite the New York Appellate Division decision in Juul v. Bd. of Ed. of Hempstead School Dist. No. 1, 428 N.Y.S. 2d 319 (App. Div. 1980), which held that, absent bad faith or coercion, a board and a probational employee could agree that the accrual of tenure could be waived for an additional year as a quid pro quo for reevaluation of a possible tenure appointment at the end of the "extra" year. Absent a statutory prohibition against waiver and given the knowing and voluntary nature of the act of waiver, such an agreement did not contravene public policy.

The Juul case mentioned two recent New York Court of Appeals decisions which had apparently overturned prior case law and held that certain other aspects of the tenure laws could be waived. See Matter of Abramovich v. Bd. of Ed., 386 N.E. 2d 1977 (1979) (waiver of right to a pretermination hearing); Feinerman v. Bd. of Coop. Ed. Services, 399 N.E. 2d 899 (1979) (waiver of right of appointment to tenure bearing position). While Abramovich and Feinerman do not involve fact patterns exactly like the case sub judice, they do lend strong support for the proposition urged by the Board and Batistoni. Further, Juul directly cited them as holding that the public policy articulated in tenure statutes is not violated by a knowing and voluntary waiver.

A recent decision of the Alabama Supreme Court, Haas v. Madison County Bd. of Ed., 380 So. 2d 873 (Ala. 1980), held flatly that statutory tenure could not be waived. So, too, in Barber v. Exeter West Greenwich Sch. Comm'n, 418 A. 2d 13 (R.I. 1980), the court held that since tenure was legislatively prescribed the length of the probationary period could not be altered by contract or otherwise. However, in Barber there was no voluntary waiver as the board there attempted to impose a condition. Also, Barber cited and relied on a New York case (Mannix v. Bd. of Ed. of New York, 235 N.E. 2d 892 (1968)), which, in view of later New York cases, is of questionable authority.

My independent review of the various cases impels me to conclude that the rationale of the New York decision in Juul is a sound one and that, given the proper safeguards, the benefits of the tenure statutes can be waived without subverting public

policy. Specifically, where an employee has had the independent advice and assistance of counsel, where he had knowingly and with that advice entered into an express written agreement to serve for one additional probationary year as a quid pro quo for additional evaluation and where, as here, the proposal was put forward by the employee and not the employer, the agreement is valid and can be executed. In this case there is not even a hint of duress, coercion or any other such invidious factor. I perceive no compelling basis for treating the tenure statute to be of any greater significance than any other statute whose protections our courts have held to be quite capable of being waived. In the particular circumstances of this case, all of the requisite elements which the law demands be present to sustain a waiver can be found. Indeed, they are present here through the active, express, voluntary conduct of the parties and there is no need to have to impute or infer their existence.

Accordingly, given the factors which are present in this case, and for purposes of this case only, I herewith **FIND** as follows:

1. The provisions of the Stipulation of Facts and the agreement between the Board and Batistoni are attached hereto, made a part hereof and are adopted as Findings of Fact as if expressly set forth;

2. The decision by Batistoni to voluntarily relinquish any claim to tenure under N.J.S.A. 18A:28-6 for a period of one additional year was a knowing, informed, voluntary act made without force, coercion or duress and made after consultation and with the advice and assistance of independent counsel of his own choice; and

3. The impetus to postpone for one year a final decision as to Batistoni's continued performance in the position of high school principal came from Batistoni and not the Board.

Thus, in view of the foregoing discussion and predicated upon the special circumstances extant in this case, and for purposes of this case only, I **CONCLUDE** that a declaratory ruling should issue to the effect that the agreement made between the Board and Batistoni constitutes a valid and enforceable contract and the Board and Batistoni have the authority under the school laws of this State to enter into the same.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF EDUCATION, FRED G. BURKE,** who is empowered by law to make a final decision in this matter. However, if Fred G. Burke does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **FRED G. BURKE** for consideration.

May 27, 1981
DATE

Stephen G. Weiss
STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

May 29, 1981
DATE

Seymour G. Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

May 29, 1981
DATE

Elizabeth J. Logan Sg
FOR OFFICE OF ADMINISTRATIVE LAW

ywg

IN THE MATTER OF THE	:	
APPLICATION OF THE BOARD	:	
OF EDUCATION OF THE WEST	:	COMMISSIONER OF EDUCATION
MORRIS REGIONAL HIGH SCHOOL	:	DECISION
DISTRICT, MORRIS COUNTY.	:	
	:	

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law.

The Commissioner observes that exceptions were waived by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Commissioner notes the submission of exceptions by a participant other than one of the parties as defined in N.J.A.C. 1:1-12.6. The Commissioner agrees that such exceptions are inappropriate and may not be considered (N.J.A.C. 1:1-12.6(c). He finds their return to the participant to be a proper action.

The initial decision by the Honorable Stephen G. Weiss, ALJ determines that the benefits of the tenure statutes can be waived without subverting public policy. Judge Weiss continues in his determination to affirm the propriety of the agreement between the Board and its employee extending tenure accrual under N.J.S.A. 18A:28-6 for an additional year because such agreement was a voluntary act without force, coercion or duress. The Commissioner cannot agree; Judge Weiss erred in his decision.

The Commissioner has considered the manifold aspects of tenure in previous decisions. In the Matter of the Tenure Hearing of Joseph A. Maratea, Township of Riverside, 1966 S.L.D. 77, the subject was cogently reviewed:

> "***Tenure of office of professional staff employees of boards of education is a legislative status provided as a public policy for the good order of the public school system and the welfare of its pupils. Wall v. Jersey City Board of Education, 1938 S.L.D. 614, 617, affirmed State Board of Education 618, 622, affirmed 119 N.J.L. 308 (Sup. Ct. 1938); Viemeister v. Prospect Park Board of Education, 5 N.J. Super. 215, 218 (App. Div. 1949); Redcay v. State Board of Education, supra Its objectives are to

> protect competent and qualified professional staff members in the security of their positions during good behavior, and to protect them against removal for 'unfounded, flimsy, or political reasons.' Zimmerman v. Newark Board of Education, 30 N.J. 65, 71 (1962) Its protection is not a personal privilege which is subject to waiver, Lange v. Audubon Park Board of Education, 26 N.J. Super. 83, 88 (App. Div. 1953), or abuse, Cook v. Plainfield Board of Education, 1939-49 S.L.D. 177, affirmed State Board of Education 180; In the Matter of the Tenure Hearing of Leo S. Haspel, Metuchen Board of Education, decided by the Commissioner January 20, 1964, affirmed State Board of Education October 7, 1964, affirmed App. Div. June 10, 1965, cert. denied N.J. Sup. Ct. May 12, 1965, cert. denied U.S. Sup. Ct. May 16, 1966, rehearing denied June 20, 1966.***" (at 105)

The Commissioner notes with approval the reference ante, by Judge Weiss to State v. State Supervisory Employees Association, 78 N.J. 54 (1978) wherein he states that "*** the court held that certain statutory imperatives could not be modified by a collective bargaining agreement as they are terms and conditions set by law. Tenure is plainly such a statute." The Commissioner cannot agree however with the perfunctory treatment and dismissal thereof by mere repetition of the insistences of the Board and Batistoni that

> "*** the labor cases have no meaningful bearing on their situation - that waiver with advice of counsel of a statutory benefit by an individual, for one year, is perfectly acceptable if it is made knowingly and without coercion and does not contravene some overriding public policy." (at p. 7, ante)

The Commissioner finds State v. State Supervisory Employees Association directly on point. As was said therein in footnote 7:

> "Mandatory or imperative statutes ordinarily are those enactments which set up a particular scheme which 'shall' be handled as directed. An example of such a statute is N.J.S.A. 18A:28-5(b), which provides that teachers '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 *** three consecutive academic years, together with employment at the beginning of the next succeeding academic year,' except for specifically enumerated reasons." (at 82)

The Commissioner points therein to the designation by the Supreme Court of N.J.S.A. 18A:28-5(b) as an imperative statute setting down, as it does, the precise conditions for tenure. The true test of whether a tenure status has accrued is, as articulated in Ahrensfield v. State Board of Education, 126 N.J.L. 543 (E.& A. 1941), whether the precise conditions laid down in the applicable statutes are met. In the opinion of the Commissioner, by like reasoning, N.J.S.A. 18A:28-6 is no less a mandatory or imperative statute "which 'shall' be handled as directed."

Accordingly, the conclusions reached by Judge Weiss in this matter are set aside. The agreement reached between the Board and Batistoni, its professional employee, is not a valid one and may not be enforced. The precise conditions enunciated in N.J.S.A. 18A:28-6 as a mandatory statute are those determinative of tenure in this matter.

IT IS SO DIRECTED.

COMMISSIONER OF EDUCATION

June 18, 1981

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 1748-80

AGENCY DKT. NO. 71-3/80A

IN THE MATTER OF:

BOARD OF EDUCATION OF THE TOWNSHIP OF EGG HARBOR,

Petitioner

v.

BOARD OF EDUCATION OF THE GREATER EGG HARBOR REGIONAL HIGH SCHOOL DISTRICT, ATLANTIC COUNTY and STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION,

Respondent.

Record Closed: March 19, 1981

Received by Agency: 4/29/81

Decided: April 27, 1981

Mailed to Parties: 5/1/81

APPEARANCES:

A. Ralph Perone, Esq., for the Petitioner

Edward W. Champion, Esq., for the Respondent Greater Egg Harbor Board of Education

Jaynee LaVecchia, Deputy Attorney General for the Respondent State of New Jersey, Department of Education (Judith Yaskin, Acting Attorney General of New Jersey, Attorney)

BEFORE **LILLARD E. LAW**, ALJ:

The Board of Education of the Township of Egg Harbor (petitioner), having filed a verified Petition of Appeal before the Commissioner of Education, seeks an equitable distribution of current expense, capital outlay, Title I carry-over funds and debt service following its withdrawal, effective July 1, 1979, from respondent, Greater Egg Harbor Regional High School District (Regional Board). Petitioner also seeks from respondent State of New Jersey, Department of Education (Department), a proportionate share of State transportation aid payable to the Regional Board during the 1979-80 school year for transportation expenses incurred in the 1978-79 school year.

This matter was subsequently transferred to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq.

A prehearing conference was held on July 2, 1980, at the Office of Administrative Law, Trenton, New Jersey, wherein the following issues were set down for adjudication:

1. Did the Atlantic County Superintendent of Schools fail to file a written report with respect to a division of the assets and liabilities between the withdrawing Egg Harbor Township District and the Greater Egg Harbor Regional District, pursuant to the decision dated March 17, 1978, N.J.S.A. 18A:13-62 and N.J.S.A. 18A:8-24?

2. Which assets, if any, are owing to the Egg Harbor Township Board from the Greater Egg Harbor Regional Board? Which specific amounts?

Therefore, the parties' respondents filed separate Motions to Dismiss, and petitioner filed a Motion for Summary Judgment with accompanying Briefs in support of their respective positions. Oral argument on the Motions was heard on October 15, 1980, at the Pleasantville Municipal Courtroom, Pleasantville, New Jersey.

By way of Decision on Motion, dated October 23, 1980, the undersigned Ordered that petitioner's claim against respondent State of New Jersey, Department of Education, for reimbursement of approved transportation expenditures paid to the Regional Board for the 1978-79 school year be **DISMISSED WITH PREJUDICE** and, thus, severed the Department from further litigation in the herein matter. Therein, respondent Regional Board's Motion to Dismiss was rejected by the undersigned, as was petitioner's Motion for Summary Judgment. On January 5, 1981, the undersigned granted petitioner's motions to argue for Transportation Aid Reimbursement against Regional Board in its Brief.

The matter proceeded to hearing on October 15 and 16, 1980. The parties subsequently submitted Briefs and the record closed on March 19, 1981.

STATEMENT OF FACTS

The Egg Harbor Township Board of Education adopted a Resolution on October 25, 1976, requesting that the Atlantic County Superintendent of Schools conduct an investigation as to the advisability of its withdrawing from the Greater Egg Harbor Regional High School. Pursuant to N.J.S.A. 18A:13-51 and N.J.A.C. 6:3-3.1, an Investigation and Report, dated March 16, 1977 (P-1), was prepared by the Atlantic County Superintendent of Schools and offered comments as to the "advisability" of such a withdrawal (P-1, p.1). After receiving the Report of the Atlantic County Superintendent of Schools, the Egg Harbor Township Board of Education filed a Petition on April 13, 1977, seeking to withdraw from the Greater Egg Harbor Regional High School District.

A public hearing on the petitioner's withdrawal request was conducted on September 2, 1977, by the Board of Review and on March 17, 1978, a decision was rendered by that Board (R-1), authorizing the submission of the withdrawal question to the electorate comprising the Regional High School District. A special election was conducted on June 27, 1978, resulting in the voters of both the Township of Egg Harbor and of the remaining Municipalities of the Regional District approving Egg Harbor Township's withdrawal from the Regional High School. Thereafter, the petitioner's status with the Regional High School was adjusted by Order of the Commissioner of Education to that of a sending/receiving relationship. Thereupon, the voters of Egg Harbor Township were precluded from taking part in the February 6, 1979, Budget Election of the Regional, or in any Building Referendum Elections conducted by the Regional after the Withdrawal

Election of June 27, 1978, but prior to the petitioner's withdrawal on June 30, 1979. Commencing July 1, 1979, petitioner was also required to pay a tuition fee of $1,615 for each of its pupils attending the Regional.

Thereafter, a request was made by the petitioner of the Atlantic County Superintendent of Schools, dated August 6, 1979, to meet with the representatives of both districts prior to the County Superintendent's preparation of a written report distributing assets and liabilities, as required by N.J.S.A. 18A:13-62 and N.J.S.A. 18A:8-24. Upon receiving the response from the County Superintendent dated August 9, 1979, that, in his judgment, it was not necessary that he submit a written report, the Egg Harbor Township Board of Education filed the herein Petition seeking a distribution of assets and liabilities. (R-2)

SYNOPSIS OF TESTIMONY

Petitioner's first witness was Thomas Smith, who stated that for the past nine (9) years he had been the Superintendent of the Egg Harbor Township School District. Superintendent Smith explained that Egg Harbor Township had been a constituent district of the Regional High School, grades nine (9) through twelve (12), since 1957 and had maintained its own School District for grades kindergarten (K) through eight (8) until the special election of June 27, 1978, which authorized petitioner's withdrawal from the Regional High School. As a result of that election, the following modifications between petitioner and respondent were ordered by the Commissioner of Education:

1. That petitioner become a K through 12 district effective July 1, 1979, and that a sending/receiving relation be established July 1, 1979, between petitioner and respondent, requiring petitioner's students in grades 9 through 12 to attend the Regional High School on a tuition basis;

2. That the composition of the Regional High School's Board of Education be altered as a result of the terms of those three (3) Board Members from Egg Harbor Township being terminated as of June 30, 1979; and

3. That the people of Egg Harbor Township be precluded from voting in the respondent's 1979-80 School Budget Election and on any Building Referendum Election subsequent to June 27, 1978, the date of the Withdrawal Election.

The court took official notice of N.J.S.A. 18A:13-62 and the requirements contained therein that the County Superintendent of Schools file a written report dividing assets and liabilities (Tr. p.84).

Upon being asked questions pertaining to the Investigative Report of the County Superintendent of Schools, Mr. Smith responded that the apportionment percentage established in the County Superintendent's report of 31.65% for Egg Harbor Township was corrected to 37.13% by the Board of Review. He testified that page 24 of this report, which lists assets and liabilities, does not mention Surplus, and that Loss of Surplus is not mentioned as one of the disadvantages. N.J.S.A. 18A:8-24, which requires the County Superintendent to file a written report, is cited in the County Superintendent's Investigative Report. The court then took official notice of the withdrawal statute and the authority of the Board of Review and the County Superintendent. The Superintendent testified that he had never received what he considered to be a written report distributing assets and liabilities from the County Superintendent, but that he had received a copy of the County Superintendent's response of August 9, 1979 (R-2), to the letter from petitioner's attorney.

Direct examination was concluded with Mr. Smith acknowledging the free balances and fund balances for the Current Expense, Capital Outlay, Debt Service and Title I accounts, and his representation that petitioner had never received any share of these sums, nor was a written report received from the County Superintendent itemizing or distributing these amounts or any portion thereof.

On cross-examination Mr. Smith stated that he did not know whether surplus funds were characterized as an asset. He also said that according to his interpretation of the word, Asset in the Public Question meant buildings and grounds. This witness gave his opinion that Title I funds are federal and, for that reason, are not directly derived from property taxes.

Petitioner's next witness, Rocco Carri, testified that he has been a member of the Board of Education for seven (7) years and its President for the past six (6) years. In his official capacity on the Board, he has not received a written report from the County Superintendent, listing or dividing assets and liabilities. Mr. Carri testified that he did not consider the letter of the County Superintendent (R-2), as such, a report, and that the petitioner has not received any assets, surplus or aid from respondent (which would include Transportation Aid). Upon being shown a written report from the Morris County

Superintendent of Schools, dividing assets and liabilities, Mr. Carri responded that he considered this document to constitute a written report. Mr. Daiker, the Secretary to the Egg Harbor Township Board of Education for the past seven (7) years, testified that in his capacity as Board Secretary, he has not received a written report dividing assets and liabilities between the petitioner and respondent from the County Superintendent. He stated that he did not consider the letter of the County Superintendent (R-2) as such. During Mr. Daiker's testimony, respondent's attorney admitted that respondent received money raised by taxes from the petitioner. Referring to P-5 evidence, this witness explained that in 1978 the amount of taxes Egg Harbor Township paid to respondent to educate the high school students was $1,089,478.45. Mr. Daiker then reviewed the Current Expense, Capital Outlay, Debt Service and Title I accounts (Transportation Aid is also to be included), stating their respective amounts, Free Balances and Appropriated Balances and referring at times to respondent's answers to Interrogatories (P-3). Mr. Daiker testified that, when the monies for these accounts were paid by petitioner to respondent, petitioner's relation to the respondent was that of a constituent district of the Regional High School District. He stated that when the appropriated balances were utilized by the respondent, the petitioner was no longer part of the Regional High School District, but had changed its status to that of a sending district, which necessitated petitioner's paying tuition of $1,615 for the education of each of its students attending the Regional High School.

On cross-examination, Mr. Daiker acknowledged that the hearing for the 1979-80 Regional High School Budget was held on March 15, 1979, and that the Budget Election was conducted on March 25, 1979. He also acknowledged that, although appropriations from the Free Balances of the accounts in question from the Budget of the previous year may have been authorized prior to petitioner's withdrawal, the actual date of the appropriation was after the petitioner's withdrawal.

During re-direct examination Mr. Daiker stated that the constituents of Egg Harbor Township were not permitted to vote upon the respondent's Annual School Budget, although a portion of the money contained in that Budget had been raised from taxes paid by Egg Harbor Township property owners. He stated that, by approving the Budget containing the Appropriated Balances from the Budget of the prior year, the effect would be that the taxes to be raised by the remaining constituent districts of the Regional High School for the education of their children would be reduced and, conversely, the amount the petitioner would then be required to raise by taxes for educational purposes would be increased by the amount of the Appropriation. This witness concluded his testimony by

saying that the petitioner did not receive any relief or credit from the respondent for the amount it appropriated from these Free Balances.

Petitioner's final witness was Roy Wager, an Education Consultant, having been employed by the New Jersey State Department of Education for fifteen (15) years. This witness stated that under the direction of the County Superintendent, he prepared the Investigative Report of the County Superintendent (P-1). When asked if the County Superintendent is to divide assets and liabilities, this witness responded yes and no, stating that there would be division only if a school building is to go with it. The witness then admitted that such wording is not set forth in the statute. Mr. Wager acknowledged that neither he nor the County Superintendent ever considered the distribution of surplus when preparing the Report. Mr. Wager further testified that the electorate has no voice in the distribution of assets and liabilities, and that this authority is vested in the County Superintendent after a successful Referendum.

On cross-examination, Mr. Wager stated that if there is no building, then there would be no Report dividing assets and liabilities, citing as authority N.J.A.C. 6:3-3.2(a) (10) and (11). He stated that his understanding is there would only be assets and liabilities if there were indebtedness. He further stated that there is no definitive definition of assets. Cross-examination was concluded by this witness's answer that where there is no building going to the withdrawing district, the Administrative Code does not call for a division of assets.

On re-direct examination Mr. Wager testified that when the building goes with the withdrawing district, it is entitled to assets and liabilities because it is taking an indebtedness. The witness said this interpretation was given to him by various members of the Department of Education. When asked where in paragraph 11 of the Code or in the Statutes this withdrawing petitioner is precluded from being awarded a division of assets and liabilities, the witness answered that it is not so stated. Mr. Wager also stated that there are two statutes which contain provisions requiring the County Superintendent to distribute assets and liabilities in a written report. He did not dispute that the only reference in the statutes to a building is by way of exemption, and that is by excepting buildings from being considered assets.

Ralph W. Martin, the Regional Board's Secretary and School Business Administrator, testified on behalf of respondent Regional Board and stated that during the

course of the Regional Board's 1979-80 budget discussions, three (3) of petitioner's constituent board of education members attended such meetings. He testified that the Free Balances from the prior year's budget were appropriated, approved by the County Superintendent, and voted upon by the electorate prior to petitioner's withdrawal. Addressing the question of Title I funds, Mr. Martin assessed $11,157.18 as petitioner's share, based upon a proportional percentage of 25.48% established by the Division of Business and Finance, and determined petitioner's share of Current Expenses to be 33.237573%. Mr. Martin also testified that he considered the Letter of the County Superintendent of August 9, 1979, to constitute a written report (R-2).

On cross-examination, Mr. Martin acknowledged that the Decision of the Board to Review (R-1) stated that, subsequent to the withdrawal, petitioner would not assume further debts or liabilities, nor acquire assets, and he admitted that the word subsequent was not included in the ballot. Mr. Martin testified that the assets sought by petitioner were accumulated prior to withdrawal. Mr. Martin stated that it would be the County Superintendent of Schools who would make the determination as to how assets and liabilities are to be distributed. When asked if the electorate has this authority, Mr. Martin's answer was "No, they do not" (Tr. p-232).

Mr. Martin stated that $65,495. was appropriated from the Current Expense Budget of 1978-79, to be used for the educational programs of students for the 1979-80 school year. He stated that approximately 1,100 of the respondent's students were from Egg Harbor Township. However, petitioner was required to pay tuition of approximately $1,615.00 per student, as petitioner's status with respect to respondent changed from that of a constituent district of respondent in 1978-79, to a sending/receiving relationship with respondent on July 1, 1979. As a result of the sending/receiving relationship change and the Free Balance Appropriation made by the respondent, the amount required to be raised by taxes by those four (4) remaining constituent Districts was reduced (Tr. pp. 234-237). Mr. Martin acknowledged that by Order of the Commissioner of Education, the constituents of Egg Harbor Township were not authorized to vote upon the respondent's 1979-80 School Budget. Mr. Martin further admitted that the Free Balances which had been appropriated were not carried forward until July 1, 1979 (Tr. p. 240). Mr. Martin admitted that respondent appropriated unused monies in a 1978-79 account for use in the 1979-80 school year.

Again Mr. Martin stated that the appropriated surplus funds were for use after petitioner's withdrawal from the Regional, the effect of which being that the monies to be raised through taxes by the remaining constituent districts would be reduced by the amount appropriated.

Pertaining to the County Superintendent's letter of August 9, 1979, Mr. Martin admitted that the letter did not mention such items as cash on hand, accounts receivable, value of land, value of building, itemized stocks, supplies, books, personal property, equipment, fuel, vehicles, appropriated balance and transfer of assets, and that most of these items were possessed by respondent at the time of petitioner's withdrawal (Tr. p. 246-251).

Mr. Martin also acknowledged during cross-examination that the Withdrawal Statute, N.J.S.A. 18A:13-58, authorized only the amount of indebtedness to be included in the Public Question on ballot (Tr. p. 256). He further testified that the reason the County Superintendent did not distribute assets and liabilities was because "this is what the voters approved" (Tr. pp. 257-258).

DISCUSSION

The first issue to be determined is whether the Atlantic County Superintendent of Schools failed to file a written report with respect to the division of assets and liabilities between the withdrawing Egg Harbor Township District and the Greater Egg Harbor Regional District, pursuant to N.J.S.A. 18A:13-62, N.J.S.A. 18A:8-24. The statutory provisions governing the withdrawal of a constituent school district from a limited purpose regional school district are contained in N.J.S.A. 18A:13-51 through 65. The statutes N.J.S.A. 18A:13-51 through 59 speak to the provisions prior to, and including, the withdrawal of a school district from a limited purpose regional school district. It is undisputed that all such statutory provisions were met by the petitioner herein. The remaining statutes, N.J.S.A. 18A:13-60 through 65, contain the provisions for matters subsequent to the withdrawal of a school district from a limited purpose regional district. With regard to the subsequent withdrawal, N.J.S.A. 18A:13-62 provides that:

> 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.A. 18A:8-24.

N.J.S.A. 18A:8-24 states:

> 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.

Respondent Regional Board contends that the statute does not state what form the County Superintendent's report must take, and argues that the letter dated August 9, 1979, meets the statutory requirement. The County Superintendent's letter, in response to petitioner's inquiry with regard to a division of assets and liabilities, states, in part, as follows:

> Relative to your reference of N.J.S.A. 18A:13-62 it is my judgment that it not necessary for me to submit a written report to divide the assets and liabilities between Egg Harbor Township and the Regional District since Egg Harbor Township is not entitled to receive any portion of the Regional District's assets or responsible for any portion of their liabilities.

The Regional Board argues that this conclusion is grounded upon the Decision of the Board of Review, wherein it followed the dictates of N.J.S.A. 18A:13-56 and stated, among other things, that the "withdrawing district would relinquish any claim to any assets of the district including buildings and grounds." The Regional Board asserts that the Board of Review directed that there be submitted to the electorate of the entire Regional School District the question,

> . . . which shall contain a statement that, subsequent to withdrawal, the Township Board shall not assume any further debts or liabilities of the Regional District, neither shall it acquire any of the assets of the Regional District, and that all remaining assets, debts and liabilities shall be shared proportionally among the remaining constituents in the Regional District.

Petitioner contends that unless the parties specifically agree to the contrary, the County Superintendent is required to prepare a written report dividing the assets and liabilities between the withdrawing district (petitioner) and the regional district (respondent). No one, but the County Superintendent, is given this authority, the statutory language being quite clear and explicit.

Having reviewed the entire record with regard to this issue, including the documents in evidence and the testimony of the witnesses, I **FIND** that the Atlantic County Superintendent of Schools failed to file a written report upon the withdrawal of the Egg Harbor Township School District from the Greater Egg Harbor Regional High School District, as prescribed by law. N.J.S.A. 18A:13-62, N.J.S.A. 18A:8-24. Even if there were no assets or liabilities to be divided between the withdrawing district and the regional district, the statute requires that the County Superintendent file a written report "on the basis of the amount of the ratables in the respective districts on which the last school tax was levied. . . ." N.J.S.A. 18A:8-24.

With regard to the remaining issue of which assets, if any, are owing to Egg Harbor Township Board from the Greater Egg Harbor Regional Board, petitioner contends that the guidelines for the distribution of such assets are set forth in N.J.S.A. 18A:8-24. Petitioner asserts that despite the general items listed for distribution, such as books, supplies, fuel and motor vehicles, its specific claim is for those items contained in the Answers to Interrogatories (P-3 evidence) and for its portion of the 1978-79 Transportation Aid funds reimbursed by the State of New Jersey to the Regional District. From the documentation and testimony, the amounts in dispute appear to be:

33.237573% of the Current Expense Free Balance of $55,804.14.

33.237573% of the Capital Outlay Free Balance of $7,717.57.

33.237573% of the Debt Service Revenue Account balance of $14,518.16.

25.48% of the Title I carry-over funds of $43,788.00 and

33.237573% of the 1978-79 Transportation Aid Funds reimbursed by the State of New Jersey in the amount of $831,532.00.

Pertaining to the Transportation Aid, petitioner observes that each district is reimbursed ninety (90) percent of the cost to the district of transporting pupils to a school. Petitioner asserts that it advanced approximately thirty-three (33) percent of the costs incurred by the Regional for the transportation of its pupils during the 1978-79 school year. Upon being reimbursed ninety (90) percent of the actual transportation costs, the out-of-pocket charge to the Regional High School was ten (10) percent. The inequity is that petitioner was considered a part of the Regional High School at the time the transportation costs were assessed and was obligated to pay approximately $307,000. That status was ignored, however, when petitioner was entitled to be reimbursed approximately $276,000 of the $307,000 it advanced. Respondent argues that because of petitioner's status in a sending/receiving relation, it is not entitled to the ninety (90) percent reimbursement of the State transportation costs it paid when it was a constituent district. Petitioner argues that the Regional Board considered petitioner a constituent district only for the purpose of paying bills, but did not consider it as such for benefit purposes. Such a position would appear to be inconsistent with the Commissioner of Education's Order precluding the residents of Egg Harbor Township from voting on an expenditure of the Regional High School at Budget or Referendum Elections held after the Withdrawal Election, but prior to petitioner's actual withdrawal. In so ordering, the Commissioner took into consideration the reality of the situation that, although petitioner was still a constituent district at the time of any such election, it would not be so at the time the budget monies were spent or the new building authorized by a referendum. Petitioner states that so, also, should the reality of this situation be recognized that when the Transportation Funds were used, petitioner was a constituent district, and that it is this time and status that should be controlling when determining what portion of these funds should be returned to petitioner. To deny at this time the ninety (90) percent reimbursement would be to place upon petitioner the excessive burden of charging its residents, by tax-raised revenues, one hundred (100) percent of the transportation costs. The inequitable result would be that Egg Harbor Township will have paid $307,000. for the transportation of thirty-three (33) percent of the pupils attending the Regional High School, whereas the entire cost to the Regional of transporting one hundred (100) percent of its students, including the pupils from Egg Harbor Township, would be only $92,000. Petitioner argues that such a determination would be totally discriminative, placing an undue tax burden upon the taxpayers of Egg Harbor Township, while benefiting those taxpayers of the remaining four (4) constituent districts with this additional Transportation Aid windfall. Petitioner asserts that similar arguments are applicable to

the Current Expense Free Balance and the Capital Outlay Free Balance, said accounts having been over-budgeted by respondent for the 1978-79 school year. It contends that these funds were made available to respondent to be used for educational purposes benefiting all of its pupils during that school year, not the subsequent year. Petitioner contends that respondent appropriated the entire Free Balances in these over-budgeted accounts, rather than only that portion belonging to the remaining constituent districts, for use the following school year. Ordinarily such a practice is common. However, because of petitioner's unique circumstance of being only the second district in the State of New Jersey to withdraw from a Regional High School, such an appropriation of the entire amount of the unexpended monies in the Current Expense and Capital Outlay accounts was improper. Respondent attempts to justify its action by stating that at the time its budget was prepared and adopted, three (3) of its nine (9) Board Members were residents of Egg Harbor Township. Petitioner argues that because of the complexity of this situation, the three members of the Regional Board of Education from Egg Harbor Township voted in favor of such appropriation, but they did not realize that a portion of the funds being appropriated had been advanced by taxes collected from property owners in Egg Harbor Township. The three (3) voting members did not consider that petitioner would be entitled to refund.

Petitioner argues that respondent attempts to justify this appropriation further by saying that the budget was approved by the County Superintendent and was thereafter favorably voted upon by the electorate. By order of the Commissioner of Education, however, the people of Egg Harbor Township were specifically excluded from taking part in that election. The result of sustaining this appropriation by the Regional Board is detrimental to petitioner, as a portion of its tax monies are being carried over for Current Expense and Capital Outlay purposes, thereby reducing the funds to be raised by taxes for those purposes by the remaining constituent districts of the Regional. Petitioner, in addition to losing those funds, is being charged a tuition rate in excess of $1,600 per pupil to satisfy the same Current Expense and Capital Outlay expenditures. This results in an over-payment by petitioner of Current Expense and Capital Outlay items. The unfairness and double taxation resulting from these circumstances is substantiated in the record in the testimony by petitioner's witness, James Daiker, and the respondent's witness, Ralph Martin.

Regarding the Debt Service Balance, petitioner asserts that it would appear at the end of the 1978-79 school year that an excess of $14,518.16 remained in this account. As the indebtedness subsequent to petitioner's withdrawal was to be assumed by

respondent and paid proportionately by the remaining four (4) constituent districts, that portion of excess funds remaining in the Debt Service Revenue Account and belonging to petitioner should not be applied to Debt Service that has been totally assumed by the Regional District. As the school buildings and grounds remain the exclusive property of the Regional Board, it does not sustain any detriment by assuming this indebtedness. To the contrary, the proportionate equitable share of the remaining four (4) constituent districts is increased by the thirty-three (33) percent of the equity interest which petitioner which had acquired during its twenty-year term as a constituent district of the Regional High School, but which it relinquished upon its withdrawal.

Addressing petitioner's claim to Title I carry-over funds, petitioner's argument pertaining to the other funds would apply, with the acknowledgement that these funds are derived from federal taxes and that petitioner's share would be 25.48%, as established from the testimony of respondent's witness, Ralph Martin.

Petitioner seeks to have returned to it its share of all the respective unused funds collected and paid to Regional Board for the education of those school children of Egg Harbor Township attending the Regional High School. Petitioner contends that said funds can no longer be expended for the purposes for which they were authorized and intended by the taxpayers of Egg Harbor Township and the Federal Government. A determination to the contrary would be discriminatory and punitive, and would constitute an unconscionable forfeiture of funds collected by taxing Egg Harbor Township property owners for funds to be used for the purpose of educating children of other communities. Such a result was never contemplated by the Legislature, the Commissioner of Education, the parties to this action or the people of the respective constituent districts.

With regard to the issue as to whether there are any assets owing to petitioner from the Regional Board, I **FIND** that:

1. Assets were generated by the Regional Board between the period of June 27, 1978, the date of the special school election for petitioner's withdrawal from the Regional District, and June 30, 1979, the effective date of said withdrawal.

2. Petitioner failed to state its claim before the Board of Review for any prospective assets generated by the Regional District.

3. Petitioner accepted the terms and conditions of the Review Board's authorization on the proposed withdrawal wherein it stated, in part, as follows:

> Accordingly, the Board of Review hereby authorizes the Atlantic County Superintendent of Schools to fix an early date pursuant to law for the election on the proposed withdrawal of Egg Harbor Township from the Greater Egg Harbor Regional High School District. The Board of Review further authorizes the submission of a question therein to the voters of the Township and of the Regional District which shall contain a statement that, subsequent to withdrawal, the Township Board shall not assume any further debts or liabilities of the Regional District; neither shall it acquire any of the assets of the Regional District, and that all remaining assets, debts and liabilities shall be shared proportionally among the remaining constituents in the Regional District. [1978 S.L.D. 275, 287, 288.]
>
> (Emphasis supplied)

It is clear from a review of the record that petitioner now calls upon this tribunal and the Commissioner to vitiate the terms and conditions the Board of Review considered and adopted in making its determination to authorize the special school election for petitioner's withdrawal from the Regional School District. The facts clearly demonstrate that petitioner acquiesced, thereby waiving any claim to the condition set forth by the Board of Review that it "not assume any further debts or liabilities . . . ; neither shall it acquire any of the assets of the Regional District. . . ." (1978 S.L.D. 287,288).

I **CONCLUDE,** therefore, that, absent any claim by petitioner before the Board of Review as to assets owing, petitioner waived such claim or claims upon the Review Board's authorization for the special school election for petitioner's withdrawal from the Regional School District. I further **CONCLUDE** that the quasi-judicial function of the Board of Review, pursuant to statute, renders petitioner's claim res judicata.

In summary, I **FIND** the Statement of Facts set forth hereinbefore are hereby adopted by references as **FINDINGS OF FACT.** In addition thereto, I **FIND** that the County Superintendent of Schools, upon the withdrawal of petitioner from the Regional, failed to file a written report with regard to the assets and liabilities between petitioner and the Regional, pursuant to N.J.S.A. 18A:13-62; N.J.S.A. 18A:8-24. I further **FIND** that petitioner failed to state a claim of alleged assets owing before the Board of Review, thereby waiving said claim.

Based upon the foregoing facts, I **CONCLUDE** that petitioner's Petition is hereby **DISMISSED.**

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, FRED G. BURKE,** who by law is empowered to make a final decision in this matter. However, if Fred G. Burke does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **FRED G. BURKE** for consideration.

27 April 1981
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

29 April 1981
DATE

Seymour Lewis
DEPARTMENT OF EDUCATION

Mailed To Parties:

May 1, 1981
DATE

Ronald L. Parks/sh
OFFICE OF ADMINISTRATIVE LAW

bm

BOARD OF EDUCATION OF THE TOWNSHIP OF EGG HARBOR,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE GREATER EGG HARBOR REGIONAL SCHOOL DISTRICT, ATLANTIC COUNTY, AND NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENTS.	:	

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law.

The Commissioner observes that exceptions were filed by petitioner pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Petitioner excepts to the determination of the Honorable Lillard E. Law, ALJ that the Board of Review had any power to divide assets. (N.J.S.A. 18A:13-56) Petitioner argues that such power rests exclusively with the County Superintendent of Schools in a report which must be filed by him/her. Petitioner properly corrects the location of oral arguments to Northfield City Hall.

The Commissioner, other than the noted location correction, finds no merit in petitioner's exceptions. A thorough examination of the record convinces the Commissioner that petitioner agreed to the conditions set down by the Review Board as a concomitant to petitioner's withdrawal from the Regional School District. (1978 S.L.D. 275, 287, 288) Petitioner's claim is res judicata.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

June 15, 1981

Pending State Board

M.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PASCACK VALLEY REGIONAL SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

For M.B., Dickman, Cohen & Sherman (Emerson Dickman, Esq., of Counsel)

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

This matter has been opened before the Commissioner on August 14, 1980 by Petition of Appeal from counsel for the Board excepting to the decision of the classification officer in the above-entitled matter dated July 18, 1980. Subsequently, by Petition of Appeal dated August 18, 1980 a Cross-Appeal was entered by counsel for M.B.

M.B. was first enrolled in the Board's secondary school upon transfer from River Vale, a constituent elementary district. Upon such transfer, he had been classified as perceptually impaired and received resource room instruction in addition to regular class instruction.

During the 1978-79 school year M.B., who was a senior in Pascack Valley Regional School District, requested that he not be graduated on the grounds that he had not been provided an adequate special education program designed to achieve success in learning as prescribed by N.J.A.C. 6:28-2.1. He further requested that placement be provided in the Kildonan School, an out-of-state residential special education facility.

Notwithstanding M.B.'s request, the Board determined that he would be graduated with his class in June 1979 and that he had met all requirements for so doing pursuant to the provisions of N.J.A.C. 6:28-2.6(a).

M.B. was subsequently enrolled by his parents in a summer program at Dunnabeck and continued in that placement into September 1979 requesting tuition reimbursement by the Board which was subsequently denied. This denial resulted in the invocation of due process procedures pursuant to N.J.A.C. 6:28-1.9(g).

The hearings conducted by the Chief Classification Officer of the New Jersey State Department of Education resulted in findings which are the basis for the Petitions herein. The Chief Classification Officer in his decision of July 18, 1980 determined that the awarding of a diploma to M.B. did not reflect the requirements of N.J.A.C. 6:28-2.6(a) which predicates the awarding of a secondary diploma upon the successful completion of his or her individually prescribed educational program.

In the instant matter, the classification officer determined that no individualized education program (IEP), as prescribed by N.J.A.C. 6:28-1.8(a), had ever been developed by the Board's CST until February 27, 1979 and that the program so developed on that date was defective in that it contained no goals and objectives as prescribed by N.J.A.C. 6:28-1.8(d) 3 and 4.

Accordingly, it was the determination of the Chief Classification Officer that M.B. was improperly graduated from the Board's high school and thus entitled to an educational program through the school year in which he attained his twentieth birthday.

The Board's Petition and supporting memorandum argue that the classification officer erred in his determination that M.B.'s grades did not accurately reflect his achievement and that his educational progress was minimal over the four year period of his enrollment in the Pascack Valley Regional School District. The Board further asserts that the classification officer erred in his finding of educational neglect on the Board's part and that M.B.'s graduation from the Board's high school was improper and that the diploma issued was, in effect, a bogus one.

The Board's Petition further argues that the classification officer's determination that the Board pay additional educational costs for the period September 1979 through June 1981 was unwarranted and that the Board should not be required to pay for educational costs beyond the time that M.B. attained his twentieth birthday.

M.B., in his Cross-Appeal and supporting memorandum, argues that the Board had wrongfully insisted upon his graduating and refused to provide additional education. M.B. asserts that he is entitled in fairness and equity to a minimum of two years of special placement in light of his contention of educational neglect. He further contends that he is entitled not only to an additional year's reimbursement for educational costs (1980-81 school year) but also to reimbursement for residential costs because the classification officer erred in his determination that day placement was probably available despite the Board's failure to utilize it. M.B. finally asserts his entitlement to reimbursement for a 1979 summer school trial placement at Dunnabeck which he agreed to pay at his own expense based upon his belief that success in such summer program would be

considered by the Board's CST as a possible justification for assuming further educational costs. M.B. asserts that it became abundantly clear that the Board's representatives had no intention of ever reconsidering their decision not to grant reimbursement for additional educational costs beyond M.B.'s date of graduation in June 1979.

The Commissioner has reviewed the entire record in the matter herein controverted as well as the decision of the classification officer and the memoranda submitted by the parties.

In the Commissioner's view, the findings of fact contained within the classification officer's decision are thoroughly substantiated by the record. The Commissioner finds the Board's argument that M.B. had fulfilled those requirements of his program necessary for graduation under the provisions of N.J.A.C. 6:28-2.6 to be entirely without merit.

To the contrary, the Commissioner has determined that the Board by graduating M.B. merely sought to relieve itself of a future obligation to provide an educational program consistent with law and regulation as cited herein and to unburden itself of past failures to so provide.

As amply demonstrated by the record, the Board and its agents failed to provide an IEP for M.B. until well into his senior year in high school; failed to provide for a comprehensive reevaluation at least every three years as required by N.J.A.C. 6:28-1.6(p); failed to comply with the exact specifications of the requirements of an IEP as required by N.J.A.C. 6:28-1.8(d); and finally and most significantly failed to provide "***a free, appropriate and individualized educational program***" (N.J.A.C. 6:28-1.1(c)) "***according to how the pupil can best achieve success in learning***." (N.J.A.C. 6:28-2.1(a)(1))

Accordingly, and for the reasons contained herein, the Commissioner adopts the prescribed relief directed by the Chief Classification Officer and orders that M.B. be reimbursed for such educational tuition expenditures to the Kildonan School through the school year in which he attained his twentieth birthday as prescribed by N.J.A.C. 6:28-1.1(c). M.B.'s request for reimbursement for the summer school program attended in 1979 and for non-educational residential costs is hereby denied.

In rendering the above determination, the Commissioner is constrained to observe that the Kildonan School was not at the time of M.B.'s placement therein on the approved list of out-of-state private residential schools of the New Jersey State Department of Education. Notwithstanding this fact, the Commissioner has directed reimbursement to M.B. because the Board herein has by its gross violation of M.B.'s rights to have available "***a free appropriate public education offered by a local school

district***" (N.J.A.C. 6:28-4.8) provided M.B.'s parents no choice but to seek an appropriate placement on their own.

COMMISSIONER OF EDUCATION

June 22, 1981

BOARD OF EDUCATION OF THE RAMAPO INDIAN HILLS REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,

PETITIONER,

V. : COMMISSIONER OF EDUCATION

MR. AND MRS. GERALD VAN DECKER, on behalf of their son, T.V.D.,

RESPONDENTS.

For the Petitioner, Green & Dzwilewski
(Allan P. Dzwilewski, Esq., of Counsel)

For the Respondents, Bernard A. Schwartz, Esq.

This matter was opened before the Commissioner by Petition of Appeal dated October 15, 1980, from a decision of the Chief Classification Officer dated September 12, 1980, finding the Ramapo Indian Hills Regional School District (petitioner) to have been in violation of certain procedural and due process rights of T.V.D. The dispute herein originally arose as a result of the decision of the CST to alter the individualized education program (IEP) of T.V.D. from a daily one-to-one program of one period per day of supplemental instruction to a one-to-three ratio three times per week.

Respondents' unwillingness to accede to such recommendation produced a request by petitioner herein for an administrative review and ultimately for a due process hearing pursuant to N.J.A.C. 6:28-1.9(e). Prior to the actual onset of the hearing process, petitioner agreed to an independent evaluation of T.V.D. at district expense. Based upon such agreement, petitioner moved for a withdrawal of the request for a hearing which was denied by the Chief Classification Officer. Said denial was based upon the conclusion of the Chief Classification Officer that a hearing was necessary to determine the validity of Respondents' allegation of denial of due process and alleged procedural shortcomings.

The Commissioner has reviewed the Petition of Appeal as well as the decision of the Chief Classification Officer and the record of the matter herein controverted. As a result of such review, the Commissioner is constrained to observe that the instant matter, except as it pertains to pupil records, may not have been an appropriate subject for consideration of the Chief

Classification Officer whose functions are delineated in N.J.A.C. 6:28-1.9(f) as follows:

> "A parent or a local school district may invoke their rights under this section whenever a challenge is made to a pupil's referral, evaluation, classification or individualized education program."

Although the matters herein controverted, apart from those relating specifically to records of handicapped pupils (N.J.A.C. 6:28-1.10(b)), might more appropriately have been addressed directly to the Commissioner pursuant to his authority under N.J.S.A. 18A:6-9 et seq. and N.J.A.C. 6:24-1.1 et seq., the Chief Classification Officer, having been confronted with an appeal relative to a programmatic dispute, appropriately chose to address the procedural and due process allegations in a manner designed to expedite their resolution rather than to refer respondents to an alternate due process procedure.

Upon review of his own records relating to the matters herein controverted, the Commissioner has determined that the Branch of Special Education and Pupil Personnel Services has, subsequent to the filing of this Petition, undertaken a Level II monitoring process of the activities and procedures of the Ramapo Indian Hills Regional School District. Many of the procedural and due process deficiencies found by the classification officer have been the subject of specific recommendations made by the monitoring team and thus incorporated into the annual June 1st finding letter as prescribed by N.J.S.A. 18A:7A-10. The Commissioner has further determined that the Ramapo Indian Hills Regional School District, as part of its annual report for the school year 1980-81 as prescribed under 18A:7A-11, had filed an EP-3 remedial plan indicating its intention of meeting those deficiencies identified by the Level II review process. On June 1, 1981, the Bergen County Superintendent of Schools, based upon the year-long monitoring process during 1980-81 school year, found the Ramapo Indian Hills School District to be in full compliance with all laws and regulations relating to the identification, evaluation and classification of handicapped pupils pursuant to N.J.S.A. 18A:46-1 et seq. and N.J.A.C. 6:28-1.1 et seq.

Accordingly, the Commissioner, having determined that the procedural and due process deficiencies identified by the Chief Classification Officer in his decision of September 12, 1980 and the subject of the matter herein controverted have been addressed and corrected by the Ramapo Indian Hills Regional School District, finds the instant matter to have been rendered moot. The Commissioner therefore affirms the findings of the Chief Classification Officer and accepts them as his own thereby denying the Board's Petition seeking reversal of said findings.

The Commissioner, however, based upon the resultant compliance by the Ramapo Indian Hills Regional School District through the monitoring process deems it unnecessary to grant further relief.

COMMISSIONER OF EDUCATION

June 23, 1981

Pending State Board

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. —
AGENCY DKT. NO. 135-73

IN THE MATTER OF:

JUANITA ZIELENSKI,
Petitioner
v.
BOARD OF EDUCATION OF THE TOWN OF GUTTENBERG, HUDSON COUNTY,
Respondent.

Record Closed: March 24, 1981
Received by Agency: 5/4/81

Decided: April 30, 1981
Mailed to Parties: 5/5/81

APPEARANCES:

Kenneth von Schaumburg, Esq., for the Petitioner (Moser, Roveto, McGough & von Schaumburg)

John Tomasin, Esq., for the Respondent

BEFORE **LILLARD E. LAW**, ALJ:

This matter comes before this tribunal by way of an Order of the Commissioner of Education directing this court to conduct a hearing on the single limited issue of mitigation of damages, subsequent to the Commissioner's Order that the Board of Education of the Town of Guttenberg (Board) to restore to petitioner an amount of $20,723 illegally withheld from her for the period September 1969 until April 1972. Juanita Zielenski v. Board of Education of the Town of Guttenberg, Hudson County, 1980 S.L.D. _____ (decided August 21, 1980).

Subsequent to the Commissioner's Order, the matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. A preemptory hearing date was scheduled for February 2, 1981, at the Office of Administrative Law, Newark, New Jersey. The parties in controversy having been represented by counsel, the hearing moved forward notwithstanding petitioner Zielenski's failure to appear. Subsequent to the hearing, the parties submitted Briefs of Law and the record was closed on March 24, 1981.

A discussion of the lengthy history of this controversy will not be recited herein, having been set forth in Zielenski, supra. The uncontroverted facts in the instant matter are set forth as follows:

STATEMENT OF FACTS

1. Petitioner had acquired a tenure status as a teaching staff member with the Board during the 1968-69 academic year.

2. The Board illegally dismissed petitioner from her tenured position commencing September 1969, and continuing until April 1972, when she was reinstated. Zielenski, 1972 S.L.D. 692.

3. Petitioner's full salary for the period in dispute is as follows:

Sept. 1969 - June 1970	$ 6,700.00
Sept. 1970 - June 1971	$ 7,600.00
Sept. 1971 - April 1972 (when reinstated)	$ 6,433.00
TOTAL	$ 20,733.00

4. By way of affidavit, petitioner set forth, in part, the following:

   1. I am the plantiff in the above-entitled action which has been instituted against the Board of Education of the Town of Guttenberg for the reasons set forth fully in the Complaint.

2. Subsequent to my failure to receive an executed copy of the Contract of Employment from the defendant, Board, covering the academic year, 1969 to 1970, I began seeking employment examining the help-wanted section of various newspapers to determine for what type of position I would be qualified. I began this search when I failed to receive my executed copy of the Contract referred to and I continued this search through the summer and early fall of 1969.

3. I was graduated from Jersey City State College with a degree in education in January of 1966. I have no typing, secretarial or other office skills whatsoever, nor am I suited for any occupation other than that of teaching for which I have been trained.

4. My search during 1969 produced no results since there were no jobs available for which I was qualified.

5. In the spring of 1970, I applied for a position as a teacher within the school system in Weehawkin, Union City, and West New York, New Jersey. Written applications for such position were filed by me at this time.

6. As a result of these applications, I obtained an interview with the Board of Education in West New York. The only teaching position open at that time, which would be for the 1970-71 academic year, was for a teacher in a bilingual class which position would require a fluency in Spanish. I do not now nor have I ever possessed fluency in Spanish.

7. Neither the Township of Weehawken nor the City of Union City ever contacted me further regarding my applications for employment. . . .

This concludes a recital of the facts relative to the limited issue in controversy in this matter.

The Board, having asserted its affirmative defense as to the issues of mitigation of damages, has the burden of showing that petitioner either had income that should be deducted from her recovery and/or that petitioner did not seek or accept suitable employment.

DISCUSSION

The Board asserts that petitioner conceded that the doctrine of mitigation of damages applies to the herein matter under the principle set forth in White v. North Bergen, 77 N.J. 538 (1978). Therein the Court recognized the common law principal of mitigation of damages, wherein the illegally dismissed public employee sought full recovery of salary and other emoluments withheld from him. The Board argues that the application of the doctrine of mitigation with respect to the teaching profession is set forth in Talman v. Bd. of Trustees of Burlington Cty. College, 169 N.J. Super. 535, 540, 541. The Board observes that mitigation, in the classic sense, is the deduction of other income received from the amount of back pay otherwise recoverable. In Talman the doctrine also applies to the principle that where other income is not actually received, the amount of back pay awarded may be reduced by the amount the discharged employee could or should have received by reasonable and sincere efforts to find other employment

The Board asserts that petitioner made minimal attempts to find other employment and argues that the amount due her should be reduced.

Petitioner asserts that the Board, in accordance with its burden as proponent of the affirmative defense, entered into evidence certain of its own prior Answers to Interrogatories confirming that petitioner would have been paid $20,733 during the period of her illegal discharge. The Board also put into evidence, on its case, petitioner's affidavit setting forth her lack of training and skills in any occupational field other than teaching, and describing her unsuccessful applications to the school systems of Weehawken, Union City and West New York, New Jersey.

The Board produced Mr. Leo Gattoni, who testified, among other things, that between 1971 and 1974, he was elementary school coordinator of the Township of North Bergen. He stated that there was a constant demand for substitute teachers during that period, and that, to his recollection (all records having been destroyed), petitioner had not made application to that system during his tenure. He testified, on cross-examination, that he would indeed be interested in any applicant's prior job experience and that the fact that an applicant's contract with another town had not been renewed would be a definite factor to be considered.

Petitioner contends that Mr. Gattoni was not asked, nor did he testify, nor was any evidence introduced by the Board concerning the wages paid to the substitute teachers and to which Miss Zielenski would assumedly have been entitled had she been accepted for such a position. Likewise, there was no testimony or evidence with respect to the number of working hours available to such substitutes. There was no evidence of availability of jobs, comparable wage scales or working hours in any other continguous community.

Petitioner offered into evidence the physician's letter in explanation of petitioner's absence from the hearing, for the purpose of meeting any inferences which the Court might draw from her failure to testify, but she withdrew the offer upon counsel's stipulation that such inferences were not to be a part of the case.

Petitioner argues that the Board must sustain its burden of proof in this matter. She asserts that the applicability of the doctrine of mitigation of damages as set forth in White, the burden of proof as to actual or potential mitigation and the amount thereof is cast upon respondent. Sandler v. Lawn-A-Mat Chemical & Equipment Corp., 141 N.J. Super. 437 (App. Div. 1976). See also Sommer v. Kridel, 74 N.J. 446 (1977), at page 457. This burden has not, it is respectfully submitted, been changed or modified by Talman v. Board of Trustees of Burlington County College, 169 N.J. Super 535 (App. Div. 1979), cited by respondent. The Court in Talman was careful to point out that it was dealing with a civil rights action arising out of statutorily proscribed sex discrimination, and that the evidential burden remains with defendant in an ordinary contract action (page 538). As in White, supra, the present situation presents nothing more than such a contract action.

Petitioner asserts that, as set forth above, respondent placed into evidence, on its own case, petitioner's Affidavit, thereby conceding the factual authenticity of the statements contained therein pertaining to her occupational skills and training and her unsuccessful efforts to seek and obtain employment in neighboring communities. Respondent suggests an obligation on petitioner's part to travel as far afield as, e.g., Bayonne, Hackensack, Fort Lee, and Kearny, although the general rule with respect to diminution of damages by a discharged school-teacher is to the effect that there is no obligation to attempt to obtain any position other than an equivalent position in a school of the same grade, in the same locality. See Byrne v. Independent School District, 139

Iowa 618, 117 N.W. 983 (1908); Shil v. School Township of Rock Creek, 209 Iowa 1020, 227 N.W. 412 (1929); Edgecomb v. Traverse City School District, 341 Mich. 106, 67 N.W. 2d 87 (1954) (not required to seek employment in any line of service other than that in which [teacher] was hired by the district). See, generally, cases collected in 44 A.L.R. 3d 629, 679, § 31. Moreover, argues petitioner, there is no evidence in the record with respect to the quantum of monies which she could have been expected to earn, by way of mitigation. Even had petitioner obtained a position in any of the surrounding communities, assuming that such positions were available, of which no proofs have been presented with the exception of North Bergen, the Board failed to show the amount of money petitioner could have earned. Petitioner cites the matter in Harvard v. Bushberg Brothers, 137 N.J. Super. 537 (App. Div. 1975), another sex discrimination case, in which the record before the Court contained a monetary basis from which mitigated damages could be computed. As noted by the Court in Cartin v. Continental Homes of New Hampshire, 360 A. 2d 96, 134 Vt. 362 (1976), "Such burden (of mitigation) is not met by merely arguing the possibility and, absent concrete evidence, the issue is merely speculative." Petitioner asserts that in this context, it is important to recall the testimony of Mr. Gattoni to the effect that consideration would certainly be given to an applicant's prior record and, further, that non-renewal of a teacher's contract in another community would be a factor in the hiring process. Petitioner argues that the evidence produced by respondent would appear to fall far short of the "preponderance" necessary to satisfy both its substantive and quantitative burden.

Petitioner respectfully makes the observation that respondent's contentions would seem to be inconsistent and irreconcilable in that it argues that Miss Zielenski should and could have obtained a teaching position in another school system, while at the same time taking the position that she was incompetent to hold such a position within its own system.

Petitioner submits that respondent has not satisfied its burden with respect to mitigation and that the Commissioner should enter an award in favor of petitioner, Juanita Zielenski, in the full amount of her unpaid wages, i.e., $20,733.00, without reduction or mitigation.

Having carefully reviewed and considered the entire record before me, I **FIND** the Statement of Facts as set forth hereinbefore, including petitioner's affidavit, are hereby adopted by reference as **FINDINGS OF FACT.**

I further **FIND** that under common law principles, petitioner was under duty and obligation to mitigate her damages, even though she had been improperly terminated from her tenured position. It is necessary at this juncture, however, to analyze the statues which bear upon petitioner's situation to determine if, indeed, there is allowance for a different standard.

The statute, N.J.S.A. 18A:6-30 provides that:

> Any person holding office, position or employment in the public school system of the state, who shall be illegally dismissed or suspended therefrom, shall be entitled to compensation for the period covered by the illegal dismissal or suspension, if such dismissal or suspension shall be finally determined to have been without good cause, upon making written application therefor with the board or body by whom he was employed, within 30 days after such determination.

Further, in force and effect at the time petitioner was improperly severed from employment, the relevant statute, N.J.S.A. 18A:6-14, provided that "if the [tenure] charge is dismissed, the person shall be reinstated immediately with full pay as of the time of such suspension."

The Court in Mullen v. Board of Education of Jefferson Township, 81 N.J. Super 151 (App. Div. 1963) addressed the issue as to whether the doctrine of mitigation was applicable to N.J.S.A. 18A:5-49.1, the predecessor of N.J.S.A. 18A:6-30 and similar in all relevant aspects thereto. The issue therein was "whether a person holding a position with a local board of education is entitled to full payment of salary for the entire period of his illegal dismissal, without mitigation, under N.J.S.A. 18A:5-49.1" (Mullen at 153.) The Court found that the Legislature had intended that "all claims made by illegally dismissed persons under N.J.S.A. 18A:5-49.1 (now N.J.S.A. 18A:6-30) be subject to the common law rule of mitigation of damages. . . ." (Mullen at 159.) The Court in Mullen also based its determination, in part, upon the common law principle enunciated in Miele v. McGuire, 31 N.J. 339 (1960), where the New Jersey Supreme Court noted that "a public employee's claim for back pay may justly be subjected to mitigation in the amount the employee actually earned or could have earned." (Miele at 350.) (Emphasis supplied.)

It is important to note that the employee is not obligated to seek and accept any form of employment in order to mitigate. It is a generally accepted principle that the duty to mitigate damages extends only to similar types of employment. 44 ALR 3d 629.

Finally, where the breaching employer claims that the amount of damages should be decreased, "the burden of proving facts in mitigation of damages rests with [him]" Roselle v. LaFera Contracting Co. 18 N.J. Super. 19, 28 (Ch. Div. 1952). Further, "when there is no showing by the employer that the employee obtained other employment, or could have done so by the exercise of diligence, the measure of damages is the contract price." 44 ALR 3d 639.

Thus petitioner was under duty to mitigate the damages caused by the improper termination of her employment. This duty means that petitioner had an obligation to seek and accept suitable employment. The Board, moreover, has the burden of showing that petitioner had income that should be deducted from her recovery and/or that she did not seek or accept suitable employment.

The facts in this matter show that petitioner did seek suitable employment during the summer and fall of 1969 for the 1969-70 academic year. The facts further reveal that petitioner completed various written applications for teaching positions in the spring of 1970 for the 1970-71 school year. These facts come by way of petitioner's affidavit as the Board's proofs. There was no showing, however, that petitioner exercised diligence or continued her duty to seek and accept suitable employment for the 1971-72 academic year. Thus for the 1971-72 academic year, petitioner sat on her hands and failed in her duty to seek and accept suitable employment and thus to mitigate the damages against the Board. I **FIND**, therefore, that the Board has carried its burden with respect to petitioner's failure to mitigate damages for the 1971-72 academic year.

Based upon the facts enunciated herein, I **CONCLUDE** that petitioner failed in her duty to mitigate damages for the 1971-72 academic year. Accordingly, the amount of $6,433 due to her for the 1971-72 academic year, from September 1971 until her reinstatement in April 1972, is hereby deducted from the restored amount of $20,733. Zielenski 1980 S.L.D. _____.

It is **ORDERED**, therefore, that the Board of Education of the Town of Guttenberg restore to petitioner an amount of $14,300 for the period petitioner was illegally discharged and during which petitioner sought suitable employment in mitigation of damages

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, FRED G. BURKE,** is empowered to make a final decision in this matter. However, if Fred G. Burke does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **FRED G. BURKE** for consideration.

30 April 1981
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

May 4, 1981
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

May 5, 1981
DATE

Ronald J. Parker/bd
OFFICE OF ADMINISTRATIVE LAW

ij

JUANITA ZIELENSKI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF GUTTENBERG, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law.

The Commissioner observes that exceptions were filed by petitioner pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Petitioner excepts to the finding by the Honorable Lillard E. Law, ALJ that her salary should be mitigated by the sum of $6,433. The Commissioner finds no merit in her pleadings. Nor can the Commissioner agree with petitioner's assertion of entitlement to interest on her final award.

The Commissioner has previously determined that there is no provision in the statutes for payment of interest, costs and legal fees. In the case of Fred Bartlett, Jr. v. Board of Education of the Township of Wall, 1971 S.L.D. 163, aff'd State Board October 6, 1971, the Commissioner said:

> "***Nothing in the cases cited by petitioner over-rides the principle enunicated by the Commissioner in Romanowski v. Jersey City Board of Education, 1966 S.L.D. 219, in which the Commissioner said at p. 221:
>
> > "'***there is no statutory authority for a board of education to pay interest as damages.
> >
> > "'It has been held that interest is payable as damages for the improper withholding of funds by a governmental agency only when provided for by statute. Brophy v. Prudential Insurance Co. of America, 271 N.Y. 644, 3 N.E. 2d 464 (Ct. App. 1936).' Consolidated

Police etc., Pension Fund Comm. v. Passaic, 23 N.J. 645, 654 (1957)
*** " (at 165)

Petitioner's request for payment for interest is therefore denied.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

Accordingly, the Board of Education of the Town of Guttenberg shall pay petitioner an amount of $14,300 forthwith.

IT IS SO DIRECTED.

COMMISSIONER OF EDUCATION

June 18, 1981

Pending State Board

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5932-80
AGENCY DKT. NO. 406-8/80A

IN THE MATTER OF:

RICHARD STOLTE,
Petitioner
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,
Respondent.

Record Closed: April 22, 1981
Received by Agency: 5/14/81

Decided: May 13, 1981
Mailed to Parties: 5/15/81

APPEARANCES:

Alan R. Freedman, Esq., for the Petitioner

John T. Barbour, Esq., for the Respondent

BEFORE **LILLARD E. LAW,** ALJ:

Petitioner Richard Stolte, a teaching staff member with a tenured status in the employ of the Willingboro Board of Education (Board), appeals from an action whereby the Board has frozen his annual salary for the 1980-81 school year at the same level it had paid him for the 1979-80 school year, subsequent to its action to remove him from an

administrative position and assign him to duties as a classroom teacher. He alleges that the Board's action constitutes a reduction in salary and, further, that it failed to provide him with a career salary adjustment for 1980-81, pursuant to the negotiated Agreement between the parties. The Board denies that petitioner's salary has been reduced, but admits that it has been frozen in the new position which, it asserts, is at or above the proper salary guide level for petitioner's present position.

The Commissioner of Education transferred the instant matter to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on December 15, 1980, at the Office of Administrative Law, Trenton, New Jersey, at which time the parties agreed that the single issue in controversy is as follows:

> May the Board, subsequent to its action to transfer petitioner from an administrative position to a classroom teaching position, freeze petitioner's salary until such time that the negotiated salary guide catches up with petitioner's placement on the teacher's salary guide?

The parties also agreed to set forth a joint Stipulation of Facts and file cross-motions for Summary Judgment. The parties submitted Memoranda of Law in support of their respective positions, and the record was closed on April 22, 1981.

STATEMENT OF FACTS

Richard A. Stolte, petitioner herein, is a tenured employee within the Board of Education of the Township of Willingboro. Petitioner, during the school years 1979-80 and 1980-81, has held the position of Physical Education Teacher, having been placed in that position by the respondent in August 1978, prior to the 1978-79 school year, resulting from a reduction in the number of junior high schools within the District. Prior to that assignment, petitioner held the position of Assistant Principal at the junior high level within the District, effective July 1, 1968.

Following this action by the Board of Education, petitioner grieved the transfer and subsequently filed a petition of appeal with the Commissioner of Education concerning the action. The issue of the legality of the transfer was subsequently decided by the State Board of Education in a decision dated July 2, 1980. That decision dismissed the petitioner's allegations concerning the legality of the transfer because of the fact

that the petition of appeal was filed outside of the time constraints prescribed for filing, established by N.J.A.C. 6:24-1.2. See, Stolte v. Bd. of Ed. of Tp. of Willingboro, March 17, 1980. The substance of that matter is not at issue herein.

Following the transfer, the petitioner's salary for the 1978-79 school year was $27,070. This is the identical salary that petitioner would have received in the position of Assistant Principal for that school year.

For the 1979-80 school year, the salary received was $27,320, which was the salary for the 1978-79 school year, plus a $250 career teaching increment which was accorded to the petitioner as a result of his position as an Administrator and in compliance with the agreement between the Administrators and the Board of Education. If the position of Assistant Principal had been maintained by the petitioner, his salary would have been $28,809.

For the school year 1980-81, the petitioner is being paid $27,320, which does not include the $250 career teaching increment. The 1980-81 salary for Administrators would be $32,335. The maximum salary provided by the Board's teachers' salary guide for 1980-81 is $19,871.

Petitioner asserts that, as shown from the Statement of Facts, petitioner's salary has effectively been frozen from the school year 1978-79. The issue, therefore, is whether or not that action is in accordance with petitioner's rights and benefits, which were acquired during the course of his employment as an Assistant Principal and, subsequent thereto, as a Physical Education Teacher. He contends that there are two sub-issues pertinent to the issue outlined above. The first relates to the petitioner's "base" salary; the second involves petitioner's salary with the inclusion of a longevity increment. As is set forth in the Facts, the petitioner has remained at a particular salary level which is consistent with the 1978-79 school year, which the petitioner argues is a reduction. In the 1979-80 school year, that base salary was consistent; moreover, a career increment in the amount of $250 was added, to which petitioner was entitled. In the 1980-81 school year, the year under consideration, that longevity increment to which petitioner claims he is entitled, was not included.

Petitioner asserts that the question becomes whether or not, by reason of the transfer, all rights, benefits and emoluments enjoyed by the petitioner, as an

Administrator, are erased. The arbitration decision and the Commissioner's decision did not deal with this point. Petitioner contends that even though he is placed in a teaching position, his status and entitlements remain those of an Administrator, and he is still protected by the Administrator's Agreement with the Board. It is submitted that the transfer, which resulted from a reduction in the number of schools and, thereby, a reduction in force, requires that the petitioner be maintained on the prior expectancy, despite his current duties. N.J.S.A. 18A:28-9, N.J.S.A. 18A:28-11 and 12.

Petitioner argues that a decision in this regard was recently promulgated by the State Board of Education in Jeannette A. Williams v. Bd. of Ed. of the City of Plainfield, Union Cty, decided January 11, 1980, by the State Board of Education, aff'd. 176 N.J. Super. 154 (App. Div. 1980). In that particular instance, a tenured High School Principal was transferred to a position of Administrative Assistant and, subsequent thereto, to the position of Elementary School Principal. Her salary was frozen at $32,560. The petitioner contended that the transfers were invalid, first because there was no recognized certificate for the title and, secondly, because it constituted a demotion to a position with a lesser salary potential. The State Board reviewed in detail the law concerning the rank or status of a tenured professional employee. In sum, the Board found that the law prevented a Board of Education from reducing compensation of an employee, except by proceedings under N.J.S.A. 18A:6-10 et seq., and further reviewed the constraints applicable to transfers set forth in N.J.S.A. 18A:28-6 (pages 5 and 6). Further, the State Board used a balancing test in determining whether a transfer is to a position of comparable rank or causes reduction in compensation within the meaning of N.J.S.A. 18A:28-5. The State Board determined that the compensation of the petitioner was not reduced in Williams because there was nothing within the statutes to authorize a reading that expectancies are to be considered in transfers of that nature. The Board reviewed the decisions of Greenway v. Camden Board of Education, 129 N.J.L. 47 (Sup. Ct. 1941); DiNunzio v. Pemberton Tp. Bd. of Ed., 1977 S.L.D. 24; and Ward v. Voorhees Tp. Bd. of Ed., decided June 11, 1979.

Petitioner submits that Williams, however, differs from the case herein. In Williams and the other cases cited therein, the transfer was to a position of what may be considered comparable rank. In Williams, the transfer was from one principalship to another; in Greenway, the transfer was from one teaching position to another; in DiNunzio, the transfer was from one principalship to another; in Stolte, herein, the transfer is from a principalship to a teaching position. In each of the prior instances, the

individuals remained under the same collective bargaining agreement. In this instance, the salary expectations are important because we are not concerned with a transfer from one position to another of comparable rank, but, rather, to a position on a lower salary level. To treat it otherwise would result in a violation of the tenure rights of the employee. Admittedly, the issue of the transfer has been decided. However, it is important to consider that transfer in light of the salary now being paid to the petitioner.

Petitioner observes that in the case of Williams and the cases cited therein, there was no problem with respect to different salary guides or different longevity increments which impact on the salary expectation of the individuals transferred, since they were all covered by the same negotiated agreement. That is not the case herein. As set forth above, there are two aspects to the ultimate decision. One is the expectancy of continued placement on the Administrators' Salary Guide, the other is the continued expectancy of a longevity increment, which directly impacts on that salary level.

Petitioner argues that the protection afforded by his tenure status must be considered in light of both the salary and longevity expectancies. This is not a transfer to a comparably ranked position with a "lesser salary" expectancy. This is, rather, a transfer by way of reduction in force, which reduced petitioner's position within the system, contrary to his tenure entitlement and the entitlements guaranteed by his contract. To not pay, in accordance with the Administrator's Agreement, either as to salary or longevity, does not comply with the Williams decision, since to do so contravenes tenure rights. As such, the Board cannot withhold salary and incremental expectancies until the teacher's guide catches up with petitioner's position.

The Board objects and contends that despite the fact that the issue of the legality of petitioner's transfer was not made an issue in the prehearing order and despite the resolution of that issue in the prior proceeding, entitled Stolte v. Board of Education of the Township of Willingboro, decided by the Commissioner of Education, March 17, 1980, aff'd State Board of Education July 2, 1980, the petitioner continually infers that such transfer was improper. Petitioner sums up his position in the last paragraph of his brief in the instant case as follows:

> This rather, is a transfer by way of reduction in force, which reduces petitioner's position within the system, contrary to his tenure entitlement and the entitlements guaranteed by his contract.

The issue agreed to at the prehearing conference and set forth in the prehearing order is:

> May the Board, subsequent to its action to transfer petitioner from an administrative position to a classroom teaching position, freeze petitioner's salary until such time that the negotiated salary guide catches up with petitioner's placement on the teacher's salary guide?

The attorneys for the parties at that time clearly understood that the legality or propriety of the actual transfer were not at issue in the instant proceeding. The prior proceeding was res adjucata thereon. The petitioner, therefore, should not be permitted to confuse the issue in the instant case by arguments directed at the transfer per se.

The Board cites the statute N.J.S.A. 18A:28-5, which prohibits the reduction in salary of tenured teaching staff members. The Board observes that in Williams, it has been held by the State Board of Education, and affirmed by the Appellate Division of Superior Court, "that the prohibition against reduction in salary found in N.J.S.A. 18A:28-5 for tenured employees did not contemplate salary expectancy but rather referred only to the amount of compensation paid the tenured employee at the time of the transfer" (176 N.J. Super. 154, 156). To the same point, see: George Morell v. Bd of Ed of the Tp of Parsippany-Troy Hills, Morris Cty, Commissioner of Education decision, dated June 5, 1980, OAL DKT. NO. EDU 406279; and, Frank Stranzi v. Bd. of Ed. of the City of Paterson, Passaic Cty, Commissioner of Education decision, April 11, 1980, OAL DKT. NO. EDU 3928-79.

At no place in petitioner's brief or petition of appeal does petitioner claim that his actual salary for 1980-81 was reduced in amount from that which he received in the 1979-80 or any prior school year. The reason for this is that in the instant matter, during the 1980-81 school year complained of, the petitioner will receive $27,320. This is equal to or the highest salary which petitioner ever received while in the employ of the Willingboro Board of Education. Petitioner at no time received a higher salary in an administrative position. Petitioner's objection is based solely and exclusively upon the fact that his salary expectation as a physical education teacher is less than his salary expectation as an administrator. This issue has been previously passed upon - salary

expectancy is not involved in the protection afforded by N.J.S.A. 18A:28-5. Williams v. Plainfield, supra. George Morell, supra., and Frank Stranzi, supra.

The Board argues that since it has not reduced petitioner's compensation as alleged, the instant petition of appeal must be dismissed.

The Board observes that petitioner admits that, "As is shown from the Statement of Facts, petitioner's salary has effectively been frozen from the school year 1978-79." The instant petition of appeal was dated August 12, 1980, after the conclusion of the subsequent school years.

N.J.A.C. 6:24-1.2 provides in pertinent part:

> To initiate a proceeding before the Commissioner to determine a controversy or dispute arising under the school laws, a petitioner shall file with the Commissioner the original copy of the petitioner, together with proof of service of a copy thereof on the respondent or respondents. Such petition must be filed within 90 days after receipt of the notice by the petitioner of the order, ruling or other action concerning which the hearing is requested. (emphasis added)

Both the Commissioner of Education and the Courts have been taking a firm position in regard to compliance with N.J.A.C. 6:4-1.2. This provision has specifically been found applicable to issues involving salary increments. Bd. of Ed. Bernards Tp. v. Bernards Township Education Assn, 79 N.J. 311 (1979), at 326-327, footnote 4. See also, Riely v. Hunterdon Central High School Bd. of Ed., 173 N.J. Super. 109 (App. Div. 1980); Miller v. Morris School District, 1980 S.L.D. (decided February 25, 1980); Bergenfield Ed. Assn. v. Bd. of Ed. of the Borough of Bergenfield, 1980 S.L.D. (decided December 15, 1980); Brooklawn Education Assoc. v. Bd. of Ed. of the Borough of Brooklawn, 1974 S.L.D. 617; Kallimanis v. Bd. of Ed. of Carlstadt-East Rutherford Reg. High School Dist., 1980 S.L.D. (decided September 26, 1980); and, Stolte v. Bd. of Ed. of the Tp of Willingboro, 1980 S.L.D. (decided March 17, 1980, aff'd State Board of Education, July 2, 1980).

The Board argues that since petitioner admits that the freezing of his salary effectively occurred in the 1978-79 school year, the petitioner should not be permitted to wait until August 1980 to file a petition of appeal objecting thereto.

The Board finally argues that superior appellate tribunals have previously passed both upon the distinction between a "reduction in salary" and a "change in salary expectancy" and upon the timeliness issue. All precedent holds that the instant petition of appeal should be dismissed. The decisions of superior appellate tribunals are the law of the case and are binding on trial level tribunals. See State v. Wein, 162 N.J. Super 159 (App. Div. 1978); State v. Smith, 169 N.J. Super. 98 (App. Div. 1979); Lowenstein v. Newark Bd. of Ed. 35 N.J. 94, 116-117 (1961); and In re Plainfield-Union Water Co., 14 N.J. 296, 302-303 (1954).

Therefore, the Board argues, the instant petition of appeal should be dismissed.

Having carefully reviewed and considered the entire record in the instant matter, I **FIND** that the Statement of Facts as set forth hereinbefore are hereby adopted by reference as **FINDINGS OF FACT.**

The arguments of the parties also having been carefully considered, this tribunal will consider the merits of the matter in light of the relevant statutes and case law.

Although not in dispute in this matter, the statutes grant boards of education the authority to effect a reduction of force upon persons under tenure, pursuant to N.J.S.A. 18A:28-9, 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 position, 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.

N.J.S.A. 18A:11-1 vests in local boards of education broad powers to:

> . . .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. . . .

Similarly, the Tenure Employees Hearing Law (N.J.S.A. 18A:6-10 et seq.) states that: "Nothing in this section shall prevent the reduction of the number of any such persons holding such offices, positions or employments under the conditions and with the effect provided by law."

The broad powers of the local boards have consistently been recognized by the Commissioner, as in William A. Wassner et al., v. Bd. of Ed. of the Borough of Wharton, 1967 S.L.D. 125, wherein it was stated:

> . . . Local boards of education are vested with broad powers in the making of decisions affecting the day-to-day operation of the schools under their jurisdiction. They have the authority to adopt rules and policies for the government and management of the schools, provided such regulations are not inconsistent with the school laws or rules of the State Board. R.S. 18:7-56. In the exercise of this authority boards of education are constrained to act reasonably and in ways which are not arbitrary or capricious. Angell et al. v. Board of Education of Newark, 1959-60 S.L.D. 141, 143, dismissed by State Board of Education, October 17, 1964. . . . (at 126-127)

The authority of boards to determine staff assignment was further recognized in Leroy Lynch et al. v. Bd. of Ed. of the Essex County Vocational School District, 1974 S.L.D. 1308, aff'd State Board of Education 1975 S.L.D. 1098, as follows:

> . . . 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)* * * (1974 S.L.D. at 1315) [original form retained]

Thus, with good cause shown, the Board reduced the number of positions of Assistance Principal and petitioner herein was transferred to his last tenured position as a Physical Education Teacher within the school district. Absent a showing of bad faith or statutory violation, the Board's exercise of its statutory discretionary authority to order the staffing of its schools is entitled to a presumption of correctness. Schinck v. Bd. of Ed. of Westwood Consolidated School Dist., 60 N.J. Super. 448, 476 (App. Div. 1960).

The petitioner's contention that his transfer from an administrative position to a teaching position entitles him to be paid on the former adopted salary guide, rather than on the latter, is without merit. The facts in this matter clearly show that petitioner was and is compensated at the administrative salary of $27,320 per year while performing the duties of a classroom teacher. The maximum salary a classroom teacher may earn, under petitioner's circumstances, is an amount of $19,871 for the 1980-81 school year. Petitioner has failed to show that the Board has, in any fashion, reduced his salary from the time of his transfer.

Petitioner's assertion that his salary would have been $32,335 for the 1980-81 school year, had he been retained as an Assistant Principal, similarly is without merit. The Court in Williams said:

> While all of the cases just cited [omitted] ... support the position that future increase in salary, or salary expectation, is not an appropriate factor to be considered when determining the validity of a transfer since tenured employees have no vested right in any future increases in salary.
>
> Turning to the applicable statutes, there is no suggestion, much less an express statement, that future salary increases or adjustments are to be considered in determining the validity of a transfer which is otherwise proper. N.J.S.A. 18A:28-5 merely prohibits "reduction in compensation" except for the reasons stated and in the manner prescribed therein. (Slip op. at 11)

Based upon the foregoing, I **CONCLUDE** that the Board's action to maintain petitioner's present salary level is consistent with statutory and case law and is thereby **AFFIRMED.** Petitioner, by virtue of his present position as a classroom teacher, has no claim to be placed upon the Board's administrative salary guide. Nor does petitioner have a claim for the Board's $250 career teaching increment during the period in which his salary as a classroom teacher exceeds the maximaum on the salary guide for teachers similarly situated.

Having thus reached this conclusion, this tribunal will not address the Board's arguments with regard to petitioner's timeleness in initiating the herein proceeding.

I **CONCLUDE** and **DETERMINE,** therefore, that petitioner's claim is without merit and the herein Petition of Appeal is hereby **DISMISSED.**

Accordingly, Summary Judgment is hereby entered for the Board of Education of the Township of Willingboro.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, FRED G. BURKE,** who by law is empowered to make a final decision in this matter. However, if Fred G. Burke does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

OAL DKT. NO. EDU 5932-80

I hereby **FILE** my Initial Decision with **FRED G. BURKE** for consideration.

5-13-81
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

May 14, 1981
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

May 15, 1981
DATE

OFFICE OF ADMINISTRATIVE LAW

sub

RICHARD STOLTE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by the Office of Administrative Law.

The Commissioner observes that no exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

Accordingly, the Petition of Appeal is hereby dismissed. Summary Judgment is accorded the Board of Education of the Township of Willingboro.

COMMISSIONER OF EDUCATION

June 29, 1981

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