NEW JERSEY SCHOOL LAW DECISIONS

Indexed

January 1, 1981 to December 31, 1981

vol. 2

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3061-80
AGENCY DKT. NO. 194-4/80A

IN THE MATTER OF:

SHIRLEY WYATT,
Petitioner
v.
BOARD OF EDUCATION OF
THE TOWNSHIP OF MANSFIELD,
WARREN COUNTY,
Respondent.

Record Closed: April 2, 1981 Decided: May 15, 1981
Received by Agency: 5/15/81 Mailed to Parties: 5/20/81

APPEARANCES:

For Petitioner: Stephen E. Klausner, Esq. (Klausner & Hunter)
For Respondent: David A. Wallace, Esq. (Aron, Till & Salsburg)

BEFORE ERIC G. ERRICKSON, ALJ:

Petitioner Wyatt, a tenured teaching staff member employed by the Mansfield Township Board of Education (Board), appeals from a February 1980 determination of the Board denying her request to return, on March 1, 1980, from an extended leave. She alleges that the Board's action was arbitrary, capricious, taken in bad faith and in violation of her tenure and seniority rights.

The Board, conversely, contends that its refusal to allow petitioner to return to active teaching duties, prior to the end of her extended leave, was a proper exercise of its discretionary authority conferred by statute.

PROCEDURAL RECITATION:

This matter was transferred, as a contested case, by the Commissioner of Education to the Office of Administrative Law on May 20, 1980, pursuant to the provisions of N.J.S.A. 52:14F-1 et seq. The parties gave notice of cross-motions for summary decision at a prehearing conference conducted on July 24, 1980. In compliance with an agreement reached at the prehearing conference, a complete Stipulation of Facts was submitted on February 18, 1981. The matter is now ripe for determination in the form of Exhibits, the Stipulation of Facts, and Memoranda of Law.

STIPULATED FACTS:

Petitioner was a tenured teacher when, on September 10, 1979, she became too medically ill to work and began using her accumulated sick leave. Thereafter, in a letter dated November 12, 1979, petitioner, noting that her accumulated sick days were nearly exhausted, made the following request.

> . . . While my condition has improved, I have determined after lengthy consideration that I must request a medical leave of absence for a period not to exceed 135 working (school) days.
>
> The alternative appears to be to risk my health and to risk interrupting the continuity of my students' academic program. The choice, either way, is not a happy one. It is necessary . . . .

(J-2)

Petitioner's physician provided written opinion that her leave was medically necessary. (J-1, 3)

The Board, on November 15, 1979, passed a motion to approve petitioner's request for a medical leave of absence for 134½ working days, without remuneration. (J-4) The Board's Administrative Principal notified petitioner the next day of the Board's action. Although the exact words he used to notify her, clearly, are not agreed upon, they are not, in any event, crucial to a determination.

By resolution, the Board, on December 6, 1979, entered into a contract with another teacher to replace petitioner until June 30, 1980. That contract contained a thirty-day termination clause.

On or about January 15, 1980, petitioner requested that she be reinstated to active duty on March 1, 1980. In a letter of the same date, her doctor notified the Board, as follows:

> This is to inform you that Mrs. Wyatt is showing steady improvement with treatment of her depression. I anticipate that this improvement will continue, and that she should be able to return to her usual teaching position and responsibilities on or around March 1, 1980. . . .

(J-5)

The Board, on January 17, 1980, referred that letter to its personnel committee for study. (J-6) Thereafter, on February 25, 1980, the Board denied her request for reinstatement, asserting that there was need for continuity of instruction. The third of the Board's four marking periods ended on March 21, 1980. Thereupon, petitioner, in timely fashion, filed her Petition of Appeal before the Commissioner.

DISCUSSION AND CONCLUSIONS:

It is undisputed that the petitioner had greater seniority than the teacher hired by the Board to replace her. She contends that the Board erred in refusing to reinstate her while retaining in its employ a teacher who was not tenured and, thus, had no seniority whatsoever. Petitioner argues further that the Board's refusal to reinstate her on March 1, 1980 was not justified by its stated reason of providing continuity of instruction. She contends that the end of the marking period, on March 21, 1980, provided a logical time when she should have been allowed to resume her duties and cites, inter alia, in this regard, Cathy Dyson v. Montvale Board of Education, 1980 S.L.D. _____ (decided July 21, 1980) wherein it was stated by the Administrative Law Judge that:

> . . . Whenever possible changes in teaching personnel should be made at the semester break or other logical dividing point. . . .

Petitioner argues further that reason would dictate that the Board should have opted to reinstate its tenured and experienced teacher to replace her nontenured and less experienced replacement.

Respondent argues, conversely, that its decision not to return her to active duty was motivated solely by its good faith desire not to break the continuity of pupil's instruction for the remainder of the 1979-80 academic year. In this regard, the Board cites Dyson, supra; Gilchrist v. Board of Education of Haddonfield, 155 N.J. Super. 358 (App. Div. 1978); Catherine Reilly, School District of the City of Jersey City, 1977 S.L.D. 403.

After careful examination of the factual context of this dispute, and consideration of relevant case law, I CONCLUDE that the Board and petitioner, during November 1980, as freely consenting parties, entered into an agreement that she was authorized an extended leave of 134½ days duration. The

considerations were that petitioner could not be compelled to return to her duties during that entire period and that the Board could not be compelled to allow her to return during the 134½ day period. The Board, acting in reliance on that action, committed itself by entering into a contract with another teacher to complete the academic year.

Petitioner is without power, having entered into the agreement with the Board to unilaterally break the terms of the agreement. She had every right to request that the Board reconsider allowing her to return. The Board did so in appropriate and timely fashion and exercised its discretionary authority by declining to do so.

That an agreement exists when an extended leave is granted by a board of education, was recently affirmed by the Commissioner in Carol Oxford v. Pohatcong Board of Education, 1980 S.L.D. _____ (decided January 16, 1981) Therein, when a Board had unilaterally altered an extended leave, the Administrative Law Judge held that:

> . . . 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. . . .

Addressing the Pohatcong Board's exceptions to the conclusion that it had entered into an agreement which it could not unilaterally alter, the Commissioner stated that there was no merit in such argument, and affirmed the holding that the Board was bound by that agreement.

There remains the argument of petitioner that the Board's denial of her request to return was arbitrary, capricious, and taken in bad faith. The Board's stated reason for the denial

was that it wished to provide continuity of instruction. Such reasoning has frequently been upheld as valid. In Gilchrist, supra, the Appellate Court, when addressing a similar contention, stated:

> . . . 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, laminectomy, orchiectomy, prostatectomy or any non-medical reason. Such a policy must be considered evenhanded, and obviously it is not subject to the claim of disparate treatment. . . .
>
> (at p. 368)

In the instant matter, the Board had already been compelled by petitioner's unfortunate illness to assign an alternate teacher to her class after the beginning of the school year. I CONCLUDE that its decision not to do so a second time, on March 1, 1980, in the midst of the third marking period, or at any other time, was a valid exercise of its discretionary authority. Gilchrist, supra. Absent proof that petitioner's replacement was ineffectual, the Board's decision, taken in timely fashion, must be considered to be reasonable and taken in good faith.

The Board's managerial authority requires that it properly staff its classrooms. Absent proof that the Board's action was in any way improper, it must be accorded a presumption of correctness. Schinck v. Board of Education of Westwood Consol. School Dist., 60 N.J. Super. 448, (App. Div. 1960)

DETERMINATION:

In consideration of the conclusions as set forth above, it is DETERMINED that petitioner is not entitled to the relief she seeks. Accordingly, it is ORDERED that respondent's Motion that the Petition of Appeal be dismissed is GRANTED.

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.

May 15, 1981
DATE

Eric G. Errickson
ERIC G. ERRICKSON, ALJ

Receipt Acknowledged:

May 15, 1981
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed to Parties:

May 20, 1981
DATE

Ronald L. Packer
OFFICE OF ADMINISTRATIVE LAW

lt

EXHIBITS IN EVIDENCE:

J-1	Lesse to Whom It May Concern, September 13, 1979
J-2	Wyatt to Board of Education, November 12, 1979
J-3	Lesse to Whom It May Concern, November 15, 1979
J-4	Board Minutes, November 15, 1979
J-5	Lesse to Board of Education, January 15, 1980
J-6	Board Minutes, January 17, 1980
J-7	Corbin to Staff Members, February 25, 1980
R-1	Corbin to Wyatt, November 24, 1979

SHIRLEY WYATT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MANSFIELD, 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.

Petitioner excepts to the determination by the Honorable Eric G. Errickson, ALJ that the Board properly exercised its discretionary authority in declining to reinstate petitioner to her position prior to the completion of a medical leave of absence previously accorded her. The Board's reply exceptions deny those of petitioner and affirm the initial decision herein. The Commissioner views with favor the exceptions filed by the Board. An examination of the record discloses that petitioner asked for and received a medical leave of absence of 134½ days. The Board, in good faith, hired an alternate teacher to perform petitioner's duties. The Board's stated reason for not returning petitioner to her position at her convenience before the completion of her leave of absence was to provide continuity of instruction. The Commissioner finds nothing arbitrary or capricious in such action and finds it to be a proper exercise of its managerial prerogative.

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 29, 1981

G.W., A minor by his guardian ad litem, G.E.,	:	
PETITIONER,	:	
V.		COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF EAST WINDSOR REGIONAL SCHOOL DISTRICT, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

For the Petitioner, Turp, Coates, Essl and Driggers (Henry G.P. Coates, Esq., of Counsel)

For the Respondent, Katz, Bitterman & Dougherty (Michael L. Bitterman, Esq., of Counsel)

Petitioner, G.E., alleges that G.W., a fifteen year-old pupil at Hightstown High School prior to expulsion for possession of marijuana on school property, was wrongfully expelled by the East Windsor Regional Board of Education (Board) contrary to the weight of evidence adduced at the hearing held by the Board and in violation of G.W.'s right to due process.

Petitioner prays that the Commissioner order the Board to reverse its expulsion decision, immediately reinstate G.W. with full academic, social and athletic privileges, provide him with any instruction necessary to enable him to catch up with his class and expunge the controverted matter from his permanent record.

The Board denies that its action in expelling G.W. was in any way illegal or improper. The Board maintains that it accorded G.W. every right of due process including proper notification of a hearing, as well as full hearing itself. This matter is now before the Commissioner on the pleadings, exhibits, Briefs and a Motion to Dismiss the instant matter advanced by the Board.

In addition to the Briefs filed by the parties in support of their respective positions, the Commissioner permitted further oral argument by counsel with respect to the Board's Motion.

The Commissioner has reviewed the evidence presented in the case including the tapes of the disciplinary hearing held by the Board on March 29, 1977, the testimony adduced at the hearing held in the office of the Assistant Commissioner in charge of

Controversies and Disputes on May 23, 1979 and the Briefs of counsel. He finds that the remaining issues at this time are whether or not the passage of time and the changed circumstances render the matter moot and whether G.W.'s personal record in the Board's schools should be expunged of any reference to the incident and actions pertaining thereto.

The Commissioner finds the relevant facts in the case to be these:

1. G.W. was suspended from Hightstown High School for five days in September 1976 for possession and use of marijuana on school property.

2. G.W. was suspended for another five days in January-February 1977 after being apprehended by police for allegedly smoking a marijuana cigarette in the school's parking lot.

3. On February 4, 1977 after a meeting in the high school principal's office, G.W. was placed on homebound instruction while awaiting a decision by the Board as to whether he should be expelled from school.

4. On March 29, 1977 a hearing was held by a subcommittee of the Board which recommended that G.W. be expelled under N.J.S.A. 18A:37-2 for

> ***
> "c. Conduct of such character as to constitute a continuing danger to the physical well-being of other pupils***."

5. On April 4, 1977 the Board ordered G.W. expelled but offered him admission to the Evening School and the opportunity to apply for readmission to the regular high school for the 1977-78 school year.

6. In August 1977 G.W. enrolled in Notre Dame High School, Trenton.

The Commissioner notes that the Board, at the time of oral argument on May 23, 1979, argued that the Petition of Appeal be dismissed as moot. (Tr. 4, 7) It is the Board's contention that since G.W. did not accept an offer to apply for readmission to Hightstown High School in August 1977 and for many months thereafter, he indeed waived his right to return. (Tr. 7)

Assuming arguendo that time and changed circumstances do make the controverted matter moot, the Commissioner finds no merit in the Board's argument that, by not responding to its offer, G.W. waived his right to any reconsideration or termination of his expulsion. The New Jersey Constitution (Art. VIII, Sec. 4) affords all persons between the ages of five and 18

the opportunity of a free public school education. Such opportunity is not unbridled. Pupils enrolled in public schools are subject to the rules established for the operation of the school and are subject to the authority of those officials over them. N.J.S.A. 18A:37-1 Pupils who do not obey such rules or who comport themselves in a manner which disrupts the tranquility of the school setting are subject to punishment by way of suspension or expulsion from continued school attendance. N.J.S.A. 18A:37-2; T.K. v. Board of Education of the City of Millville et al., decided March 7, 1980

However, the Commissioner knows of no law, rule, regulation, or court decision that categorizes the act of not applying for enrollment or reenrollment in a public school as an irrevocable waiver. Again assuming arguendo that the Board had a right to suspend or expel in the instant case, it cannot under the N.J. Constitution hold that failure to apply for reinstatement cancelled G.W.'s right or opportunity to reconsider his decision at a later date. Therefore, the Commissioner determines that the instant case may not be dismissed on the ground of mootness since the Board failed to provide a valid reason for such action.

The Commissioner will now review the record of this matter as it pertains to G.W.'s contention that the Board's action expelling him was arbitrary, capricious, and unlawful. G.W. avers that the Board acted contrary to the weight of the evidence adduced at the hearing and likewise failed to follow the precise conditions of N.J.S.A. 18A:37-5 which states:

> "No suspension of a pupil by ***a principal shall be continued longer than the second regular meeting of the board of education of the district after such suspension unless the same is continued by action of the board***." (Emphasis added.)

There is no evidence in the record that the Board, on or before March 14, 1977, did indeed take action to continue G.W.'s suspension. The Board was cognizant, however, of the matter for it scheduled a hearing "***to determine whether [G.W.] will be expelled from Hightstown High School*** on Tuesday, March 29, 1977 at 8:00 p.m.*** at which time the complaint against [G.W.] will be heard by the East Windsor Regional School District Board of Education.***" (Superintendent's Letter of March 15, 1977, at p. 2)

The Commissioner finds the Board's action technically deficient in regard to N.J.S.A. 18A:37-5. The Board should have formally determined whether or not G.W.'s suspension was to continue. However, such action is determined not to be fatally defective to the instant proceedings. The Commissioner so holds.

In the Commissioner's judgment the actions of the Board in the way it conducted the expulsion hearing and the manner in which it arrived at its conclusion on April 4, 1977 are open to question. Initially, the Commissioner observes that the hearing of March 29, 1977 was held by a sub-committee of the Board of which three were Board members and two were not. Before the sub-committee reported to the Board on April 4, 1977, tape recordings (C-1, C-2) of the hearing were made available to those Board members not present at the hearing. There is no firm evidence that the Board members not present at the hearing availed themselves of the opportunity to listen to the tapes.

Secondly, the Board failed to follow the unanimous recommendation of its Child Study Team that G.W. be allowed to return to Hightstown High School and gave no reason or rationale for ignoring the advice and judgment of the experts it employs. Certainly, the Board bears the ultimate responsibility for decision-making. W.G. v. Board of Education of the Township of Ocean, 1974 S.L.D. 780 Boards are expected to seek and act upon competent advice or give adequate reasons for not doing so. In John Scher v. Board of Education of the Borough of West Orange, 1968 S.L.D. 92 the Commissioner said:

> "***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.*** The board's decision should be grounded***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***. The recommendations of such experts are an essential ingredient in any determination which has as significant and far-reaching effects on the welfare of a pupil as expulsion from school.***" (Emphasis added.) (at pp. 96-97)

The Commissioner does not condone drug abuse by school pupils and will support a local board of education which exercises its discretion in imposing what it regards as a necessary deterrent to illegal acts by pupils in school or on school property. W.G., supra However, the Commissioner holds that, in enforcing drug abuse regulations, a local board of education must acknowledge the rights of due process guaranteed to pupils of any age by the Constitutions of the United States and the State of New Jersey. A board has the discretion to reject a child study team report but by doing so it should provide defendant's reason(s) for such action.

Finally, the Commissioner questions whether or not the Board herein actually expelled G.W. or merely suspended him for

the remainder of the school year. The motion made, seconded and passed on April 4, 1977 did indeed state that the Board was expelling petitioner. (Board's Brief, at p. 2) But the resolution added two codicils: that G.W. be given an opportunity to enroll in the Evening School and that he be permitted to reapply for admission for the 1977-78 school year.

A local board of education under N.J.S.A. 18A:37-5 has three options for action after a pupil suspension has been turned over to it: to reinstate, to continue the suspension, or to expel. Expulsion, by definition, is a final act which cannot be overturned save by formal reconsideration of the board of education, the Commissioner or a court of proper jurisdiction. If the board's decision to expel is not final and absolute, the action amounts to long-term suspension. A local board cannot delegate to its employees its authority to expel pupils nor can it divest itself of the control of readmission of expelled pupils as was done in the instant case. (Board's Brief, at pp. 2-3) The Commissioner concludes from the record that the Board failed to fully comply with the law in regard to the manner in which it eventually expelled petitioner.

Moreover, the Commissioner finds and determines herein that the Board's action constituted a long-term suspension of G.W. and may not be viewed as his permanent expulsion from Hightstown High School.

Accordingly, the Commissioner directs that the Board amend its minutes of April 4, 1977 by changing the reference to G.W.'s disciplinary action from expulsion to suspension. He further directs that any permanent pupil records now on file be expunged of any notation of his disciplinary problems, and that a copy of any records being kept in perpetuity comply with the law and copies thereof be provided G.W. (or his guardian). See In Matter of G., 1965 S.L.D. 146, 151; N.J.A.C. 6:3-2.1 et seq.

With exception of the relief to be accorded herein as directed by the Commissioner, the instant Petition is hereby dismissed.

COMMISSIONER OF EDUCATION

June 30, 1981

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 0140-81
AGENCY DKT. NO. 277-6/80A

IN THE MATTER OF:

PARSIPPANY-TROY HILLS
EDUCATION ASSOCIATION,
Petitioner
v.
BOARD OF EDUCATION OF THE
TOWNSHIP OF PARSIPPANY-TROY HILLS,
MORRIS COUNTY,
Respondent.

Record Closed: May 4, 1981
Received by Agency: May 21, 1981

Decided: May 19, 1981
Mailed to Parties: May 22, 1981

APPEARANCES:

Cassel R. Ruhlman, Jr., Esq., for Petitioner
(Ruhlman and Butrym, attorneys)
Myles C. Morrison, III, Esq., for Respondent
(Dillon, Bitar & Luther, attorneys)

BEFORE **WARD R. YOUNG,** ALJ:

Petitioner alleges the Board acted improperly in bifurcating its driver education program by deleting behind-the-wheel instruction from its regular daily program and offering it to pupils in the adult program for a fee.

The matter was transmitted to the Office of Administrative Law on June 13, 1980 as a contested case pursuant to N.J.S.A 52:14F-1 et seq., and docketed as EDU 3750-80.

The parties agreed to submit the matter for summary decision and an Initial Decision was forwarded to the Commissioner on November 7, 1980. The Commissioner on December 29, 1980, remanded the matter for additional findings of fact. The parties again agreed to submit the matter for summary decision and filed jointly executed stipulations of fact and an amendment.

The record was closed upon the receipt of petitioner's rebuttal memorandum on May 4, 1981.

The issues to be addressed by agreement of the parties are as follows:

1. Does the Board's failure to provide behind-the-wheel instruction in driver education in the regular school curriculum constitute a denial of a thorough and efficient education?

2. Is the driver education program an integral part of the Board's curriculum?

3. May the Board's driver education program be bifurcated, with behind-the-wheel training offered in the evening adult school, for which pupils are assessed a fee?

The facts stipulated by the parties are as follows:

1. Driver education, including both classroom and behind-the-wheel instruction, was previously taught in respondent's schools as a part of its regular school program and was available to all of its students of appropriate age without charge.

2. For at least the last eight years, the only driver education offered by the Board as a part of its adopted curriculum has consisted of the classroom instruction outlined in Attachment "A." This instruction constitutes the course of study in health for the sophomores in the district. Health is a segment of the district's course of study in physical education. Students do not receive separate grades in health; rather, health grades constitute a part of the student's grade in physical education. A student can fail the health component of physical education and still receive a passing grade in physical education. Behind-the-wheel instruction is not offered by the Board as part of its curriculum. However, behind-the-wheel instruction, taught by teachers certified by the New Jersey State Board of Examiners is offered to students of the district in the afternoon after regular school hours and on Saturdays under the auspices of the Evening Adult School. In addition, the E.Z. Method Driving School offers behind-the-wheel training as part of the Evening Adult Program which is open to all persons including students who are unable to attend the afternoon and Saturday sessions. The same fee is charged for afternoon, Saturday and evening sessions. The "Course of Studies" guides for health and physical education, which are the instruments adopted by the Board in establishing the curriculum for the district, make no mention of any behind-the-wheel instruction.

3. As discussed above, the driver education offered by the Board as part of its curriculum consists solely of classroom instruction. That instruction is a part of the course of study in health, which, in turn, is a part of the course of study in physical education. Because credit in physical education is given and because such credit is required for graduation, classroom instruction driver education is a part of a course of study which does receive credit. However, a student may fail driver education and still receive credit for physical education towards graduation. No credit is given for students who elect to enroll in the behind-the-wheel training offered through the Evening Adult School.

4. To the extent that the sophomore year course of study in health consists of classroom instruction in driver education, and to the extent that health constitutes a part of the physical education program, a student's participation in the driver education program is a part of his or her record. No record is kept of whether or not a student elects to take behind-the-wheel training through the Evening Adult School; such participation is not recorded in the pupil's permanent high school record.

5. Satisfactory completion of the classroom instruction in driver education is not a prerequisite to a pupil taking behind-the-wheel instruction through the Evening Adult Program; in fact, there is no way that program would know if the student had even taken classroom instruction.

6. Pupils who attend high school in the district during their sophomore year take the classroom instruction in driver education offered as the course of study in health. No student is required to take behind-the-wheel training from anyone.

7. The Board makes no provision for students who are unable to pay the fee established for the behind-the-wheel instruction. If a student elects to take the course, he or she is responsible for the fee.

Attachment "A," a part of the stipulated facts, consists of a course of studies for physical education and a separate course of studies for health. The former is incorporated herein by reference. The more relevant course of studies for health is reproduced:

HEALTH EDUCATION PROCEDURES

I. Each student leaves physical education for a period of five weeks for instruction in health. The health unit thus comprises one-half of a marking period.

II. The health education grade is combined with the physical education grade. Therefore, a student need not pass health in order to pass physical education for the year.

III. The health education teacher shall change schedules with each of the physical education teachers taking their classes into the health room for the specified time.

IV. The areas of instruction for each of the grade levels are as follows:

Freshmen	-	Venereal Disease Education
		Drug Education
		Cancer and Heart Disease
Sophomores	-	Safe Driving
Juniors	-	Consumer Health
		Human Sexuality (Part I)
Seniors	-	Human Sexuality (Part II)
		Death Education

SOPHOMORE HEALTH GENERAL OBJECTIVE

1. The student has an understanding of the automobile and how it works.

2. The student is aware of the importance of automobile maintenance.

3. The student has an understanding of the various operational and control switches and devices of the auto.

4. The student has an understanding of the rules of the road as stipulated in the New Jersey State Driver Manual.

5. The student is aware of the problem of drinking and driving.

6. The student is aware of the different types of automobile insurance.

SOPHOMORE HEALTH

SAFE DRIVING

I. How the auto works
   - A. Parts of the engine
   - B. Parts of the chassis
   - C. Systems of the auto

II. Automobile Maintenance
   - A. Maintenance tips for each system of the auto
   - B. Tire care
   - C. Economy measures
     1. Tips for good mileage
     2. Avoiding wasteful practices

III. Instruments, Devices and Controls
   - A. Instrument panel
   - B. Automobile control devices and switches
   - C. Other operational devices and switches

IV. Rules of the Road (N.J. State Driver Manual)
   - A. Driver licenses
   - B. Motor vehicle registration
   - C. Your driving privilege
   - D. Traffic control devices
   - E. Basic driving and safety
   - F. Driving rules and regulations
   - G. Defensive driving
   - H. Driver problems
   - I. Driving emergencies

V. Automobile insurance
   A. Liability insurance
      1. Required limits
   B. Comprehensive insurance
   C. How to keep insurance premiums low

DOES THE BOARD'S FAILURE TO PROVIDE BEHIND-THE-WHEEL INSTRUCTION IN DRIVER EDUCATION IN THE REGULAR SCHOOL CURRICULUM CONSTITUTE A DENIAL OF A THOROUGH AND EFFICIENT EDUCATION

The petitioner cites N.J.S.A. 18A:7A-1 et seq., N.J.A.C. 6:8-2.1, N.J.A.C. 6:27-6.1 and N.J.A.C. 6:11-7.18 in support of its contention that determination of this issue must be an affirmation, and quotes N.J.S.A. 18A:7A-2a(3):

> Because the sufficiency of education is a growing and evolving concept, the definition of a thorough and efficient system of education and the delineation of all the factors necessary to be included therein, depend upon the economic, historical, social and cultural context in which that education is delivered . . . . (at Pb 3).

Petitioner also cites sections of "State Educational Goals" incorporated in N.J.A.C. 6:8-2.1 as follows:

> (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.
>
> (b) The public schools in New Jersey shall help every pupil in the State:
>
> 4. To acquire the knowledge, skills and understanding that permit him or her to play a satisfying and responsible role as both producer and consumer;
>
> 5. To acquire job entry level skills and, also to acquire knowledge necessary for further education;
>
> 6. To acquire the understanding of and the ability to form responsible relations with a wide range of other people, including but not limited to those with social and cultural characteristics different from his or her own; . .

Petitioner cites N.J.A.C. 6:27-6.1 and N.J.A.C. 6:11-7.18 as additional support for his contention and urges these regulations must be construed in pari materia with the previously cited statute and regulation. They refer to approval of a course in driver education during the summer months and standards pertaining to college programs preparing driver education teachers, respectively. Failing to find relevance in these regulations to the issue before me, I do not reproduce them.

Petitioner also argues that "where the classroom portion of Driver Education is presented it defies common sense to hold that behind-the-wheel training is not an essential part of a thorough and efficient education in the field of driver education." (See exceptions to Initial Decision, p. 3).

Petitioner's final argument is that "what this Board is saying is that any course of study that is not mandated by law can be offered to its students, at least partially, outside the regular school program on a tuition basis. Such a position, if allowed to continue, will subvert the Constitutional requirements of a thorough and efficient education and laws adopted to implement that mandate."

The Commissioner has addressed this issue in Ann Camp, et als. v. Board of Education of the Borough of Glen Rock, Bergen County, 77 S.L.D. 706, wherein he stated:

> Boards of education, while not compelled by law to offer behind the wheel driver training, have been encouraged by the State Department of Education, the law enforcement agencies and by local citizens to do so in the interests of practicality and individual and public safety. The Board in this instance has elected to relegate its behind the wheel driver training to hours other than the regular school day. This it may legally do assuming proper supervision and the use of certified teachers. (at 710, 711)

Petitioner recognizes Camp but asserts that does not mean its thrust is still valid and current. Reliance is placed on the legislative statement of purpose in the Public School Education Act of 1975 that "education is a growing and evolving concept." N.J.S.A. 18A:7A-2a(4).

A search for legislative or State Board rule amendments since Camp has failed to reveal any requirement that driver education must be included in curricular offerings by local boards within the ambit of the Public School Education Act of 1975. I **FIND** that the Commissioner's decision is dispositive of this issue and **CONCLUDE** that the Board's failure to provide behind-the-wheel instruction in the regular day school curriculum is not a denial of a thorough and efficient education.

IS THE DRIVER EDUCATION PROGRAM AN INTEGRAL PART OF THE BOARD'S CURRICULUM

Petitioner cites at Pb 7 a letter written under date of June 28, 1978, by then acting Commissioner Lataille, wherein is quoted: "Recognizing that driver education was an integral part of any school program . . ." Said letter is attached to petitioner's brief and is incorporated herein by reference, and was written to a driver education coordinator of a school district out of Morris County. The letter responded to the coordinator's "concern as to where and how driver education should be located within the State Department of Education." I **FIND** no consequence or merit to the quoted declaration as support petitioner's contention that the determination of this issue must be affirmative, as said statement must be construed to be ultra vires. The Commissioner himself has frequently stated that he will not substitute his judgment for local boards', and I am confident he would never attempt to usurp the authority of the Legislature or State Board.

Respondent insists the Board acted within the scope of its authority in relegating behind-the-wheel training to hours other than the regular school day.

A determination of this issue must be based on what meaning and intent is attached to use of the word integral. A search in several dictionaries reveals little dispute between authors. "Essential to completeness," "formed as a unit with another part," and "lacking nothing essential" are adopted here for application in determining this issue.

There can be little dispute that there is considerable value to be derived by pupils from classroom instruction in driver education. There can also be little dispute that the practical applications of said values in the absence of behind-the-wheel training would create a void in the attainment of the objectives of the program.

In the instant matter the driver education offered by the Board as part of its curriculum consists solely of classroom instruction. That program is a part of the course of study in health, which is a part of the course of study in physical education. It has been stipulated by the parties that physical education is a credit course which becomes a part of a pupil's permanent record.

It was further stipulated that satisfactory completion of classroom instruction in driver education is not a prerequisite for behind-the-wheel training. No credit is given for behind-the-wheel training. Participation in that phase of the program is not recorded in the pupil's permanent record, and the Board never adopted behind-the-wheel training within its curriculum.

Here the Board has not eliminated behind-the-wheel training for its pupils, but has simply relegated it to hours other than the regular school day, and charges a tuition fee.

In Camp, supra, the Commissioner held that school boards have the prerogative to restructure their driver education programs but must provide proper supervision and use certified teachers. Id. at 710-11. The Commissioner also stated that school boards are not required to offer behind-the-wheel programs, but are encouraged to do so by the State Department of Education, law enforcement agencies and local citizens in order to promote safety. Id. at 710.

The central issue on remand is not whether the driver education program is an integral part of the school curriculum, but whether behind-the-wheel training is an integral part of the driver education curriculum. It is already established that the classroom instructional program is integrated into the health segment of the required physical education program.

No case law has been found which addresses this question. But given the statements in Camp that behind-the-wheel training is not required by law, together with the stipulations set forth herein which clearly show the Board has avoided a de jure relationship between classroom instruction and behind-the-wheel instruction, it would appear that the Board is free to remove the latter from the curriculum as it is not an integral part of the school curriculum as a matter of policy. However, it must be determined if a de facto relationship exists.

An extended school day is not an uncommon scheme utilized to alleviate scheduling difficulties in secondary schools. Noncredit activities such as clubs and athletics are offered after the regular school day but are generally recorded in pupil permanent records and transmitted with college admission credentials. Portions of credit courses, such as laboratory sessions, are sometimes scheduled after the end of the regular school day.

A suggested perspective here is to view the driver education program as a chain with identifiable links: the Board's adopted curriculum; the health education offerings integrated into the required physical education curriculum; driver education classroom instruction integrated into the health program; and the bifurcation of behind-the-wheel training at times other than the regular school day. Can the chain be broken by Board determinations not to offer credit for behind-the-wheel training; nor require classroom instruction as a prerequisite for it; nor record participation in a pupil permanent record? I think not. To so hold could result in a determination that no relationship exists between classroom instruction in science and laboratory experiences in that course offering if the Board were to deal with the laboratory segment as it has with behind-the-wheel training here.

I so **FIND** and **CONCLUDE** that classroom instruction in driver education is an integral part of the school curriculum; that behind-the-wheel training is not a de jure integral part of the driver education program; but that behind-the-wheel training is a de facto integral part of the driver education program.

MAY THE BOARD'S DRIVER EDUCATION PROGRAM BE BIFURCATED, WITH BEHIND-THE-WHEEL TRAINING OFFERED IN THE EVENING ADULT SCHOOL, FOR WHICH PUPILS ARE ASSESSED A FEE?

The sole issue that remains is whether the Board may assess pupils a fee for behind-the-wheel training.

This appears to be a determination of first impression.

In in the Matter of the Appeals of the Board of Education of the Black Horse Pike Regional School District and the Sterling Regional School District, Camden County, 73 S.L.D. 130, State Department of Education approval of petitioner's summer school program was rescinded because a registration fee was levied and charged to all students as a prerequisite to summer school admission. In his decision, the Commissioner said:

> Since summer schools must, if they are to retain integrity, be regarded as companion schools to those conducted during the course of the regular school year, the State Board has properly, in the Commissioner's judgment, joined both kinds of schools together in the opening sentence of the rule on the operation of summer schools. This rule (N.J.A.C. 6:27.31(a)) provides that:
>
> > The rules for the approval of full-time secondary schools except as otherwise provided shall apply to secondary summer sessions. ***
>
> Thus, the two kinds of schools - full-time secondary schools and secondary summer sessions - are inextricably linked together.
>
> It follows, therefore, that the following provisions of the State Board rule (N.J.A.C. 6:27.31(a) which states that:
>
> > *** No summer secondary session may be approved unless it:
> >
> > 1. Is operated by a board of education without charge to the pupils living within the district ***
>
> is a necessary and cogent requirement of the rule. Education in New Jersey must be thorough and efficient and "free," and insofar as the rule is applicable to regular programs of instruction, it is also applicable to companion summer sessions.

> In this regard, the Commissioner holds that it makes no difference that the summer session is voluntary. If it is offered at all, it must be offered in a parallel manner to the offering of the regular school program, and any provisions which mandate a cost as a prerequisite to program admission must be rendered a nullity. (at 136, 137)

The Legislature addressed itself to summer school enrichment programs and tuition charges, and the laws which became effective May 31, 1979 are reproduced here:

> 18A:54B-1. Enrichment program defined
> For the purposes of this act "Enrichment Program" means any summer school program offered by a public school for which a student does not receive credit for graduation and is unrelated to the curriculum content of the regular school program. (Emphasis supplied.)

> 18A:54B-2. Tuition; rules and regulations
> For the purpose of providing enrichment programs in public schools boards of education may charge tuition for students to attend such noncredit courses subject to rules and regulations promulgated by the State board.

The Commissioner addressed the matter of fees charged to students for participation in field trips in Melvin C. Willett v. Board of Education of the Township of Colts Neck, Monmouth County, 66 S.L.D. 202. In that decision, the Commissioner incorporated at page 205 the New Jersey State Constitution, Art. VIII, Sec. IV, para. 1, which states: "The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years." (Emphasis supplied.) He also said:

> The term "field trip" as used in this case is understood and is limited to mean a journey by a group of pupils away from school premises under the supervision of a teacher for the purpose of affording a first-hand educational experience as an integral part of an approved course of study. For example, pupils may visit the post office, the firehouse, a bank, a farm, a museum, government buildings, a factory; they may take nature walks, visit a planetarium, observe examples of air and water pollution, attend a professional theatrical performance. (at 205).

and

> The Commissioner finds and determines that the regulation adopted by the Colts Neck Board of Education on December 13, 1965, with respect to field trips is inconsistent with the school laws of New Jersey to the extent that it requires that the costs of such field trips shall be borne by parents of the participating children and, therefore, such portion of regulation is improper and unenforceable. (at 206)

The position of the Commissioner in Willett was modified in Board of Education of the Borough of Fair Lawn, Bergen County v. Harold F. Schmidt, 78 S.L.D. 735. In that matter the legality of charging pupils for costs of food and lodging incident to their participation in the Board's Outdoor Education Program, which consisted of a period of two and one-half days at a YMCA camp on days during which school was in session, was upheld. The Commissioner held (at page 739) that "Reasonable charges may be made to those pupils who voluntarily engage in the program for costs of food and lodging . . ."and that the matter was "importantly differentiated from Willett since it is stipulated herein that participation is optional in an activity conducted in part during school hours and in part during the sixteen hours of the day when school is not ordinarily in session."

In affirming the Commissioner's decision in Fair Lawn, decided June 6, 1979, the State Board added one qualification. It cited N.J.A.C. 6:4-1.5, which provides:

> (a) No student shall be denied access to or benefit from any educational program or activity solely on the basis of race, color, creed, religion, sex, ancestry, national origin or social and economic status.

and held that:

> We therefore conclude that in operating the outdoor educational program the Board could properly require the payment of a $25.00 fee for meals and lodging by all pupils whose families could afford such a fee; but that in the case of any pupil whose economic status would deprive him of the opportunity to take such field trip because he could not pay the fee, the Board must provide in some other way for the participation of such impecunious student.

Since Fair Lawn, the Legislature enacted N.J.S.A. 18A:36-21, which became law effective June 26, 1980:

> 1.
> Any board of education may authorize field trips 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 reduce 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. Approved and effective June 26, 1980.

The State Board of Education adopted rules governing Adult Education, as incorporated in N.J.A.C. 6:44-3.1 and is reproduced here in part:

> 6:44-3.1 Standards for reimbursement
> (a) To be eligible for reimbursement, local programs of adult education must be approved by the Commissioner of Education. To meet the approval of the Commissioner, the educational services provided by the local public schools of the State for out-of-school youth and adults must:
> . . .
>
> 2. Be designed to serve persons beyond the compulsory school age and not regularly enrolled in a public or private secondary school; . . . .

A careful review of statutory and case law as well as regulations should make certain propositions clear. That review suggests the following in the order of authority:

1. The Constitution of the State of New Jersey guarantees a thorough and efficient system of free public schools for the instruction of all State residents between five and eighteen years of age.

2. The Legislature has declared that fees may be charged for no credit enrichment programs in summer school.

3. The Legislature has declared that charges may be assessed to students for field trips but no student who fails to pay same is to be denied participation in said trips.

4. The State Board has declared that the Commissioner may not grant approval of a summer school program if a fee is charged.

5. The State Board has determined that although food and lodging fees may be charged for field trips, no pupil is to be denied participation.

6. The State Board has declared that adult programs are to be designed to serve those beyond the compulsory school attendance age in order for the Commissioner to grant approval for educational services provided for out-of-school youth and adults. Eligibility for State reimbursement is contingent on the Commissioner's program approval.

7. The definition of field trips by the Legislature and the Commissioner are synonymous, with the Commissioner's elaboration through examples of visitations, observations and attendance of a performance.

It was stipulated here that behind-the-wheel training in driver education for pupils in attendance in the regular high school program is available only under the auspices of the evening adult school in the afternoon after regular school hours and on Saturdays, and in addition, by the E.Z. Method Driving School for those unable to attend the afternoon and Saturday sessions, the program being also designed for other residents of the community. During 1979-80, a fee in the amount of $105 was charged for each participant in the program. It was also stipulated that no provisions are made for pupils who can not afford the fee.

It has already been determined above that behind-the-wheel training is an integral part of the driver education program, which has been deemed to be an integral part of the curriculum through Board approval of it. As such, I **FIND** that the Constitution of the State of New Jersey, in guaranteeing a free public education, requires that no fee be charged. This determination is buttressed by Commissioner's decisions and State Board declarations that no fee be charged for summer school programs that grant credit for satisfactory completion or are linked with the regular curriculum.

A contrary holding would appear to make it possible, for example, for a Board to bifurcate a science laboratory segment without credit to a time outside of the regular school day, assign credit only to the classroom segment, and require that participating pupils pay a tuition fee for the laboratory segment.

Respondent's attempt to construe behind-the-wheel training as a field trip is without merit. Such training requires a departure from school premises due to lack of space and conditions on the premises in order to achieve the objectives of this portion of the program. The exceptions to fees charged for field trips as declared by the Legislature, State Board, and the Commissioner are inapplicable here.

A search in statutory and case law as well as State Board regulations has not revealed a prohibition of the enrollment of day students in the behind-the-wheel training program under the auspices of evening adult program as approved by the Board. **I SO FIND.**

It appears the Board has three alternatives in exercising its discretionary authority about driver education:

1) eliminate the driver education program in its entirety;
2) incorporate the behind-the-wheel training segment in the regular school day; or
3) bifurcate the behind-the-wheel training segment outside of the regular school day without the charge of a tuition fee.

Practical implications should be noted. The Board's decision to bifurcate and exclude behind-the-wheel training from its curriculum can be presumed to be essentially economic. While there is surely nothing wrong with fiscal restraint, one ramification of its determination is that otherwise eligible pupils may be precluded from behind-the-wheel training if they cannot afford the tuition fee. Another ramification, arguably, is that classroom instruction and behind-the-wheel training are perhaps unwisely separated since incorporation of the two segments in a single program may conceivably produce a safer class of drivers.

In summary, **I CONCLUDE** that:

1. The Board's failure to provide behind-the-wheel instruction in driver education in the regular school curriculum does not constitute a denial of a thorough and efficient education.

2. The classroom instruction in driver education is an integral part of the health program, which is an integral part of the required physical education program, which is an integral part of the school curriculum.

3. Behind-the-wheel training is an integral part of the driver education program.

4. The Board may bifurcate behind-the-wheel training from its curricular offerings incorporated in the regular school day, assuming proper supervision and the use of certified teachers.

5. The Board may not charge a tuition fee for pupils participating in the behind-the-wheel training program.

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.

19 May 1981
DATE

WARD R. YOUNG, ALJ

Receipt Acknowledged:

21 May 1981
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

May 22, 1981
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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PARSIPPANY-TROY HILLS EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PARSIPPANY-TROY HILLS, MORRIS COUNTY,	:	DECISION ON REMAND
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 has examined the record herein and the arguments advanced by the parties. He notes that he has previously addressed the issue of driver education as a required subject in Ann Camp, supra, wherein he said:

> "***Boards of education, while not compelled by law to offer behind the wheel driver training, have been encouraged by the State Department of Education, the law enforcement agencies and by local citizens to do so in the interests of practicality and individual and public safety. The Board in this instance has elected to relegate its behind the wheel driver training to hours other than the regular school day.***" (at 710, 711)

In the present instance the Commissioner notes that, although the Board is not required to offer driver education as part of a mandated curriculum necessary to satisfy the exigency of a thorough and efficient education, it has chosen to include driver education as a portion of the health course of the physical education program consisting solely of classroom instruction. The Commissioner also notes that the Board has made provision for the behind-the-wheel training to be offered on a fee basis at a time other than the regular school day through its Evening Adult School. The Commissioner observes that he has previously determined that driver education is not mandated and may be offered outside of the regular school day. Camp, supra In the matter presently controverted, the Board has made provisions beyond those required by a thorough and efficient education.

Accordingly, in the opinion of the Commissioner, a local board of education may determine to limit its driver education program solely to those units within its health and physical education curriculum which are taught in the classroom. (N.J.S.A. 18A:11-1; N.J.A.C. 6:8-3.5)

It may likewise at its discretion offer as a service to the general community a program of behind-the-wheel instruction in its Evening Adult School open to all those who seek to avail themselves of such services. The Commissioner finds and determines that such program, if offered, may charge the same fee to high school age pupils so attending as is charged to all other community members. The Commissioner is constrained to observe, however, that no credit may be offered for such Adult School course, no notation may be made upon the pupil's transcript, and the course must be offered exclusively during those hours in which the Adult School is normally in session.

Accordingly, the findings and determination of the Court herein are set aside and summary judgment is awarded the Board.

COMMISSIONER OF EDUCATION

July 13, 1981

PARSIPPANY-TROY HILLS EDUCATION ASSOCIATION,

PETITIONERS-APPELLANTS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF PARSIPPANY-TROY HILLS, MORRIS COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, July 13, 1981

For the Petitioner-Appellant, Ruhlman & Butrym
(Cassel R. Ruhlman, Jr., Esq., of Counsel)

For the Petitioner-Respondent, Dillon, Bitar & Luther
(Myles C. Morrison, III, Esq., of Counsel)

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

November 10, 1981

Pending New Jersey Superior Court

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 0871-80
AGENCY DKT. NO. 473-12/79A

IN THE MATTER OF:

ANNIE K. GARVIN,
Petitioner
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF JACKSON, OCEAN COUNTY,
Respondent.

Record Closed: May 1, 1981
Received by Agency: 6/4/81

Decided: June 3, 1981
Mailed to Parties: 6/8/81

APPEARANCES:

Arnold Mellk, Esq., for the Petitioner (Greenberg & Mellk, Attorneys)

Leonard W. Roeber, Esq., for the Respondent (Russo, Courtney & Foster, Attorneys)

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

Annie K. Garvin, a tenured teaching staff member in the employ of the Board of Education of the Township of Jackson (Board), filed a Petition of Appeal before the Commissioner of Education wherein she alleges that the Board failed to comply with its Affirmative Action Plan and discriminated against her when it selected and employed a male candidate for the position of vice-principal to its high school. The Board denies the allegations and sets forth three separate defenses requesting a dismissal of the herein Petition.

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 March 25, 1980, a prehearing conference was held and the issues to be determined in the instant matter were set forth as follows:

1. Did the Board fail to comply with its Affirmative Action Plan filed before the Commissioner of Education with respect to its application, interviews and subsequent employment to the position of vice-principal?

2. Did the Board discriminate against petitioner when it selected a male candidate for the position of vice-principal?

Hearings in the matter were conducted on December 8 and 9, 1980, at the Ocean County Administration Building, Toms River, New Jersey. The parties submitted post-hearing briefs and the record was closed on May 1, 1981.

UNCONTESTED FACTS

During the 1978-79 school year, it became known that one of the high school's vice-principals would be vacating his position and that the Board would seek candidates for the position for the 1979-80 school year. On or about September 1979, a committee of school administrators was formed to screen candidates for the position and to make recommendations to the Board. The screening committee consisted of Mr. Nicholas Sciarappa, acting superintendent of schools; Mr. Robert Lewis, principal of the Jackson Memorial High School; and Mr. William F. Doerr, vice-principal at the high school.

The Board advertised the vacancy in local newspapers, the New York Times and by notice to its employees through the principals of its various schools. Sixteen (16) individuals applied to the Board for the position. Of the sixteen (16) applicants, eight (8) were employees of the Board while eight (8) were applicants from outside the school district. All sixteen (16) applicants were interviewed by members of the screening committee, using an instrument entitled "Questions for Secondary Vice-Principal Interview" (P-1). Thereafter, the screening committee selected four (4) individuals, all of whom were employees of the Board, for a second interview and used an instrument entitled "Final Interview Agenda," which consisted of five (5) questions asked of each candidate in a private interview (P-2).

By way of a letter, dated September 27, 1979 (P-3), the screening committee recommended to the Board that it appoint Mr. Robert Pollock to the position of vice-principal at the high school. Thereafter, the Board appointed Mr. Robert Pollock to the position.

The Board's past practice, with regard to administrative appointments for a vacant position, was to accept recommendations from its administrative staff of more than one candidate. The Board would then, independent of its administrators, interview the candidates and make its final selection and appointment. The procedure was not followed in the instant matter, since the Board accepted the screening committee's recommendation and appointed Mr. Pollock.

On or about February 1978, the Board's adopted Affirmative Action Plan was approved by the New Jersey Department of Education.

Petitioner, Annie K. Garvin, has been a teacher in the Board's employ since 1965 and has served as the department chairperson for social studies from 1975 through 1980. She has both a principal's and a supervisory certificate and is a holder of a Ph.D. degree from Clark University. Her duties as department chairperson included evaluation of teachers, budget work, supervision of students, and discipline within the department.

This concludes a recital of the uncontested facts in the instant matter.

Prior to the hearing in the instant matter, the Board propounded a Notice of Motion to Dismiss, with an accompanying Memorandum of Law, grounded upon its assertion that the Petition of Appeal was not filed within the time constraints, pursuant to N.J.A.C. 6:24-1.2. Petitioner, in a timely manner, filed a Memorandum of Law in opposition to the Board's Motion and requested that the motion be denied.

The regulation, N.J.A.C. 6:24-1.2, provides:

> 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 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. . . .

The Board asserts that the subject of the within Petition is an alleged act of sex discrimination, wherein petitioner claims she was not promoted to a position of vice-principal because petitioner is a female. The alleged act of discrimination occurred on or about September 28, 1979, when petitioner learned that a male employee had been appointed by the Board to the position in question. Thereafter, on or about December 24, 1979, petitioner filed her Petition of Appeal before the Commissioner of Education. Petitioner did not, however, serve a copy, with proof of service, of the said Petition upon the respondent Board within the time required by N.J.A.C. 6:24-1.2. The Board asserts that ninety (90) days from September 27, 1979, the date of notification, was December 27, 1979. It contends that there was no service upon the Board within the allotted time. Moreover, it asserts that petitioner never served the Board as required by the regulation, but rather that the Board was in receipt of a copy of the Petition from the Commissioner on January 28, 1980, some thirty-two (32) days subsequent to the expiration of the ninety (90) day period set forth in the regulation.

The Board argues that the ninety (90) day period prescribed for action by petitioner can admit of no other construction than that it is mandatory in its requirement. Public policy requires that disgruntled public employees take prompt action on any appeal of an adverse decision in order that the public body may proceed with its business without fear of having its actions reversed. A similar time limitation was discussed in the case of Borough of Park Ridge v. Salimone, 21 N.J. 28 (1956), where the Supreme Court held that the ten (10) day appeal period provided for in Civil Service appeals was mandatory and the Court stated further:

> . . . the time must come when the appointing authority can rely upon the conclusion of the issue and proceed to make arrangements in the interest of the public to replace the dismissed employee without fear that its action will be undone. Not only does common practice require it, but the fundamental policy of the law demands definite limitations. [Borough of Park Ridge v. Salimone, supra, at 46]

The Board notes that the delay in not filing promptly was caused by lack of knowledge on the part of the public employee's then attorney, similar to the lack of knowledge on the part of the petitioner in the within matter, who originally filed the petition pro se, and was apparently unaware that the Petition should be served on the respondent Board.

The Board argues that it does not matter whether petitioner has a worthwhile cause of action or that the decision may appear harsh or unjust. In discussing a delay in processing an appeal by a Civil Service attorney, the court in Atlantic City v. Civil Service Adm., 3 N.J. Super. 57 (App. Div. 1949) said:

> The law of this State is well settled that in the case sub judice, a public employee's right to reinstatement, even assuming, but not deciding, that his removal or other interference with his rights may be unjust and unwarranted, may be lost by his unreasonable delay in asserting his rights.

It is the position of the Board that the delay, and actual failure, to serve the Board as required by the regulations cannot be excused by the Commissioner, as the time requirements set down by N.J.A.C. 6:24-1.2 are mandatory. Public policy requires a finality in matters concerning public employees in order that the public body may carry out its public duties promptly without fear of exposing the taxpaying public to double payments of salaries should their decisions be later reversed.

Petitioner, in opposing the Board's Motion to Dismiss, argues that the regulation in question contemplates a time limitation with regard to the filing of the verified Petition before the Commissioner to address the timeliness of the commencement of an action by a petitioner. She argues that the regulation is not intended to render the filing of a petition fatally defective in the absence of a simultaneous filing of proof of service upon respondent. She asserts that by its own admission, the Board was in receipt of a copy of the verified Petition within some three (3) weeks subsequent to its receipt by the Commissioner. She argues that there was no prejudice created by such a minor delay, nor can the Board point to any such prejudice as the result thereof.

Petitioner argues and relies, in part, upon N.J.A.C. 6:24-1.19, which provides that:

> The rules herein contained shall be considered general rules of practice to govern, expedite and effectuate the procedure before, and the actions of, the commissioner in connection with the hearing and determination of controversies and disputes under the school laws. They 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.

She asserts that the facts of the instant matter do not even rise to the level of requiring the precise implementation of N.J.A.C. 6:24-1.19 because no rule has been violated. Alternatively, she contends that it would work an extreme injustice to petitioner in the event that the verified Petition was dismissed solely for the reason that the Board did not receive a copy in a timely fashion.

Petitioner argues that the cases cited by the Board are inapplicable to the herein matter. In Borough of Park Ridge v. Salimone, 21 N.J. 28 (1956), the Supreme Court of New Jersey was faced with an appeal from a Civil Service Commission ruling which reversed the action of the Municipal Borough Council in removing the defendant Salimone from his position as Borough Police Chief. The holding and reasoning of Park Ridge, however, are not even applicable, or dispositive, of the instant matter in light of the following: (1) defendant Salimone therein received a plenary hearing at the municipal level, prior to his belated appeal to the Civil Service Commission; and (2) the issue before the Supreme Court was the timeliness of the filing of a Notice of Appeal, not the timeliness of the filing of the initial pleading to commence an action. The disparity of that case, both factually and substantively, from the instant matter is clearly evident in that petitioner herein has not received any hearing whatsoever and, furthermore, the pleading challenged herein by respondent is not a Notice of Appeal seeking judicial review to which a strict time requirement might otherwise apply. (See, e.g., Rules 2:4-2.5 of the Rules Governing the Courts of the State of New Jersey.)

The case of Atlantic City v. Civil Service Commission, 3 N.J. Super. 57 (App. Div. 1949) is likewise inapposite for the identical reasons: namely, the issue therein was the timeliness of a Notice of Appeal to the Civil Service Commission, filed some three years and six months subsequent to the dismissal of an assistant city solicitor from office. Atlantic City stands solely for the proposition that the doctrine of laches will operate as an effective bar to an appellant who does not seek higher judicial review of a previous decision in a timely fashion. No such facts are present in the case at bar, nor can even an analogy be drawn with respect thereto.

For the reasons advanced above, petitioner requests that the Board's Motion to Dismiss be denied.

The record in this matter adequately supports petitioner's contention that she pursued what she believed to be appropriate forums for the relief she sought. The court in Auciello v. Stauffer, 58 N.J. Super. 522 (App. Div. 1959) said:

> The principal element in applying laches is not so much the period of delay in bringing action but the factor of resulting prejudice to the defendant. 2 Pomeroy, op. cit., supra, § 419d., p. 177. West Jersey Title and Guaranty Co. v. Industrial Trust Co., 27 N.J. 144, 153 (1958). [at p. 530]

And;

> . . . it is entirely appropriate to weigh the nature and degree of the illegality of the activity complained of since such factors clearly bear upon the over-all equities of the situation, and the application of the defense of laches is peculiarly dependent upon considerations of equity. 2 Pomeroy's Equity Jurisprudence (5th ed. 1941), § 419d., p. 177; see Pierce v. International Telephone & Telegraph Corp., 147 F. Supp. 934 (D.C.N.J. 1957). Cf. Bookman v. R.J. Reynolds Tobacco Co., 138 N.J. Eq. 312, 406 (Ch. 1946), to the effect that: 'It is the rule that the defense of laches depends upon the circumstances of each particular case. Where it would be unfair to permit a stale claim to be asserted, the doctrine applies. Where a gross fraud has been perpetrated, the court is hesitant to relieve the wrongdoer on the ground of laches.' [at p. 529]

I **FIND,** therefore, that petitioner filed her Petition before the Commissioner in a timely manner, however, neglecting to serve, with proof of service, a copy of the Petition upon the respondent Board; and

I **FIND** that no prejudice was created by petitioner's failure; and

I further **FIND** that by virtue of the Commissioner's having transmitted the matter to the Office of Administrative Law for determination as a contested case, subsequent to the pleadings having been joined, having exercised his prerogative and, in effect, having relaxed the rule, pursuant to N.J.A.C. 6:24-1.19; accordingly

I **CONCLUDE,** therefore, that the herein Petition of Appeal is viable and that the Board's Motion to Dismiss is hereby **DENIED.**

A concise summary of testimony elicited at hearing is set forth herein below:

Among the witnesses called by petitioner were two of the Board's three administrators involved in the screening of candidates and the selection of the finalist for the position of vice-principal. The third administrator, Mr. Robert Lewis, the then high school principal, had left the school district and was not available to testify at the time of hearing. Mr. Lewis' deposition, however, was moved into evidence as R-1.

The testimony of the two administrators, Mr. Doerr, one of the two vice-principals, and Mr. Sciarappa, the then acting superintendent, concerned the candidate's interview process and the screening committee's final recommendation of Mr. Pollock to the Board. Both testified that the initial interviews involved sixteen (16) candidates, in which each candidate was asked a series of questions with the screening committee members individually, who rated the responses on a scale of five (5), the highest score, to a low of one (1) (P-1). At the completion of this series of interviews, the screening committee tallied the total scores of each candidate and selected four (4) candidates with the highest scores to return for a second interview. The four individuals, as selected, consisted of two (2) female candidates and two (2) males, all of whom were employees of the Board. The screening committee, by consent, eliminated all out-of-district candidates to insure that the individual finally selected would be one who is aware of the existing problems in the school district.

The testimony of the vice-principal centered, primarily, upon his personal concerns as to the candidate's ability to handle pupil discipline and pupil attendance. He stated that pupil discipline was the most important factor to him in the ultimate selection of a second vice-principal and that he placed great emphasis upon the candidate's physical strength. Mr. Doerr testified that he was not aware nor did he know of the Board's Affirmative Action Plan. His testimony was replete with responses that he did not, or could not, recall events concerned with the interviews of the candidates. Mr. Doerr's testimony at hearing contradicted his testimony at deposition, specifically with regard to his assessment of petitioner's qualifications for the position. At hearing he testified that he believed petitioner to be qualified; however, on deposition he stated that he did not believe that petitioner possessed the physical qualifications for the position. On his deposition, Mr. Doerr observed that Mr. Pollock, the successful candidate for the position, was six feet, six inches (6' 6") in height.

At issue in this matter, with regard to the Board's alleged violation of its Affirmative Action Plan, is petitioner's assertion that Mr. Doerr stated that "a woman

could never be Vice Principal" in the high school. (Petition of Appeal par. 8) On direct examination, Mr. Doerr originally denied making such a statement; however, he subsequently testified that he had no recollection of making the statement.

Both Mr. Doerr and Mr. Sciarappa testified that they did not review the candidates' personnel documents as to their qualifications prior to the interviews but, rather, relied solely upon the final total marks the screening committee members ascribed to the responses of the individual candidates (P-2). Mr. Sciarappa testified that he believed that the candidate's writing ability was an important consideration in the selection of the vice-principal; however, he admitted that no writing samples were taken from any of the candidates.

Mr. Doerr and Mr. Sciarappa testified that as the result of the ratings of the final interviews, the final order of selection was as follows: Mr. Pollock - first; Mrs. D'Zio - second; Dr. Garvin - third; and Mr. Reider - fourth.

The Board's Affirmative Action Officer, who was also the Board's Curriculum Coordinator for grades kindergarten through six, testified that his duties and responsibilities consisted of reacting to concerns or complaints arising out of the anti-discrimination statutes, pursuant to Title IX of the Federal Regulations and Title 6 of N.J.A.C. He stated that he believed that the Board had promulgated its own rules and regulations for the implementation of affirmative action, pursuant to the guidelines set forth by the New Jersey State Department of Education, Office of Equal Education Opportunity (OEEO). He testified that OEEO had requested that the Board maintain a percentage of female school administrators equal to the percentage of females employed in Ocean County, which was ten (10%) percent.

The Affirmative Action Officer stated that in September 1979 the Board had one (1) female administrator in its employ out of eighteen (18) administrative positions. He stated that this represented five and five-tenths (5.5%) percent of the total administrative staff and concluded that it represented an underutilization of female administrators. He stated further that "underutilization" did not necessarily mean "noncompliance with the Board's Affirmative Action Plan."

The Affirmative Action Officer testified that, during the 1978-79 academic year, a female administrator resigned the position as Curriculum Coordinator and that she

was replaced by a male administrator. He stated further that three (3) female supervisors were employed by the Board commencing September 1980 and that he assumed they were administrators. He testified, however, that the supervisors' salaries were based upon the Board's Teacher Salary Guide plus an unspecified stipend. He stated that the supervisors were not members of the Jackson Administrators' Negotiating Unit, nor were they compensated according to the Administrators' Salary Guide.

With regard to the instant matter, the Affirmative Action Officer testified that he was not involved in the personnel screening process or the advertising for the position in controversy or for other positions. He stated further that he does not meet with the Board's assistant superintendent in charge of personnel with regard to affirmative action and he reiterated that his role was only to react to concerns.

Petitioner testified with regard to her qualifications, stating that she had formerly held the position as social studies chairperson in the high school and that her duties and responsibilities included evaluating teachers, preparing the department's budget, keeping inventory and control of books and supplies, interviewing new teachers, observing teachers, supervising and disciplining pupils, and supervising and assisting the professional staff.

Petitioner reiterated her charge against Mr. Doerr and stated that she recalled a conversation she had with Mr. Doerr late in 1978-79 academic year about the vacancy in the vice-principal's position during which, she alleged, Mr. Doerr said, "a woman could never be vice principal of this school." She asserted that Mr. Doerr again made essentially the same statement in August 1979 (Tr. II 175-176, 194-196).

With regard to the screening committee's recommendation to the Board, petitioner introduced into evidence the Board's discussion of the screening committee's process and recommendation at a Closed Conference Meeting held on October 3, 1979, which is set forth, in full, as follows:

MOTION TO APPEAR ON THE OFFICIAL BOARD AGENDA
October 10, 1979

2. Approved -- on a motion by Mrs. Gillas, seconded by Mr. Campbell, and based on the recommendation of the high school principal and the Acting Superintendent of Schools, the Board of Education appoint Mr. Robert Pollock as

Assistant Principal of the Jackson Memorial High School, effective 10/8/79, and at a salary rate as filed with the Secretary to the Board of Education, (salary to be discussed at Board Conference meeting).

Discussion: Mr. Sciarappa suggested that the best candidate was recommended for the job and he was 'on target', and his responses were very well given. He advised that all the procedures were followed and he would defend any suit against the Board.

Mr. Monjoy advised that the Personnel Committee was not involved.

Mrs. Gillas suggested that the Board would have an easier time if they knew the questions and asnwers [sic] used in determining the grades given the candidates.

Mr. Sciarappa advised that all the information was available and was very well documented. The Screening Committee comprised of Mr. Lewis, Mr. Doerr and Mr. Sciarappa.

Mr. Reilly questioned whether resumes were available for the four final candidates?

Mr. Sciarappa advised that completed resumes were not required. He suggested that there were processes of interviewing and those requirements were filled. He also stated that certification requirements were certified.

Mr. Reilly advised that if resumes were available he would see that some of them were not certified.

Mr. Reilly - 'Do you review people's evaluations?'

Mr. Sciarappa - 'Yes, I have them in his file.'

Mr. Reilly - 'And you would still recommend him?'

Mr. Sciarappa advised that all four candidates were of the high school, and that Dr. Garvin had a doctorate in History. On his rating, he advised, Mrs. D'Zio was second and Mrs. Garvin was third.

Mr. Campbell questioned 'based on interview and whatever else you considered, why do you think Mr. Pollock was the finalist in your opinion?'

Mr. Sciarappa - 'His responses were far superior; we gave them the same amount of time and they were rated on these responses.'

Mr. Campbell - 'Was he also the clear choice of the other two?'

Mr. Sciarappa - 'It was a unanimous selection; there was no hedging at all.'

Mr. Reilly - 'The responses were better?'

Mr. Sciarappa - 'I have never attended an interview where the responses were done in written form; at the end we gave them an opportunity; there was dialogue.'

Mr. Reilly - 'Is it fact or fiction that Mr. Pollock was going to be denied tenure?'

Mr. Sciarappa - 'I don't recall this.'

Mr. Reilly - 'Does he have more supervision than the other three?'

Mr. Sciarappa - 'No, he has been in the district eleven years.'

Mr. DeLuca advised that he could not see how a person with a doctorate degree could have less experience. He stated he did not use basic interviewing principles.

Mr. Sciarappa advised that the process followed was thorough.

Mr. Monjoy stated that this was the same process used in the past, except that the Board selected the Screening Committee. He further commented that the Board did not normally ask for responses in writing. He stated that he did not see anything that was done improperly.

Mr. Reilly stated that these were people who were interviewed who were not qualified.

Mr. Sciarappa inquired if he was referring to the finalists?

Mr. Reilly advised that he was referring to the people initially interviewed.

Mr. Campbell stated that this was a harmless error.

Mr. Reilly suggested that Mr. Pollock's past problems were almost public, and the Acting Superintendent was not aware of them?

Mr. Sciarappa advised that he did not know what Mr. Reilly was referring to, and if he had pertinent information he should divulge this to the Board.

Mr. Reilly - 'He was almost denied tenure.'

Mrs. Gillas suggested she had some concerns in this selection, and questioned whether or not all files were checked.

Mr. Sciarappa reminded the Board that they offered Mr. Lewis 100% cooperation, and support.

Mr. Eure advised that he agreed with Mr. Sciarappa, and would support the administration's selection. He suggested that

personalities were creating a problem of selecting the best candidate.

Mr. Reilly advised that he was bringing up some valid points. He stated 'when it comes down on you, and these things occur don't say you did not know. When they go on past procedures and all of a sudden it is changed. The previous assistant vice-principal was selected by the Board of Education.' (W. Doerr)

Mr. Sciarappa advised that this was not an administrative recommendation.

Mr. Monjoy stated that he felt the screening procedures were fair and objective.

Mr. Reilly inquired as to whether or not these screening procedures conformed to our existing policy on affirmative action?

Mr. Sciarappa advised he checked with Affirmative Action Officer, Ed. [sic] Leonard. He advised him that if he selected the best person for the job, he would have no problem.

Mr. Monjoy advised that the leverage of affirmative action was a factor.

On a motion by Mr. DeLuca, seconded by Mr. Eure, the motion was called.

Roll Call Vote on the call:	Yes:	Mr. Campbell Mr. DeLuca Mr. Eure Mrs. Gillas
	No:	Mr. Reilly Mr. Rubin
	Abstaining:	Mr. Monjoy
On the Motion:	Yes:	Mr. Campbell Mr. DeLuca Mr. Eure Mrs. Gillas (after passing) Mr. Rubin Mr. Monjoy
	No:	Mr. Reilly
MOTION CARRIED		(P-8)

Thus it appears that the Board had questions, if not reservations, about the screening committee's recommendation. Nevertheless, the Board accepted the recommendation and appointed Mr. Pollock to the position.

FINDINGS OF FACT

Having carefully reviewed the entire record in this matter, including the pleadings, documents in evidence, testimony of the witnesses and briefs, I **FIND** that those uncontested facts set forth hereinbefore are hereby adopted by reference as Findings of Fact. In addition thereto, I **FIND** the following facts to be true:

1. At least since 1975, the Board has not employed more than eleven (11%) percent of qualified females in its administrative positions.

2. The procedure used by the screening committee was so subjective in nature that there was no test for its validity.

3. The absence of any involvement of the Board's Affirmative Action Officer, either in the development of the instruments that were used or in the actual candidate interviews, ignored the provisions of the Board's Affirmative Action Plan.

4. Vice-principal Doerr's admission that he was unaware of the Board's Affirmative Action Plan shows that the Board and its agents failed to comply with N.J.A.C. 6:4-1.8(b).

5. Vice-principal Doerr's reliance upon the physical strength of the candidates was in violation of the provisions of N.J.A.C. 6:4-1.6.

6. There is nothing in the herein record to support Mr. Sciarappa's statement to the Board that he checked with the Affirmative Action Officer prior to making the recommendation to the Board that it employ Mr. Pollock. (P-8)

The New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq. declares, in part, that it is an unlawful practice "for an employer, because of the . . . sex of any individual . . . to refuse to hire or employ . . . such individual." [N.J.S.A. 10:5-12(a)]

The New Jersey State Board of Education, at N.J.A.C. 6:4-1.6, promulgated regulations which provide that:

> (a) All persons regardless of race, color, creed, religion, sex, or national origin shall have equal access to all categories of employment in the public educational system of New Jersey.
>
> (b) All New Jersey public school districts shall comply with all State and Federal laws related to equal employment. . . .

Based upon the foregoing, I **FIND** that there was no substantive data upon which the Board could have reasonably concluded that the successful male candidate had superior qualifications over the female candidates for the position of vice-principal.

Having so found, I **CONCLUDE** that the Board was in violation of N.J.S.A. 6:4-1.6 et seq. and its own Affirmative Action Plan.

With regard to petitioner's prayer for relief that, "(1) Vice Principal Pollock be removed from his position . . . [and,] (2) Petitioner Garvin be placed in the position in question, with back pay to the first day of Vice Principal Pollock's appointment," such actions would, under the facts and circumstances herein, be inappropriate. While there was a showing that the Board violated the Affirmative Action regulations, there was no showing herein that petitioner was, indeed, better qualified than any of the other candidates. On that basis alone, petitioner's prayer for relief is rejected. Griggs v. Duke Power Co., 401 U.S. 424 (1971); Ronald J. Perry v. Bd. of Ed. of River Dell Reg. H.S. Dist., (N.J. App. Div., Apr. 8, 1981, A-3476-79).

Accordingly, the herein 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 0871-80

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

2 June 1981
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

4 June 1981
DATE

Seymour Lewis
DEPARTMENT OF EDUCATION

Mailed To Parties:

June 8, 1981
DATE

Ronald L. Parker/pd
OFFICE OF ADMINISTRATIVE LAW

ms

DOCUMENTS IN EVIDENCE

P-1 Questions For Secondary Vice-Principal Interview

P-2 Final Interview Agenda

P-3 Memorandum to all applicants from Mr. Robert G. Lewis, dated September 17, 1979, Job Description, Assistant/Vice-Principal

P-4 Questions For Secondary Vice-Principal Interview, candidate, Robert Pollock, initials, W. F. Doerr

P-5 Questions For Secondary Vice-Principal Interview, Ann Garvin, by W. F. Doerr

P-6 Questions For Secondary Vice-Principal Interview, Dr. Annie Garvin, September 21, 1979, by Mr. Sciarappa

P-7 Final Interview Agenda, Dr. Annie Garvin, September 26, 1979, by Mr. Sciarappa

P-8 Page 2, Closed Conference Meeting, October 3, 1979 [Four (4) pages]

P-9 Final Interview Agenda, Ann Garvin, by Mr. Lewis

P-10 Final Interview Agenda, Dr. Garvin, by Mr. Doerr

P-11 Final Interview Agenda, C. D'Zio, by Mr. Doerr

P-12 Final Interview Agenda, Carol D'Zio, by Mr. Lewis

P-13 Final Interview Agenda, Carol D'Zio, by Mr. Sciarappa

P-14 Final Interview Agenda, Robert Pollock, by Mr. Lewis

P-15 Final Interview Agenda, Robert Pollock, by Mr. Doerr

P-16 Final Interview Agenda, Robert Pollock, by Mr. Sciarappa

P-17 Final Interview Agenda, Bernie Reider, by Mr. Lewis

P-18 Final Interview Agenda, Bernie Reider, by Mr. Doerr

P-19 Final Interview Agenda, Bernie Reider, by Mr. Sciarappa

P-20 Letter to Frank Morra, Gardner Attlee, R. E. Shaw and Robert Pollock from James McCarthy, dated June 22, 1973

P-21 Letter to Dr. Ann Garvin from Screening Committee, dated September 25, 1979

P-22 Letter to Dr. Annie K. Garvin from Screening Committee, dated September 27, 1979

P-23 Memorandum to Screening Committee from Carol L. D'Zio and Annie K. Garvin, dated September 28, 1979

P-24 Letter to Dr. Annie K. Garvin from Screening Committee, dated October 3, 1979

P-25 Resume of Annie K. Garvin

P-26 Memorandum to the Board of Education from the Screening Committee, dated September 27, 1979

R-1 Deposition of Robert Lewis taken on July 29, 1980

R-2 Six-page resume of Robert W. Pollock

R-3 Letter application of Robert W. Pollock, Jr., dated September 7, 1979

R-4 Letter application of Carol L. D'Zio, dated September 5, 1979

R-5 Letter application of B. Reider, dated September 12, 1979

ANNIE K. GARVIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF JACKSON, OCEAN 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 argues that the Honorable Lillard E. Law, ALJ erred in his determination, ante, that "***there was no showing herein that petitioner was, indeed, better qualified than any of the other candidates. On that basis alone, petitioner's prayer for relief is rejected.***" Petitioner contends that she has been subject to unlawful discrimination because of her sex and relies on Flanders v. William Paterson College of New Jersey, 163 N.J. Super. 225 (App. Div. 1976). Petitioner argues that the Commissioner must rectify the injustice created by the Board's action. The Commissioner does not agree.

Petitioner's argument ignores the fact that she was not the only female candidate for the position. Assuming arguendo the validity of petitioner's argument, there is nothing in the record to convince the Commissioner that petitioner's experience and qualifications are superior to the other female candidate.

This does not preclude a warning to the Board that, whereas it has established an Affirmative Action Plan, prudent policy mandates adherence to the Plan and the active involvement of the Affirmative Action Officer in staffing needs.

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

July 15, 1981

ANNIE K. GARVIN,

PETITIONER-APPELLANT,

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE TOWNSHIP OF JACKSON, OCEAN COUNTY, : DECISION

RESPONDENT-RESPONDENT.

Decided by the Commissioner of Education, July 15, 1981

For the Petitioner-Appellant, Katzenbach, Gildea & Rudner (Arnold M. Mellk, Esq., of Counsel)

For the Respondent-Respondent, Russo, Courtney & Foster (Leonard W. Roeber, Esq., of Counsel)

The decision of the Commissioner is affirmed for the reasons stated therein.

Because of the finding below that the Board was in violation of N.J.A.C. 6:4-1.6 et seq. and its own Affirmative Action Plan, the County Superintendent of Ocean County is hereby requested to review the Jackson Board's Affirmative Action Policy and to monitor its implementation until he is satisfied that the Board is in compliance with our regulations governing affirmative action.

Mateo DeCardenas abstained in the matter.

December 2, 1981

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3060-80
AGENCY DKT. NO. 193-4/80A

IN THE MATTER OF:

VINCENT GERMINARIO, JOSEPH GERMINARIO, WILLIAM J. WOODS and RONALD GASTELU,
Petitioners,
v.
HOBOKEN BOARD OF EDUCATION,
Respondent.

Record Closed: March 11, 1981
Received by Agency: 6/2/81

Decided: 5/29/81
Mailed to Parties: 6/3/81

APPEARANCES:

William A. Cambria, Esq., for Petitioners
(Sauer, Boyle, Dwyer, Canellis & Cambria, attorneys)

Philip Rosenbach, Esq., for Respondent
(Lowenstein, Sandler, Brochin, Kohl, Fisher, & Boylan, attorneys)

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

This matter concerns the propriety of the deduction by the respondent, Hoboken Board of Education, of one-half day's pay from the salary otherwise due to three teachers who walked out of a meeting which they were required to attend. Only a

nominal amount of money is involved: the total salary withheld from all these petitioners amounts to $156. The correctness of the Board's action depends upon whether the withholding is regarded as a "reduction in compensation" prohibited by N.J.S.A. 18A:6-10 without the bringing of formal tenure charges or as merely a nonpayment of salary because of an illegal absence. Petitioners contend that they were within their contractual rights under the collective negotiations agreement when they left the meeting before its conclusion. They further claim that the Board's decision to penalize some but not all of the teachers who did not stay for the entire meeting constitutes discrimination against those selected for punishment. On the other hand, the Board maintains that petitioners deliberately disrupted legitimate school business and that under the law it had no choice except to refuse to pay for services which were not rendered.

On April 29, 1980, Vincent Germinario, Joseph Germinario and William J. Woods filed a verified complaint with the Commissioner of Education seeking restoration of amounts withheld from their salaries and removal of letters of reprimand which supposedly had been placed in their personnel files.* Originally, a fourth party, Ronald Gastelu, joined in the petition, but he voluntarily withdrew from the case prior to the hearing. 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 hearing was held on February 10, 1981. 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 from both parties, the record was closed as of March 11, 1981. By order entered pursuant to N.J.A.C. 1:1-16.6, the time for completion of the initial decision has been extended.

UNCONTESTED FACTS

Most of the operative facts are undisputed and may be succinctly summarized. All three petitioners are tenured teaching staff members employed by the Board and assigned during the 1979-80 school year to duties at Hoboken High School. Vincent Germinario is an activist in the Hoboken Federation of Teachers who in the past has instituted various grievances and other litigation against the Board. Both of the remaining petitioners are also prominent members of the Federation, although neither of them has ever participated in any grievance proceeding.

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* At the hearing it was learned that none of the letters had yet been placed in petitioners' personnel files. Nevertheless, the Board announced its intention to remedy this omission in the event that it is successful in this litigation.

Each year the district conducts an in-service training session or workshop for its faculty, known as Institute Day. As described by the school administration, the purpose of Institute Day is to help teachers meet the state mandate of providing a thorough and efficient education for every student, to review the results of the minimum basic skills test and to discuss strengths and weaknesses of the educational program. It is a regularly scheduled event listed in the administrative calendar prepared for 1979-80 as well as prior school years.

Vincent Germinario first became aware of the actual hours for the Institute Day to be held on February 6, 1980 when the time schedule was posted on a bulletin board some two or three days in advance of the planned meeting. Germinario noted what he felt were clear violations of certain provisions of the agreement governing working conditions for teachers in the district. In particular, he was disturbed that the meeting would commence more than ten minutes after the last student dismissal, would exceed 45 minutes in duration and would continue beyond the 3:14 p.m. dismissal time (all of which he viewed as contrary to the express language of Article 8 of the controlling agreement between the Board and the Hoboken Teacher's Association).

Soon thereafter, on or about February 4, 1980, he visited the principal's office and complained to vice principals Anthony Kolich and Carlotta Winslow about the alleged violations. However, he stopped short of filing a formal written grievance as provided under the agreement or informing the vice principals of his intention to leave at the normal school closing time regardless of whether the meeting was actually over. While testimony differed on whether Vincent Germinario asked the vice principals to communicate his complaint to the principal, it is undisputed that Kolich promptly brought the problem to the principal's attention. But the principal took no action to resolve Germinario's objections. Neither of the other petitioners made any complaints to the administrative staff prior to the occurrence of the meeting, nor did they announce their intention to leave early if the meeting lasted longer than 3:14 p.m.

On February 6, 1980 petitioners arrived at work on time and taught all their assigned classes, which were scheduled to end that day at shortly before 1:00 p.m. so that everyone could attend Institute Day. At 2:00 p.m., petitioners gathered together with other teachers for a large group meeting held in the high school cafeteria. After opening remarks followed by a discussion of general interest, the large group broke down by department into smaller groups for consideration of matters of specific concern to

individual teachers. Petitioners belonged to the social studies department and were seated at one of the tables in the cafeteria for a small group meeting led by vice principal Kolich and the department head. At approximately 3:15 p.m., petitioners got up from their chairs, put on their coats and left the premises. At around the same time, other teachers participating in separate meetings taking place in the cafeteria and elsewhere in the building also made their exits. Altogether 16 teachers simultaneously left the meetings they were attending. Just before petitioners left, Kolich warned them that the meeting was not yet officially completed. Although Vincent Germinario replied, "Thank you" (indicating that he had heard and understood the warning), he and the other petitioners proceeded to leave anyway in defiance of their supervisor's instructions. Another teacher who had started to leave the social studies group along with petitioners sat down again as soon as Kolich explained that the meeting was not finished.

CONTESTED FACTS

One of the major areas of factual disagreement was the effect on the meeting when petitioners walked out. Petitioners insisted that the social studies group had already completed its discussion by the time they left. According to Vincent Germinario, he was sitting close to the exit and left "quietly."

Of course, petitioners did not stay to witness the impact of their leaving upon the meetings in progress. Kolich recalled that the social studies group was in the process of discussing history aids for teaching urban studies when petitioners suddenly departed. Once they had gone, the group discussion turned from the subject on the agenda to an evaluation of what had just occurred.

As the teachers were leaving the cafeteria, the principal of the high school, Joseph Buda, rushed to the microphone in the front room and tried to stop as many as possible. He directed that attendance be taken and then engaged in a question-and-answer session with the remaining teachers. Buda testified that the walkout had disrupted the trend of the small group meeting he had been observing. He personally felt that his train of thought had been interrupted. Instead of continuing with the planned program, he spent the rest of the meeting collecting suggestions from the audience on what went wrong. Estimates of what time the meeting finally concluded vary from 3:35 p.m. to 4:00 p.m., with most witnesses agreeing that it was sometime around 3:45 p.m.

A second major area of factual disagreement involved whether the Board discriminated against petitioners by unfairly treating them differently from other participants in the walkout. It is petitioners' belief that they were singled out for punishment because of their pro-labor activities in connection with the Hoboken Federation of Teachers, although Vincent Germinario could name only four of the supposedly favored teachers who were not members of the same organization.

The day after the meeting Buda sent a letter demanding an explanation to all 16 teachers known to have left early. Responses were received from only three teachers, while the others, including petitioners, simply ignored the request. Within a week, Buda distributed a second letter directing those who had not answered to provide a written response before the end of the day. Due to the absence of Vincent Germinario on that day, Buda sent him a third letter identical to the second. None of the petitioners made any response to the follow-up letters. Seven of the other teachers also chose not to respond, but they were not subject to punishment of any kind by the Board.

In justification of the Board's action, George R. Maier, superintendent of schools, explained that the three petitioners and Gastelu were the only offenders who had been directly warned by an administrator that the meeting was not officially ended. An investigation into the circumstances revealed that because of confusion occasioned by the walkout there may have existed a genuine misunderstanding on the part of some teachers as to whether the meeting was over. Unlike the others, however, petitioners and Gastelu had no possible excuse for disregarding the explicit warning of Kolich. Consequently, Maier considered these four to be the "greatest violators." He recommended to the Board that they alone suffer any penalty and that the other likely offenders be given the benefit of the doubt.

With respect to those facts in dispute, I **FIND** the following:

1. When petitioners abruptly left Institute Day on February 6, 1980, the social studies group they were attending was still in the midst of its discussions. Similarly, other small groups in the cafeteria were still conducting ongoing discussions.

2. From the fact that petitioners had been warned by their supervisor that the meeting was not officially ended, I infer that they deliberately intended to disrupt the meeting.

3. Petitioners left the meeting at 3:15 p.m., one half-hour before the meeting came to an end at around 3:45 p.m.

4. As a result of petitioners and others leaving before the meeting was over, the continuity of the program was seriously interrupted and topics remaining to be covered were never reached.

5. In determining whom to punish for leaving early, the Board drew a reasonable distinction between those who had received prior warning that the meeting was not officially over and those who had not received such warning.

6. Proofs were inadequate to establish that petitioners were discriminated against by reason of their activities on behalf of the Hoboken Federation of Teachers.

7. Members of the Hoboken Federation of Teachers who did not receive a suitable warning were not punished even though they left the meeting early.

LEGAL CONCLUSIONS

Based on the facts developed at the hearing and the applicable law, I **CONCLUDE** that the Board acted improperly when it unilaterally refused to pay a portion of petitioners' salaries.

At the outset, it must be emphasized that petitioners failed to pursue the appropriate remedy available to resolve any dispute which may have arisen regarding their rights under the collective negotiations agreement. Doubtless if petitioners had acted more responsibly, this entire unfortunate episode could have been easily avoided. Teachers' working hours are clearly a "term and condition of employment" within the

contemplation of the Employer-Employee Relations Act, N.J.S.A. 34:13A-5.1 et seq., and therefore are the proper subject for negotiation and grievance procedures. Bd. of Ed. of Woodstown-Pilesgrove Reg. Sch. Dist. v. Woodstown-Pilesgrove Reg. Ed. Ass'n, 81 N.J. 582 (1980); Englewood Bd. of Ed. v. Englewood Teachers Ass'n, 64 N.J. 1 (1973). Under Article 3 of the 1979-80 agreement between the Board and the Hoboken Teacher's Association, any employee challenging the Board's interpretation of a contractual provision may file a written grievance with his principal. Grievance procedures established by the agreement involve three levels of review leading ultimately to arbitration. Certainly Vincent Germinario, who has filed grievances on other matters, was thoroughly familiar with the process. Rather than utilize this convenient remedy, petitioners adopted confrontational tactics which displayed both lack of respect for their supervisors and lack of concern for their students. Without condoning petitioners' unprofessional behavior, however, the outcome of this case must depend on whether the Board acted within its powers when it sought to discipline petitioners for their misconduct.

Pursuant to the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq., no tenured teaching staff member may be "reduced in compensation" unless written charges are certified by the board of education and an independent hearing is conducted before the Commissioner of Education. Basically, the role of the board of education is analogous to that of the trial jury. Separation of the prosecutorial function from the decision-making function is carefully preserved. See, In re Fulcomer, 93 N.J. Super. 404, 413 (App. Div. 1967); Hoek v. Asbury Park Bd. of Ed., 75 N.J. Super. 182 (App. Div. 1962). Here the Board acted as investigator, prosecutor and judge in the initial proceeding which culminated in the withholding of a portion of petitioners' salaries. No tenure charges have yet been preferred against petitioners and no tenure hearing has ever been held. Thus if the penalty imposed by the Board constitutes a reduction in compensation within the meaning of N.J.S.A. 18A:6-10, the action is invalid for failure to follow the required statutory procedure.

Pointing to a line of cases involving teachers' illegal strikes and work-stoppages, the Board argues that it possessed no authority to pay petitioners for their unexcused absences. For instance, in Somma v. Long Branch Bd. of Ed., 1974 S.L.D. 276, the Commissioner of Education declared that payment of salaries to teachers engaged in a one-day strike would be tantamount to a gift of public monies for services not rendered. In Highton v. Union City Bd. of Ed., 1974 S.L.D. 193, aff'd 1974 S.L.D. 207, the

Commissioner upheld the denial of two days' salary to teachers participating in a job action and further ruled that the board of education erred when it paid salary for three additional days during which the teachers were still on strike. And in Farmer v. Camden Bd. of Ed., 1967 S.L.D. 287, the Commissioner held that nonpayment of salaries of striking teachers must be considered unearned pay rather than a reduction in salary. Accord, Goldman v. Bergenfield, 1973 S.L.D. 441; Borshadel v. North Bergen Bd. of Ed., 1972 S.L.D. 353. Similarly, the Commissioner has consistently approved the forfeiture of salary of teachers who seek to extend their vacation periods by an abuse of the board's policy on sick leave, Warren v. Brooklawn Bd. of Ed., 1976 S.L.D. 980, or personal days, Greenberg v. New Brunswick Bd. of Ed., 1963 S.L.D. 59.

Our present situation is readily distinguishable from the precedent on which the Board relies. Unlike the illegal strikers or the dishonest vacationers who did not report to work, the petitioners were not absent on the date in question. They came to work on time, taught all classes assigned to them and stayed through the usual dismissal time. Indeed, they left only about 30 minutes prior to the time when they would have been released by the principal. Whereas the amount of pay deducted in the prior cases was proportional to the length of the illegal absence on the theory that the salary had not been earned, here the Board assessed a penalty greatly in excess of the salary attributable to the period of absence. Obviously the penalty was designed to punish petitioners for their insubordination, not merely to protect the public purse against payment for undelivered services. Considering the magnitude of the provocation, the Board might very well have been justified in taking such action; but in order to do so legally, it should have instituted tenure charges rather than attempting to circumvent the statutory right to notice and the opportunity for a meaningful hearing.

Insofar as petitioners' claim of invidious discrimination is concerned, the burden of proof rests squarely on the party making the allegation. Cf. Hyland v. Smollok, 137 N.J. Super. 456, 462-3 (App. Div. 1975), certif. den. 71 N.J. 328 (1976). As indicated in the factual findings above, petitioners have failed to substantiate their claim that they were treated differently on account of their membership or activities in a labor organization.

Finally, petitioners cite no authority in support of the proposition that the Board should be prohibited from placing letters of reprimand in their personnel file. By virtue of N.J.S.A. 18A:11-1(c) and (d), a board of education is vested with general authority to manage the public schools and to regulate the conduct of its employees. To

implement its powers, the Board is entitled to keep records on the performance of its employees in order to make informed decisions on salary increments, promotions, transfers and other managerial questions. Absent a strong showing that the Board acted unfairly or violated some specific constitutional or statutory provision, the Commissioner will not interfere with the Board's ability to carry out its management responsibilities.

For the foregoing reaons, it is **ORDERED** that the Board restore the monies withheld from each petitioner.

And further **ORDERED** that the remaining relief requested by petitioners is denied.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF EDUCATION, FRED G. BURKE,** who 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.

5/29/81
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

June 2, 1981
DATE

Seymour Weis
DEPARTMENT OF EDUCATION

Mailed To Parties:

June 3, 1981
DATE

Ronald L. Parker/gb
FOR OFFICE OF ADMINISTRATIVE LAW

gb
bb

APPENDIX

LIST OF WITNESSES

1. Vincent Germinario
2. Joseph Germinario
3. William Woods
4. Richard Martinelli
5. Joseph Buda
6. Anthony Kolich
7. Carlotta Winslow
8. George R. Maier

LIST OF EXHIBITS

EXHIBIT NO.	DESCRIPTION
J-1	Copy of the 1979-80 Agreement between the Hoboken Board of Education and the Hoboken Teacher's Association
J-2	Copy of a letter dated March 20, 1980 to Mr. Woods from George R. Maier
J-3	Copy of a letter dated March 20, 1980 to Mr. Germinario from George R. Maier
J-4A	Copy of a letter dated February 7, 1980 to Vincent Germinario from Joseph P. Buda
J-4B	Copy of a letter dated February 7, 1980 to Joseph Germinario from Joseph P. Buda
J-4C	Copy of a letter dated February 7, 1980 to William Woods from Joseph P. Buda
J-5A	Copy of a letter dated February 15, 1980 to Vincent Germinario from Joseph P. Buda
J-5B	Copy of a letter dated February 15, 1980 to Joseph Germinario from Joseph P. Buda
J-5C	Copy of a letter dated February 15, 1980 to William Woods from Joseph P. Buda
J-6	Copy of a letter dated February 19, 1980 to Vincent Germinario from Joseph P. Buda
J-7	Copy of an Inter-Office Communication dated January 24, 1980 re: Institute Day from George R. Maier
J-8	Copy of T & E Agenda dated February 6, 1980
J-9	Copy of Bell Schedule for Institute Day dated February 6, 1980
J-10	Copy of a Memo dated March 4, 1980 to Grace Corrigan from George R. Maier re: Salary Deductions
J-11	Copy of portions of the Minutes of the Meeting of the Board of Education of Hoboken on March 11, 1980

(EXHIBITS CONTINUED)

J-12	Copy of a letter dated February 15, 1980 to Patrick Carabellese from Joseph P. Buda
J-13	Copy of a handwritten letter dated February 15, 1980 to Mr. Buda
J-14	Copy of a handwritten letter dated February 15, 1980 to Mr. Buda from James McGavin.
J-15	Copy of a letter dated February 7, 1980 to Nicholas Protomastro from Joseph P. Buda
J-16	Copy of a letter dated February 7, 1980 to John Calabrese from Joseph P. Buda
J-17	Copy of a letter dated February 7, 1980 to Ronald Dario from Joseph P. Buda
J-18	Copy of a letter dated February 10, 1980 to Ronald Gastelu from Joseph P. Buda
J-19	Copy of a handwritten letter dated February 15, 1980 to Mr. Buda from Jean Gandolfo
J-20	Copy of a handwritten letter dated February 15, 1980 to Mr. Buda from Louise Mongiello
R-1	Copy of a letter dated February 11, 1980 to George Maier from Joseph P. Buda
R-2	Copy of a letter dated February 15, 1980 to George Maier from Joseph P. Buda

VINCENT GERMINARIO, JOSEPH GERMINARIO, WILLIAM J. WOODS AND RONALD GASTELU,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF HOBOKEN, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the entire record of the matter controverted herein incuding 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 Ken R. Springer, ALJ that the Board restore the monies withheld from petitioners. The Board argues that it is without authority to pay teaching staff members for services not rendered. Petitioners in their reply exceptions refute those of the Board and argue that Judge Springer erred by not barring the placement of letters of reprimand from petitioners' personnel files.

The Commissioner finds no merit in the Board's arguments. The record herein is clear; petitioners did not refuse to teach classes nor did they fail to observe the contractual hours for arrival and dismissal. The Commissioner finds the action of the Board in assessing a half day's pay for the approximate thirty minutes' absentation by petitioners from the administrative meeting to be impermissibly punitive in nature.

The Commissioner cannot agree with petitioners' arguments that they are immune from reprimand because they were not ordered to stay in the meeting. The record clearly shows that petitioners were warned that the meeting was not officially ended. To claim, as petitioners do, that such warning did not constitute instruction to stay, begs the literal meaning of the words. Petitioners on one hand claim to "hew to the line" of the contractual language strictly read concerning the length of the school day but fail to follow procedural guidelines specified by contractual language in filing a grievance on the matter presently controverted. Petitioners cannot have it both ways.

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 restore the monies withheld from each petitioner. Other relief requested by petitioners is denied.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

July 17, 1981

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. —
AGENCY DKT. NO. 415-11/78

IN THE MATTER OF:

ELMWOOD PARK EDUCATION ASSOCIATION,
Petitioner
v.
ELMWOOD PARK BOARD OF EDUCATION, BERGEN COUNTY,
Respondent.

APPEARANCES:

Louis Bucceri, Esq., for Petitioner (Goldberg & Simon, attorneys)

Stanley Turitz, Esq., for Respondent

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

This is an action by the Elmwood Park Education Association (Association) for an order voiding a certain Elmwood Park Board of Education (Board) policy concerning withheld salary and adjustment increments.

The matter was opened before the Commissioner of Education. It was transmitted to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. The matter proceeds on cross-motions for summary judgment, supported by exhibits, briefs and transcript of oral argument.

I

On August 29, 1978, the Elmwood Park Board of Education adopted an amendment to its policy 4141.1. This policy deals with salary increments of professional personnel employed by the Board. In its original form, the policy concerned the procedures to be followed in effecting a withholding of increment(s) and in effecting a restoration of an increment or increments withheld.

The first section, not amended, comports with statutory and case law governing withholdings. The second section treats of restorations. Before amendment, it read as follows:

> Increments Restored
>
> Once a salary increment has been withheld, it may be regained by the employee following a favorable recommendation of the building principal and the Superintendent of Schools. Recommendations for the restoration of the increment may be made after a period of one year, with the payment being divided over the next two (2) annual contracts.

The amendment of August 29, 1978, added the following language:

> Recommendation for the restoration of a withheld increment may be made only once by the Superintendent of Schools and within two calendar years after the action of withholding.

It is the amendment only that is in contention.

II

The Association maintains this provision binds a future board of education to a prior board's decision regarding restoration, or not, of a withheld increment. This violates N.J.S.A. 18A:29-4.1 and applicable decisions of the Commissioner of Education. See, e.g., Cummings v. Pompton Lakes Bd. of Ed., 1966 S.L.D. 155; Holroyd v. Audubon Bd. of Ed., 1971 S.L.D. 214; Procopio v. Wildwood Bd. of Ed., 1975 S.L.D. 807, aff'd State Bd. of Ed. 1975 S.L.D. 1161.

The cited statute creates power in the board of education to adopt salary policies and specifies the precise extent to which successor boards may be bound by the adoption. In pertinent part, the statute states, "Such policy and schedules shall be binding upon the adopting board and upon all future boards in the same district for a period of two years. . . ."

The amended policy bars action by a future board beyond two years after a withholding has been effected. By invoking the policy, a board illegally usurps the power of its successors to restore an employee to position on the salary guide. No board may do such a thing without express statutory authority.

III

The Board contends it has clear statutory power to withhold salary increments (N.J.S.A. 18A:29-14) and the statute additionally provides, "It shall not be mandatory upon the board of education to pay any such denied increment in any future year as an adjustment increment." This being so, it is within a board's authority to place limitations on how and when an increment may be restored, in light of the fact that it does not have to restore the increment at all.

The Board contends also that any succeeding board has the right and ability to modify or repeal any existing policy. The policy in question merely sets forth certain procedures which must be followed before an employment increment may be restored. The Board therefore argues its policy is a reasonable exercise of its discretionary authority and is entitled to a presumption of correctness. Kopera v. W. Orange Bd. of Ed., 60 N.J. Super. 288 (App. Div. 1960)

IV

A board of education is a creature of the Legislature. It may do such things as it is authorized to do by the Legislature or, through the Legislature, by the State Board of Education or the Commissioner of Education. It cannot do what it is not authorized to do. The absence of a prohibition is not enough; an authorization is required.

It is well established that a board of education is a noncontinuous body, whose authority is limited to its own official life and whose actions can bind its successors only

in those ways and to the extent expressly provided by statute. McLean v. Glen Ridge Bd. of Ed., 1973 S.L.D. 217, 225. N.J.S.A. 18A:29-4.1 provides boards with authority to adopt a salary policy affecting teaching staff members for two years and N.J.S.A. 18A:17-15 provides boards with authority to appoint a superintendent of schools for a period not to exceed five years, for example.

No authority can be found for adopting a nonsalary policy, as in this case, having an effective span of application greater than the life of the board adopting it. The subject policy is, on its face, ultra vires.

An ultra vires action may be ratified, of course, by a successor board. Kiamie v. Cranford Bd. of Ed., 1974 S.L.D. 218, aff'd St. Bd. of Ed. 1974 S.L.D. 225. This raises a serious practical problem, however. At each reorganization meeting of a board, (N.J.S.A. 18A:10-3) it is a nearly universal practice to adopt and ratify the actions of the predecessor board. This is a necessary expedient. Boards could not reasonably be expected to act anew on each action that has gone before. Yet the expedient is not without its pitfalls and the present case is a clear example of what dangers lurk in a summary, albeit expedient, act.

The Association's argument that the policy illegally takes from successor boards their power to restore a withheld increment is a compelling one. It is, indeed, not mandatory upon the board to pay the denied increment in any future year (N.J.S.A. 18A:29-14), but a future board cannot be denied the right to make restoration if, in its judgment, that is appropriate.

That a board is free to modify or repeal existing policy is not the issue. What is central to this matter is that an action ought not to be taken in the first place unless authorized by statute, when its effect exceeds the life of the current board and binds future boards.

In light of the above discussion and having carefully reviewed and weighed the arguments of counsel, I **FIND** and **CONCLUDE** that the action taken by the Elmwood Park Board of Education adopting the August 29, 1978, amendment of policy 4141.1 was an action beyond the scope of powers legislatively invested in boards of education.

Accordingly, that portion of the policy is void and of no effect. It is so **ORDERED.**

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.

29 JUNE 1981
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

30 June 1981
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

July 7, 1981
DATE

Elizabeth J. Leyden, Cl.
OFFICE OF ADMINISTRATIVE LAW

ms

ELMWOOD PARK EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ELMWOOD PARK, 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 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 amendment of Board policy 4141.1 is declared void and of no effect.

The Commissioner so holds.

COMMISSIONER OF EDUCATION

August 10, 1981

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6578-80
AGENCY DKT. NO. 487-9/80A

IN THE MATHER OF:

DAVID REY,
Petitioner
v.
BOARD OF EDUCATION OF THE CITY OF PERTH AMBOY, MIDDLESEX COUNTY,
Respondent.

Record Closed: May 29, 1981
Received by Agency: July 19, 1981

Decided: July 8, 1981
Mailed to Parties: July 14, 1981

APPEARANCES:

J. Alan Gumbs, Esq. (Gumbs & Grad, attorneys) for Petitioner

Alfred D. Antonio, Esq. (Antonio & Flynn, attorneys) for Respondent

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

Petitioner, a vice principal employed by the Perth Amboy Board of Education (Board), appeals as arbitrary, capricious, discriminatory and without rational basis, an action of the Board during July 1980, appointing a candidate other than himself to an elementary school principalship. The Board, conversely, contends that its selection of an applicant other than petitioner was a legal exercise of its statutory authority and duty to appoint the candidate it believed, after careful consideration of the qualifications of all candidates, was best qualified for the position.

PROCEDURAL RECITATION:

After the pleadings had been filed during September and October 1980, the Commissioner, on October 22, 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. A plenary hearing was conducted in Perth Amboy, New Jersey, on April 1, 1981 and May 29, 1981. Counsel gave oral summations at the end of the second day of hearing, thereby completing the record.

UNCONTROVERTED FACTS:

I **FIND** the following to be the uncontested facts which reveal the contextual setting of the dispute:

Petitioner, during his twenty-three (23) years of employment with the Board as a teaching staff member, has been assigned as a properly certified vice principal for the past twelve (12) years. When he applied for a posted principalship vacancy during 1980, a female candidate who had served under him, and who had less administrative experience than he, was unanimously recommended on June 25 by both the Superintendent and the Board's personnel committee (R-12) and was appointed by the Board on June 30, 1980. After notice was given to petitioner and the successful candidate, the Petition of Appeal was filed in timely fashion.

TESTIMONY OF WITNESSES:

Petitioner testified that, when he had first been assigned as a vice principal to School No. 10 in 1969, he shared for six years the full range of administrative duties and supervision of programs with the principal. He testified that he had successfully applied knowledge gained from his research to reduce the number of failures, retentions, and discipline problems at that school by improving the system of instruction. He testified that, as a result, the reading performance of pupils at School No. 10 went from the lowest to the highest in the system within three (3) years. He testified that it was also through his efforts after reassignment to the Board's McGinnis School in 1975 that similar improvements in instruction and discipline were achieved. He also testified that his

experience as a part-time administrator at Rutgers' Newark campus, where he directs an evening school learning center, has provided him with invaluable administrative experience.

Two (2) deans of the Rutgers University College at Newark were called by petitioner and testified that petitioner had directed Rutgers' evening school learning center, directed its tutorial program, maintained excellent records and was a decisive, punctual and precise administrator.

An assistant director of elementary education from the New Jersey Department of Education testified that he had noted much improvement in the program at School No. 10 under petitioner's leadership. He testified that as the result of innovative grouping established by petitioner, he had recommended that teachers from other schools go to School No. 10 to observe.

A teacher who had worked in a State-funded remedial program testified that she always found the program under petitioner's direction to be well organized, well scheduled, and supplied with well-defined goals and safety precautions. Another teacher who had worked under petitioner for seven (7) years at the McGinnis School testified that she had had only one problem in all of that time with petitioner's handling of discipline at that school. Similar testimony was elicited from two other subordinates of petitioner. They testified that he is fair, punctual, helpful and supportive and that they know of no instances when he inflicted corporal punishment on pupils.

In regard to charges of corporal punishment which had been preferred against him by the Superintendent, petitioner testified that, in remonstrating with a boy who had hit another pupil, he had merely given the boy a "non-hard" whack to impress on him that he should not abuse other pupils.

Called as a Board witness, a Division of Youth and Family Services (DYFS) social worker testified that he had been called by the parent of a pupil to investigate the alleged corporal punishment of his child by petitioner (R-1, 2). He testified that on both of his visits to the school, petitioner had denied inflicting corporal punishment on the pupil whom he had admonished for striking another child. He testified and wrote in his report that after his investigation, he was unable to conclude whether petitioner had indeed inflicted corporal punishment on the pupil (R-1).

The Superintendent, as the Board's final witness, testified that, in response to his inquiries into allegations of corporal punishment, petitioner had responded in writing that he had given the pupil ". . .an opportunity to experience two non-hard hits while [R] was present and told [R] to let me know if [J] hit him again. . . ." (R-2, Tr. 2, p. 184). He testified that he told petitioner that although he could understand his desire to impress on [J] the need not to hit [R], his action was contrary to State law and Board policy (R-13). He testified that, after he preferred a charge of corporal punishment, to which petitioner submitted a statement on his own behalf (R-14), the Board concluded that:

> There is probable cause to credit the evidence in support of the charge, but . . . such charge is not sufficient to warrant a dismissal or reduction in salary. (R-15)

The Superintendent testified that the incident of alleged corporal punishment was but one of several reasons why he did not recommend petitioner for a principalship. He testified that:

1. He believed the successful candidate he recommended had superior resumes, evaluations and qualifications to serve as a principal (R-10A-F);

2. Petitioner had been admonished on occasion for not giving pupils due process hearings prior to suspensions;

3. Petitioner had punished pupils for actions outside the jurisdiction of the school;

4. Petitioner had violated the Federal Child Nutrition Act by using lunch period for disciplinary measures against pupils;

5. Petitioner, in October 1979, had been late in submitting free and reduced lunch data for McGinnis School (R-9);

6. Petitioner at times had not acted so as to build rapport with his subordinates on staff;

7. Petitioner had left the building without authority while summer school was in session and was required to make up time for his absences (R-7,8).

He testified that for all of those reasons he had not recommended petitioner and had not forwarded his resume to the Board.

The Superintendent also testified that petitioner was easy to get along with on a personal basis, amenable to innovative ideas, and had never been evaluated as an unsatisfactory teacher or administrator (P-2; R-3,4). He testified further that although, in his opinion, the successful candidate had superior qualifications, seven candidates had been interviewed by the Board for the position of principal.

FINDINGS OF FACT:

On the basis of a preponderance of credible evidence within the record, I **FIND** the following additional facts which, in arriving at a determination, are considered together with the uncontested facts previously set forth:

1. Petitioner had been admonished by the Superintendent on a number of occasions for actions which the Superintendent considered to be improper.

2. Petitioner had never been evaluated as unsatisfactory, either as a teacher or a vice principal.

3. The charge of corporal punishment against petitioner was never proven or disproven. By his own admission, however, he inflicted at least two (2) taps or "non-hard" hits on that pupil, an act which the Superintendent deemed improper.

4. The successful candidate's evaluations were, with one exception in 1971 through 1979, in the outstanding category (R-10A,B). Thereafter, her checklist evaluations on a revised form which provided only for satisfactory and unsatisfactory ratings, show that she was in all instances rated satisfactory.

5. During 1976 and 1979, petitioner was not evaluated in any area as outstanding. He was rated with approximately an equal number of checks in the "strong" and "satisfactory" categories.

6. Petitioner impressed a number of his subordinates as being a fair, supportive and capable vice principal. This finding is based solely on the testimony of those who testified on his behalf at the hearing.

7. The Superintendent, on the basis of a number of perceived deficiences, did not recommend petitioner for appointment as a principal. Rather, he recommended another candidate who, while having less administrative experience, he believed possessed superior qualifications for the position. This finding is grounded solely on the credible, forthright, detailed and well substantiated testimony of the Superintendent which was in no way shaken by cross-examination while on the witness stand.

DISCUSSION AND CONCLUSIONS:

Absent arbitrariness, bad faith or discrimination, a board of education has the statutory authority to exercise its discretion to determine who is best qualified to staff positions in its school, N.J.S.A. 18A:11-1. This well established principle has frequently been enunciated by the Commissioner, who has consistently held that, absent a showing of impropriety or illegality, he will not substitute his judgment for that of a local board when it acts legally within the parameters of its authority in the employment or promotion of teaching staff members. Similar holdings have been handed down by the State Board of Education and the Courts, Schinck v. Bd. of Ed. of Westwood Consol. School Dist., 60 N.J. Super. 448.

Petitioner herein alleges that the Superintendent and the Board acted arbitrarily and capriciously in selecting for its principal a staff member with less administrative experience than he. The record does not support that allegation. Rather, the record shows that the successful candidate had, for a number of years, displayed outstanding qualities and performance which, in the unbiased judgment of the Superintendent, surpassed those of petitioner. Nor is there a showing within the record that the successful candidate had ever been admonished for failing to follow regulations,

for being late in submitting required reports or data, for failure to achieve rapport with her co-workers or for having been absent without authorization. The record is replete with credible evidence that the Superintendent, in arriving at his recommendation, acted in a well reasoned manner by considering numerous facets of the strengths and weaknesses of candidates for the principalship. The record further displays that the Board's personnel committee and the entire Board conscientiously interviewed and evaluated numerous applicants before appointing the successful candidate.

That seniority of experience alone need not be the controlling factor in promoting candidates to higher positions was clearly shown by the words of the Commissioner in John J. Kane v. Hoboken Bd. of Ed., 1975 S.L.D. 12. Therein, it was held that the Hoboken Board had legally filled three principalships with candidates who had less seniority and experience than Kane who was a vice principal in the Hoboken system. In holding for the Board, the Commissioner stated:

> . . . Boards have the responsibility to appoint the most able and competent persons to fill teaching staff positions, including all administrative and supervisory positions. This is a basic responsibility through which boards of education provide what, in their judgment, is the most thorough and efficient education program possible for their pupils. See Lynch et als. v. Board of Education of the Essex County Vocational School District, Essex County, 1974 S.L.D. 1308.
>
> Petitioner has not shown that the Board acted outside its authority, nor is there any evidence to that effect. The report of the hearing examiner is, therefore, adopted in its entirety.

The Commissioner has previously stated that:

> . . . [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. . ." Boult and Harris v. Board of Education of Passaic, 1939-40 S.L.D. 7, 13, aff'd State Board of Education 1939-40 S.L.D. 15, aff'd 135 N.J.L. 329 (Sup. Ct. 1947), 136 N.J.L. 521 (E.& A. 1948). (at pp. 17-18)

Given these facts and precedents in case law as previously set forth, I reach a similar **CONCLUSION:** that the Superintendent, in arriving at his recommendation, and the Board, in arriving at its determination to employ the successful candidate, exercised their discretionary authority without arbitrariness, capriciousness, bad faith or discrimination. Accordingly, I **CONCLUDE** that the decision to employ her as their principal was in all respects legal and free of impropriety.

DETERMINATION

In consideration of the above-stated conclusions, it is **ORDERED** that the Board's appointment of the successful candidate for principal is **AFFIRMED.** It is further **ORDERED** that the Board's request that the Petition of Appeal be dismissed is **GRANTED.**

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 6578-80

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

July 8, 1981
DATE

Eric G. Errickson
ERIC G. ERRICKSON, ALJ

Receipt Acknowledged:

July 10, 1981
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

July 14, 1981
DATE

Elizabeth J. Kagan, Esq.
OFFICE OF ADMINISTRATIVE LAW

ij

DOCUMENTS IN EVIDENCE:

P-1 Sinatra to Rey, October 31, 1977

P-2 Rey's Performance Report, April 30, 1980

R-1 DYFS Report by Winkler, March 27, 1980

R-2 Rey to Sinatra, January 16, 1980

R-3 Evaluation of Rey, May 12, 1976

R-4 Evaluation of Rey, May 1, 1979

R-5 Board Policy No. 308

R-6 Board Policy No. 307

R-7 Sinatra to Rey, July 2, 1979

R-8 Rey to Sinatra, August 7, 1979

R-9 Sinatra to Rey, October 18, 1977

R-10A-F Evaluations of Renee Howard

R-11 Application of Renee Howard

R-12 Perez to Board Members, June 25, 1980

R-13 Sinatra to Rey, January 23, 1980

R-14 Rey to Roedecker, May 14, 1980

R-15 Resolution Regarding Tenure Charges, June 5, 1980

DAVID REY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PERTH AMBOY, 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 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.

COMMISSIONER OF EDUCATION

August 11, 1981

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6579-80

AGENCY DKT. NO. 442-9/80A

IN THE MATTER OF:

MINDY ROSEN

v.

BOARD OF EDUCATION

OF BAYONNE

Record Closed: June 15, 1981

Received by Agency: July 13, 1981

Decided: July 9, 1981

Mailed to Parties: July 14, 1981

APPEARANCES:

Herbert L. Zeik, Esq., for Petitioner

John V. Gill, Esq., for Respondent

BEFORE **ELINOR R. REINER**, ALJ:

Petitioner, Mindy Rosen, filed a Verified Petition with the Commissioner of Education alleging that the Board of Education of the City of Bayonne, et al. (respondent) improperly denied her graduation status from Bayonne High School, class of 1980. Specifically, petitioner asserted that the failing mark she received in U.S. History II in her senior year, which resulted in her being denied a high school diploma and graduation

from Bayonne High School with the class of 1980, was unjust. Her argument centered on the manner in which she was required, upon her return to Bayonne High School after a period of illness, to fulfill the requirements of U.S. History II.

After respondent filed an answer requesting that the petition be dismissed, 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 January 5, 1981, at which time the following issues were isolated:

1. Did respondent act arbitrarily and capriciously in denying petitioner her high school diploma and graduation status from Bayonne High School, class of 1980?

2. Did respondent act improperly in changing petitioner's grade in U.S. History II from "absent" to "poor" for the fifth marking period?

3. Should the home instruction teacher's grade for the sixth marking period be petitioner's final grade for that period?

4. Did respondent fail to exercise its legal obligations with regard to petitioner's illness?

5. Was it unreasonable for respondent to require petitioner, after her return to school, to take three examinations in U.S. History II for the fifth and sixth marking periods in a period of one week?

At the hearing held in this matter on March 24 and 25, 1981, the parties stipulated to the following facts:

1. Petitioner was a senior at Bayonne High School, class of 1979-80.

2. The term of the 1979-80 school year was separated into six marking periods, which ended on the following dates:

   a) October 24, 1979

   b) December 12, 1979

   c) January 30, 1980

   d) March 12, 1980

   e) May 7, 1980

   f) June 11, 1980

3. Petitioner received a mark of poor in U.S. History II for the first marking period. For the second marking period, petitioner received an absent, which was changed to a C. For the third marking period, petitioner received a C+. For the fourth marking period, petitioner received a C.

4. After the fourth marking period, and on or about March 28, 1980, petitioner contracted contagious mononucleosis and was absent from March 28, 1980 until June 2, 1980.

5. School was closed from April 3, 1980 until April 13, 1980 for Easter recess.

6. Petitioner was under the care of Dr. West, whose certificate, dated June 13, 1980, is P-1 in evidence.

7. On or about May 6, 1980, petitioner and her mother were advised by Dr. West that the contagious portion had ended and petitioner could receive home instruction.

8. On May 9, 1980, petitioner's mother called the school to notify it that Mindy was eligible for home instruction.

The guidance counsellor, Mrs. Parlavecchio, advised Mrs. Rosen that something in writing was needed in order for petitioner to receive home instruction.

9. On May 12, 1980, such note was hand-delivered to the school and Mindy was advised that no one was available at that time, but every effort would be used to obtain home instruction for her.

10. On May 15, 1980, Janine Harris, the home instruction teacher, appeared at petitioner's home to begin home instruction, which continued from May 15 to May 30.

11. On May 30, 1980 Mrs. Harris advised petitioner and her parents that home instruction would end and she would not return.

12. The home instructor's report dated June 4, 1980 was received into evidence (J-2).

13. On June 2, 1980, petitioner returned to Bayonne High School and, as ordered, produced a certificate from Dr. West, which was filed with the school (P-3 in evidence).

14. After returning to school, petitioner went to her classes. However, at no time did a school doctor examine the petitioner while at home or when she returned to school.

15. On June 2, 1980, petitioner returned to U.S. History II, taught by Mrs. Cerro. Petitioner attended U.S. History II on June 3, 1980. On Wednesday, June 4, 1980, the document (P-4) was signed by petitioner and Mrs. Cerro.

16. That document sets forth in detail a schedule of testing dates commencing on June 5, 1980 and extending through June 11, 1980.

17. The tests were taken both before, during and after the final exam, which was given June 6 and June 11.

18. Petitioner received a mark of 84 on the objective portion of the final exam given June 6, 1980 and petitioner received a mark of C (representing a 70) on the second portion of the exam dated June 11, 1980.

19. Petitioner passed every subject for the school year other than U.S. History II.

20. Petitioner received a final report card (P-5 in evidence).

21. No child study team was ever sent to see petitioner during the period of her illness.

In addition, it became apparent at the hearing that the following facts were uncontroverted and are thus found as fact:

1. On or about April 16 or April 17, petitioner's mother advised Mrs. Parlavecchio, the guidance counsellor at respondent, that Mindy was ill. As a result, prior to the time home instruction could begin, homework assignments were sent home for petitioner to complete.

2. Mrs. Harris, the home instruction teacher, gave petitioner a test in U.S. History II.

3. Mrs. Parlavecchio had frequent conversations about petitioner's health and schoolwork, both with petitioner's parents and her teachers.

4. During the sixth marking period, Mrs. Cerro taught petitioner from June 2 to June 11 (eight days), while Mrs. Harris taught petitioner for 11 days.

5. After petitioner returned to school on June 2, 1980, she complained to her mother and to Mrs. Parlavecchio, her guidance counsellor, as to the amount of work Mrs. Cerro, her U.S. History II teacher, required of her.

6. Mrs. Parlavecchio advised petitioner's mother that she was determined to go along with Mrs. Cerro's requirements for petitioner in terms of makeup work and exams.

7. Petitioner was not required to make up work by Mrs. Cerro, although according to the handbook, each student is required to complete makeup assignments for all "work missed during a five day absence." "Work missed during a five day period of absence should be made up on the first five days immediately after the student returns to school."

8. Mrs. Parlavecchio determined that a schedule of tests had to be set up so that petitioner would know what was expected of her and could complete the requirements in U.S. History II before graduation. Neither Mrs. Parlavecchio nor petitioner's parents were present when petitioner signed this schedule.

9. The "poor" received by petitioner for the first marking period is numerically equivalent to a 50. The C received by petitioner for the second marking period is equivalent to a 70. The C+ for the third marking period is equivalent to a 78. The numerical equivalent for the fourth marking period was 73.

10. Mrs. Cerro computed a marking period grade by averaging the test average and the homework average. Petitioner passed none of the tests and received passing grades on the basis of homework assignments.

11. Petitioner was asked to and did make up tests on successive days on Chapters 36, 37, and 39 (20 pages each), which she failed.

12. There is no contention that the tests given by Mrs. Cerro were unfair. Rather, the tests were based on the workbooks and the work sheets. Mrs. Cerro reviewed with the class for the final directly from the exam.

13. Petitioner's final grade was computed by aggregating the grade for each marking period and the final and dividing by seven.

14. With respect to petitioner's grade in bookkeeping, petitioner received a C for the sixth marking period in bookkeeping from the home instruction teacher, which was later changed to a poor. All other marks from Harris's report are identical to the marks on petitioner's report card.

15. On June 11, 1980, petitioner received an activities award (P-1 in evidence).

16. As a result of petitioner's failure to pass U.S. History II, she was not permitted to graduate on June 16, 1980.

17. On or about June 12, 1980, Mr. and Mrs. Rosen appeared at the Graduation Review Board. The Board reviewed petitioner's grades and advised them that petitioner would not graduate, but would have to attend summer school as an alternative.

Given these undisputed facts, the issue at the hearing centered on the method by which it was determined that Mindy failed U.S. History II and, specifically, the meaning of the C+ given to Mindy by the home instruction teacher as it related to her final grade in U.S. History II.

Testifying as to the expectation that Mindy had regarding the manner in which she would be graded, Mrs. Judith Rosen testified that the home instruction teacher was supposed to bring Mindy up-to-date (she recalled that Mindy completed all assignments between April 15 and May 15 and handed them to the home instruction teacher), but Mindy would have to go to school to take her exams. On or before Memorial Day, Mrs. Rosen was advised by Mr. Weisman, Vice-Principal of Bayonne High School, that Mindy must return to school and take her exams in order to graduate. Claiming that she was not advised by either the home instruction teacher or Mr. Weisman that Mindy would have to make up tests, Mrs. Rosen recalled that Mrs. Harris told her that the final exam would be the only exam they need worry about. Mrs. Harris presumably informed her that "there was no way feasible that Mindy could make up all the tests." Moreover, Mrs. Rosen believed that Mr. Weisman meant that Mindy had to take final exams and not tests. Specifically, she recalled him stating, "I am talking strictly about final exams."

According to this witness, with respect to the fifth marking period, Mrs. Harris informed her that petitioner would receive an average of the fourth marking period and the sixth marking period. With respect to the sixth marking period, Mrs. Rosen recalled Harris informing her that she was in charge of the sixth marking period and the grade she gave Mindy was for this period. (This was so despite the fact that J-2 states that the grade is for less than 50%.)

Petitioner's testimony on the subject mirrored that of her mother. She stated that, upon her return to school, she met with her history teacher, Mrs. Cerro, and advised of Mrs. Harris's view that petitioner need only take final exams. Mrs. Cerro, however, told petitioner that she had to make up tests in order to graduate. Believing that she had to make up 16 tests, inasmuch as she had to make up Chapters 36, 37, 38 and 39, each containing four sections, petitioner informed Mrs. Cerro that she could not take all these tests in three days. Petitioner testified that she spoke to Mr. Cornelia, Chairman of the History Department, regarding the number of tests required of her and recalled that he told her that what Mrs. Cerro wanted her to do was impossible and that the grades should be averaged. Apparently, it was due to this dispute as to what petitioner should be required to complete that prompted the preparation of the schedule. Petitioner alleged that she signed the schedule while in an exhausted state, and after having apprised Mrs. Cerro of Mr. Cornelia's idea of averaging and being told, "I don't care - sign the paper."

Claiming to have been under duress when she signed the schedule, she recalled advising Mrs. Cerro that she wanted her parents to see the schedule. She testified that Cerro advised her to sign it or not graduate.

Mrs. Parlavecchio, guidance counsellor at respondent, stated that the schedule of makeups was not unreasonable, inasmuch as petitioner received work sheets during her illness. Referring to the handbook, she stated that petitioner could not have 2 and 1/2 months to make up the work, since graduation was scheduled for June 16, 1980. Although unable to recall the specifics of any other such agreements, she did state that agreements may have been employed on other occasions. Thus, she encouraged petitioner to take the tests.

Mrs. Cerro, testifying as to this issue, claimed that, after she advised petitioner that she had to make up some work for the fifth marking period, she began getting feedback that petitioner was complaining about taking 16 to 25 tests. In order to clarify the situation, inasmuch as this figure was clearly inaccurate, and due to the fact that petitioner was rebellious and did not want to complete the work (petitioner did not refer to her exhausted state), she prepared the schedule. She testified that she discussed the situation with Mr. Cornelia and recalled that he did not inform her that her requirements were unreasonable or that the two marking periods should be averaged. Contending that the schedule was not unreasonable under the circumstances (petitioner did not have to complete all assignments handed out to the students), she noted that although she offered to instruct petitioner prior to the start of the school day, petitioner arrived later to take the tests and did not avail herself of this opportunity for extra help. Mrs. Cerro noted that she also set aside time during class to review with petitioner.

The witness further testified with respect to the specific components utilized to compute the grades for the fifth and sixth marking periods. With respect to the fifth marking period, prior to the time petitioner became ill, she took two tests, one on March 17, and one on March 24, for which she received a 53 and a 40, respectively. According to Mrs. Cerro, petitioner was absent the rest of the fifth marking period. She was sent the work sheets for that period and was given a test when she returned to school on Chapter

36, sections four and five, receiving a grade of 50. Inasmuch as petitioner did not bring in her homework assignments for this marking period, she received no credit for them. Mrs. Cerro noted that she asked petitioner to bring in the assignments, knowing it would help her grade (Mrs. Cerro gave credit for the assignment whether or not the answers were correct), but petitioner never supplied them. Petitioner claimed that she did all the work that had been sent home for her to do and also the work given her by the home instruction teacher. She stated on direct examination that she showed Mrs. Cerro the completed assignments. However, she did not recall if Mrs. Harris took the completed assignments to the school. On questioning by this judge, petitioner stated that some of the assignments were brought to school by Mrs. Harris and may have been returned to petitioner, and some petitioner kept. She indicated that she "probably showed the work to Mrs. Cerro." On rebuttal, petitioner testified that she showed Mrs. Cerro homework for the sixth marking period, which Cerro returned to her the following day, but never showed Cerro the fifth marking period work because Cerro never asked for it. According to Mrs. Cerro, petitioner never showed her completed assignments that had been sent to her between April 15 and May 15.

However, Mrs. Cerro claimed that petitioner's failure to produce assignments was not counted against her. Her grade was based on the homework that was covered during the period she was present in class and the average of the tests. The average of the tests was 48, from which Mrs. Cerro deducted four points for incomplete assignments. Thus, petitioner's grade for the fifth marking period was 44.

With respect to the sixth marking period, Mrs. Cerro testified that she accepted the grade of the home instruction teacher and the amount of time the home instruction teacher taught petitioner. Thus, she accepted the grade of C+ (75) from the home instruction teacher (apparently, this took into account the mark of 80 on Chapter 38). Since home instruction and guidance advised Mrs. Cerro to count the home instruction teacher's mark as a test because it constituted less than 50% (if it constituted over 50% it would have counted as the grade for the marking period), Mrs. Cerro counted the home instruction teacher's grade as a test. Mrs. Cerro gave petitioner tests on Chapters 39 and 37 for which petitioner received a 23 and a 40, respectively. Mrs. Cerro

averaged the three tests and arrived at the grade of 46. Inasmuch as petitioner produced two assignments after she came back, five points were added to her grade and she received a grade of 51 for the sixth marking period. Mrs. Cerro testified that petitioner received all the credit for homework assignments during this marking period that she could have received.

In conclusion, Mrs. Cerro stated that she believed she gave petitioner every consideration.

Based upon a review of the testimony adduced at the hearing, the court is compelled to find that petitioner failed to carry her burden of proving that respondent's actions were arbitrary or capricious. An-issue-by-issue analysis of the points raised by petitioner confirms the correctness of this conclusion. (With respect to issue #4 raised at the prehearing, the court finds that there has been no evidence presented to indicate that respondent failed to exercise its legal obligations with regard to petitioner's illness.)

With respect to the method used by respondent to compute petitioner's final grade in U.S. History II, there is actually little dispute as to the reasonableness of computing the final grade on a straight numerical average of the six marking periods and the final examination, each counting one-seventh. While petitioner mentions the fact that such a system could have a "clearly negative bias" for a "student who has done very poorly in one or two marking periods to achieve a passing final grade in a course," petitioner admits that she has no quarrel with the reasonableness of this rule as a general matter. Petitioner correctly states that "it eliminates the possibility of a student not applying himself for the entire school year, then passing a course by passing the final examination." Actually, petitioner's argument is that in the instant circumstances, petitioner's final grade was computed with reference to "improper" grades for the fifth and sixth marking periods. It is, therefore, imperative to determine whether petitioner's grades for the fifth and sixth marking periods were improperly determined.

With respect to the fifth marking period, there is no question that prior to the time petitioner became ill, she took two tests for which she received a 53 and a 40. Petitioner testified that she expected the grade for this marking period to be an average of the fourth and the sixth marking periods. Petitioner's mother testified that she had

been so advised by Mrs. Harris, the home instruction teacher, while petitioner claimed to have received a similar response from Mr. Cornelia, Chairman of the History Department. Mrs. Cerro, on the other hand, contended that she discussed the situation with Mr. Cornelia, who did not inform her that the two marking periods should be averaged. These conversations, which fall into the category of hearsay testimony, do not seem to this court to aid in the resolution of the controversy at hand. While petitioner may have expected and hoped that the marking period could be averaged, she was certainly advised upon her return to school that this would not be the case. Moreover, she was advised, contrary to her expectations, that she would be required to make up tests. Apparently, petitioner was so upset by this requirement that Mrs. Cerro, in order to clarify the make-up schedule, prepared a schedule of tests which petitioner signed. Petitioner would have this court find that she signed this schedule (J-4 in evidence) while under duress. However, such a finding appears to this court not to be relevant to the issues herein. Whether petitioner signed the schedule while under duress might be essential to determine if petitioner were being penalized for failing to take the tests and, in effect, not living up to the agreement which she made. In the instant case, petitioner took the tests and failed them. Therefore, it is unnecessary to determine whether her signature on the schedule was extracted through duress.

The question at issue is whether the fact that petitioner was required to take makeup tests was unreasonable. (The issue of makeup work for which petitioner claims she should have been entitled to a period of two months to make up, is not an issue, inasmuch as petitioner was clearly not required to make up work by Mrs. Cerro upon her return to school. Moreover, as will be discussed herein, the failure of petitioner to provide Mrs. Cerro with makeup assignments accomplished during her absence did not count against her.) Petitioner claims that it was inappropriate to require her, while in the process of recovering from a lengthy illness, to make up a series of tests. The testimony indicated that petitioner was required to make up three tests upon her return to school. The first test was on Chapter 36, sections four and five, while the other two tests were on Chapters 37 and 39, all sections. This court finds that the requirement that petitioner make up three tests upon her return to school was not unreasonable. Considering the fact that the chapters were, as testified to by petitioner, only 20 pages long, tests on somewhat less than three chapters cannot be deemed burdensome.

Referring specifically to the fifth marking period, petitioner was sent the work sheets for that period and was given a test on chapter 36, sections four and five. The obligation of petitioner to take this test under these circumstances appears to this court to be reasonable. Petitioner's grade of 50 on this test was averaged with her two other test grades for an average of 48. Mrs. Cerro testified that inasmuch as petitioner did not bring in her homework assignments for this period, she received no credit for them. Instead, her grade was based on the average of the tests, and the homework that was covered during the period she was present in class. Since petitioner failed to complete assignments during the time she was present in class, four points were deducted from her grade to arrive at a 44 for the fifth marking period. While petitioner's testimony on the issue of whether she showed Mrs. Cerro completed assignments during the fifth marking period was conflicting, as outlined above, the fact appears to be that petitioner never showed Mrs. Cerro the fifth marking period work. Whether Mrs. Cerro asked for this work (which she claims to have done) or not, petitioner should have been aware of the fact that she could receive credit for completed assignments. Thus, she should have provided Mrs. Cerro with this work. Since she did not assume this responsibility, and was not penalized for her failure to do so, petitioner's contention that she was treated unfairly must fall. That being so, petitioner's grade for the fifth marking period appears to be justly arrived at.

With respect to the sixth marking period, the real contention appears to be that the home instruction teacher's grade of a C+ should have counted as the grade for that marking period, inasmuch as she actually had responsibility for that period. In support of this contention, petitioner points to the fact that the home instruction teacher actually spent more days teaching petitioner than Mrs. Cerro. It should be noted that the board resolution (J-6 in evidence), which is referred to by petitioner, does not deal with this precise point. The board resolution, which is felt by petitioner to shed some light on this question, reads in pertinent part:

1. The home instruction teacher who has a student for a marking period will grade only for that period.

4. When the home instruction teacher has the student for less than 50% of the academic year, the regular classroom teacher will give the final grade.

Section 1 of this resolution, read out of the context of this controversy, can clearly be seen to have been promulgated as a limiting device to ensure that a home instruction teacher who has a student for one marking period would not have the opportunity to grade that student for the year. Even if this section can be read with section 4 of the resolution to mean that a home instruction teacher who has a student for over 50% of the marking period will give the student the grade for that period, clearly Mrs. Cerro had petitioner on her roll for over 50% of the marking period, and thus had responsibility to give the sixth marking period grade. In support of this, J-2 in evidence indicates that the home instruction teacher intended to give petitioner the grade for less than 50% of the marking period, leaving open for debate whether Mrs. Harris would have given petitioner this same grade if the grade was to be the sixth marking period grade.

Upon concluding that the home instruction teacher's grade need not have been the sixth marking period grade, the final question to be resolved is whether it was unusual for Mrs. Cerro to count the home instructor's grade as a test. It does not seem to this court that Mrs. Cerro acted unreasonably in so doing nor, as described above, was it unreasonable for Mrs. Cerro to require that petitioner make up the two tests on Chapters 39 and 37, respectively. Given this conclusion, and the fact that petitioner received all the credit for homework assignments she could have received during this marking period, the determination that petitioner receive a 51 for this marking period cannot be considered to be arbitrary, capricious or unreasonable.

Based upon the above discussion and findings of fact, it is therefore **CONCLUDED** that respondent's action in denying petitioner her high school diploma and graduation status from Bayonne High School, class of 1980, was justified.

For the foregoing reasons, the relief requested by petitioner, Mindy Rosen, is **DENIED.**

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.

OAL DKT. NO. EDU 6579-80

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

DATE July 9, 1981 — **ELINOR R. REINER**, ALJ

Receipt Acknowledged:

DATE 7/13/81 — DEPARTMENT OF EDUCATION

Mailed To Parties:

DATE July 14, 1981 — FOR OFFICE OF ADMINISTRATIVE LAW

ywg

APPENDIX

WITNESSES

For Petitioner

Mindy Rosen
Judith Rosen

For Respondent

Rosemary Parlavecchio
Camille Cerro

EXHIBITS

J-1 Letter from Dr. West, dated June 13, 1980.

J-2 Home instructor's report, dated June 4, 1980.

J-3 Certificate of Dr. West, dated May 20, 1980.

J-4 Memo to Mindy Rosen from Mrs. Cerro, dated June 4, 1980.

J-5 Final report card received by Mindy Rosen.

J-6 Portion of Board of Education Resolution adopted August 21, 1979.

R-1 Letter from Kathryn Sharp, dated February 15, 1980, to parent or guardian.

R-2 Certificate from Dr. West, dated May 6, 1980, re Mindy Rosen.

R-3 Student Handbook.

P-1 Student activities award, dated June 11, 1980.

MINDY ROSEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BAYONNE, 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 the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Petitioner in her exceptions contends that the actions of the history teacher were in violation of state law. Petitioner claims to have been compelled under duress to sign an improper agreement with such teacher. Petitioner denigrates Judge Reiner's conduct of the matter presently controverted. The Board's reply exceptions support the Judge and her conduct. The Commissioner finds no merit in petitioner's exceptions.

A thorough examination of the record herein, including the documents submitted in evidence and the testimony of witnesses, does not reveal to the Commissioner the manner in which the history teacher violated state law or any evidence that petitioner was compelled by the teacher to sign an improper agreement. Further, the Commissioner does not find the slightest shred of evidence that Judge Reiner's conduct of this matter and her behavior therein were in any way other than exemplary.

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

August 11, 1981

MINDY ROSEN, :

PETITIONER-APPELLANT, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY, : DECISION

RESPONDENT-RESPONDENT. :

:

Decided by the Commissioner of Education, August 11, 1981

For the Petitioner-Appellant, Herbert L. Zeik, Esq.

For the Respondent-Respondent, John V. Gill, Esq.

The Petitioner here was a high school senior who claimed that she had unjustly been given a failing mark in U.S. History II, which resulted in her being denied a diploma and graduation with the class of 1980. She complained of the manner in which she was required, upon her return to school after a period of illness, to fulfill the requirements of the history course. After an evidentiary hearing, both the Administrative Law Judge and the Commissioner concluded that the Board of Education was justified in denying the diploma since the failing grade had been reasonably determined.

The decision below is affirmed. Furthermore, we are of the view that the petition failed to state a claim upon which relief could be granted, and therefore a motion to dismiss should have been made. See Ruch v. Board of Education of Greater Egg Harbor Regional High School District, 1968 S.L.D. 7, affirmed by Appellate Division 1969 S.L.D. 202; Sachs v. Board of Education of East Windsor Regional School District, 1976 S.L.D. 170, affirmed by State Board 1976 S.L.D. 175.

The decision of the Commissioner is affirmed for substantially the reasons stated therein.

November 10, 1981

Pending New Jersey Superior Court

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6494-80
AGENCY DKT. NO. 458-9/80A

IN THE MATTER OF:

ANN KIGERL,
Petitioners
v.
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH PLAINFIELD, MIDDLESEX COUNTY,
Respondent.

Record Closed: June 1, 1981
Received by Agency: July 14, 1981

Decided: July 13, 1981
Mailed to Parties: July 17, 1981

APPEARANCES:

Stephen B. Hunter, Esq., (Klausner & Hunter, attorneys) on behalf of the Petitioners

Robert J. Cirafesi, Esq., (Wilentz, Goldman & Spitzer, attorneys) on behalf of the Respondent

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

Ann Kigerl (petitioner) is employed by the Board of Education of the Borough of South Plainfield (Board) as a clerk assigned to the Board's special services office. Petitioner lays claim to a secretarial position which commands a higher salary or, in the alternative, petitioner seeks an order by which the Board would be required to adjust her

salary to a higher rate equivalent to that which she received prior to her present assignment.

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 prehearing conference was conducted, subsequent to which the parties filed cross-motions for summary judgment. The record was readied for disposition June 1, 1981, the date for final reply memorandum.

The uncontested facts of the matter are these:

Petitioner has been employed by the Board since December 1, 1962, when she was assigned as a bookkeeper. Thereafter, petitioner was assigned as an executive secretary in the Board's business office on September 17, 1968; as an "A" category secretary, payroll assistant and secretarial assistant on July 1, 1973; as an "A" category payroll assistant on October 10, 1978; and, finally, as a "D" category clerk in the special services office on July 1, 1980. Petitioner's salary as a clerk in the special services office was less than the salary she received as a payroll assistant.

Petitioner contends that (1) the Board violated her tenure rights by its reduction of her salary at the commencement of her assignment as a clerk in the special services office; (2) that the Board violated her seniority rights which, she asserts, flow from an agreement entered into by the Board and by the South Plainfield Educational Secretarial Association (Association) of which she is a member; and (3) that the Board is bound by the agreement which purportedly provides petitioner with seniority rights, including the right to bring less senior employees in the "A" category of secretaries.

The agreement to which petitioner anchors her claim for seniority and bumping privileges states that all secretaries shall be paid according to the secretarial salary policy incorporated and made part of the agreement. That salary policy sets forth six guides: SP1, SP2, A, B, C, and D. The SP1 guide has the highest starting salary and the highest salary at each step of the guide, including the maximum step. Each guide thereafter has a progressively lower beginning salary, a lower salary at any given step, and a lower maximum salary. The "D" salary guide sets forth the lowest salary rates of the five other guides. Secretaries in the Board's employ are assigned one of the six guides

for salary purposes, depending upon the nature of their duties. No mention is made of seniority in the agreement.

The Board abolished petitioner's position of payroll assistant on June 2, 1980. That position was compensated according to the "A" salary guide. Petitioner was thereafter advised of available vacant positions, one of which, at least, was an "A" category salary guide position. The other available positions were of lower rank and salary. Petitioner, under protest, selected the "D" category position of special service clerk on June 12, 1980. She was then assigned that position on June 17, 1980. Petitioner remains in the Board's employ as a special services clerk, which position is assigned to the "D" guide, for purposes of salary establishment. Petitioner did not choose the position paid according to the "A" salary guide because that position was not one included within the bargaining unit.

This concludes a recitation of the facts of the matter.

DISCUSSION OF LAW

Petitioner lays a claim to tenure in a position which commands salary compensation according to the "A" salary guide and she claims seniority and bumping privileges over less senior employees who remained in positions compensated according to the "A" salary guide at the time her position was abolished. Petitioner contends in the first instance that her assignment to a position compensated according to the "D" salary guide from a position through which her salary was determined according to the higher "A" category does violence to her accrued tenure rights. This is so, petitioner reasons, because that reassignment was accompanied by a decrease in her salary and was accomplished by the Board without following the requirements of N.J.S.A. 18:A6-10 et seq., the Tenure Employees Hearing Law, which would include the filing of charges against her.

Next, petitioner contends that, regardless of the Board's action to abolish her former position of payroll assistant, her present assignment, special services clerk, constitutes a transfer from one secretarial position (payroll assistant) to another secretarial position (special services clerk) and, as such, the Board is prohibited from reducing her salary. Petitioner cites in this regard Fegen v. Board of Education of Fair

Lawn, 1966 S.L.D. 167 and the inference petitioner draws from that ruling, together with Given v. Board of Education of West Windsor School District, 1978 S.L.D. 43.

Finally, petitioner argues that seniority rights for secretarial personnel are manditorily negotiable and, as such, the Association and the Board did negotiate such seniority rights and concomitant bumping privileges as set forth in the agreement. Petitioner concludes that the Board violated those agreed-upon seniority rights to which she now makes claim.

Persons employed by boards of education in "any secretarial or clerical position" may acquire a tenure status of employment, pursuant to the provisions of N.J.S.A. 18A:17-2. A person employed as a secretary or as a clerk, who acquires tenure, does not acquire the same statutory right to seniority as teachers, N.J.S.A. 18A:28-11 et seq., or school janitors, N.J.S.A. 18A:17-4. A secretary or clerk with tenure may ". . . not be dismissed or suspended or reduced in compensation, except for neglect, misbehavior, or other offense . . ." N.J.S.A. 18A:17-2.

However, there is nothing to prevent a board of education from abolishing in good faith a position it deems necessary to be abolished, N.J.S.A. 18A:6-10. Here, the Board did abolish petitioner's former position of payroll assistant. Though an allegation of bad faith in this regard was made, it has since been withdrawn. Thus the Board's action to abolish that position is seen here to have been taken in good faith. Petitioner, having no statutory claim to seniority privileges, had no claim to continuing employment in a position compensated at the "A" salary guide. Nonetheless, petitioner was offered a list of vacant positions from which she was allowed to choose. Why she chose a position compensated at the "D" salary guide level, rather than available higher paying positions, is not disclosed here. Regardless, when a person, whose position is lawfully abolished, is reassigned or transfers or is transferred to another position with a lower salary structure, a reduction in salary does not occur for purposes of N.J.S.A. 18A:17-2. Booth v. Board of Education of the City of Salem, 1980 S.L.D. _____ (March 24, 1980).

While I share petitioner's view that seniority rights may be a subject for negotiation, State v. State Supervisory Employees Ass'n., 78 N.J. 58 (1978), Plumbers and Steamfitters v. Woodbridge Board of Education, 159 N.J. Super. 83 (App. Div., 1978), in the agreement, there is absolutely no mention of seniority rights within the generic category of secretary. That is, while the agreement, by reference, incorporates the

Board's salary policy, which sets forth six different salary guides for ostensibly six different levels of duties and responsibilities, it is silent in regard to seniority rights within each level of duty and responsibility.

Thus while I am of the view that a certain kind of seniority for secretaries and/or clerks may be negotiated, notwithstanding the absence of express legislative authority in the manner afforded teachers and school janitors, I find nothing in the record before me to establish that the Board and the Association negotiated such rights.

I **FIND** that the Board properly abolished petitioner's position of payroll assistant, which was compensated according to the "A" salary guide; I **FIND** that petitioner selected a position which is compensated at the lowest "D" salary guide; I **FIND** no basis, in fact, to support petitioner's thesis that she has seniority rights or bumping privileges; and I **FIND** no basis upon which support could be found that petitioner's tenure rights were violated.

I **CONCLUDE** that the Petition of Appeal and its allegations are without merit. Therefore, I **ORDER** that the Petition of Appeal be **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 6494-80

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

July 13, 1981
DATE

DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

July 17, 1981
DATE

OFFICE OF ADMINISTRATIVE LAW

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ANN KIGERL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH PLAINFIELD, 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 failure of the Honorable Daniel B. McKeown, ALJ to determine that the Board improperly transferred petitioner involuntarily from an "A" category position to a "D" category position in violation of her seniority rights. Respondent's reply exceptions refute those of petitioner and affirm the initial decision by Judge McKeown. The Commissioner agrees with respondent's arguments.

Petitioner submits that the full meaning of the tenure law for secretarial employees includes the necessity of a seniority system for dismissal where there is an abolishment of a position. The Commissioner finds no merit in such argument and, in prior decisions, has concluded that no statutory prescription or rule of the State Board of Education has been promulgated which provides tenured educational secretaries with a set of clearly delineated seniority rights or procedures governing dismissal when a reduction in force is effected by boards of education. Marie Sheridan v. Board of Education of the Township of Ridgefield Park, 1976 S.L.D. 995 and Booth, supra

In the present matter the Commissioner notes that petitioner's reassignment not a transfer by the Board but resulted from a position abolishment and petitioner's own choice of a "D" position rather than available higher paid assignments, for reasons unstated in the record.

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

August 18, 1981

ANN KIGERL,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH PLAINFIELD, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, August 18, 1981

For the Petitioner-Appellant, Klausner & Hunter
(Stephen B. Hunter, Esq., of Counsel)

For the Respondent-Respondent, King, King & Goldsack
(Victor E.D. King, Esq., of Counsel)

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

Mateo DeCardenas abstained in the matter.

December 2, 1981

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5026-80
AGENCY DKT. NO. 349-7/80A

IN THE MATTER OF:

LAWRENCE LITTMAN,
Petitioner
v.
BOARD OF EDUCATION OF,
THE TOWNSHIP OF CRANFORD,
Respondent.

Record Closed: April 7, 1981
Received by Agency: July 16, 1981

Decided: July 14, 1981
Mailed to Parties: July 20, 1981

APPEARANCES:

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

Richard J. Kaplow, Esq., for Respondent
(Weinberg & Manoff, attorneys)

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

This matter concerns whether a board of education acted improperly in withholding a teacher's employment and adjustment increments for the 1980-81 school year under N.J.S.A. 18A:29-14.

On July 14, 1980, petitioner Lawrence Littman filed a verified petition with the Commissioner of Education alleging that the decision of the Cranford Board of Education to withhold his annual salary increment was arbitrary, capricious and unreasonable. An answer denying any wrongdoing was filed by the Board on July 24, 1980. Subsequently, 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. Hearings were held on January 27 and 28, 1981. Witnesses who testified and documents considered in deciding this case are listed in the appendix. During the course of the hearings, an additional question arose as to whether Littman had received sufficient notice of his alleged deficiencies so that he might correct any unsatisfactory performance before suffering the loss of a salary increase. Upon receipt of legal memoranda submitted on behalf of the parties, the record was closed as of April 7, 1981. Time for preparation of this Initial Decision has been extended to July 14, 1981.

Background facts necessary for an understanding of this case are largely undisputed. Littman is a tenured teacher of mathematics who has been employed by the same school district for 24 years. Generally he has been given satisfactory ratings on all prior evaluation reports, and his annual salary increment has never been previously denied. For the 1979-80 school year, he was assigned to teach five classes of algebra, trigonometry and college preparatory mathematics at the high school level. In mid-March 1980, the principal of Cranford High School, Robert Seyfarth, informed Littman of his intention to recommend the withholding of Littman's salary increase for the following year. However, no formal evaluation conference was ever held, due to a procedural disagreement between those individuals. Littman insisted that he had a right to be represented at such conference by a representative from the teachers' bargaining unit, whereas Seyfarth refused to discuss his evaluation unless Littman came alone. Instead, on March 28, 1980, Littman, accompanied by a representative of his choosing, met with both Superintendent of Schools Robert Paul and Seyfarth to review the situation.

By resolution adopted on April 15, 1980, the Board voted to withhold Littman's employment and adjustment increments for the 1980-81 school year. Total dollars withheld amounted to $1,690. The Board's decision was made by recorded roll-call

majority vote of the full membership. Within ten days after the decision was reached, the Board served written notice of its determination upon Littman. Four reasons were expressed by the Board as the basis for its action: (1) Failure to employ classroom management techniques to control disruptive "calling out" and extraneous talking by students; (2) Inadequate lesson planning; (3) Insufficient involvement of students in the learning process resulting in teacher-dominated lessons; and, (4) Use of imprecise mathematical terminology. While the parties can agree on most of the underlying facts, they differ substantially on the proper interpretation to be given those facts. Each of the Board's charges and Littman's response will be briefly summarized.

Failure to Employ Classroom Management Techniques

Most serious of the complaints about Littman's performance was his alleged inability to maintain adequate classroom discipline and promote an atmosphere conducive to learning. He was accused of allowing some students to call out answers to questions or make other comments, even though the teacher had not recognized that it was their turn to speak. Earlier evaluations had described such conduct as annoying and distracting to those students who wanted to follow what was happening in class. According to the Board, this long-standing problem had been first brought to Littman's attention as early as 1971. Past evaluation reports show that the problem worsened considerably in 1975-76 and then improved somewhat until 1978-79, when it reappeared on at least one occasion. In the 1979-80 school year, incidents of calling out were observed by supervisors on four out of five classroom visits.

On December 3, 1979 and again on February 12, 1980, Eileen Garfunkel, Littman's immediate supervisor, witnessed students calling out in Littman's classes without waiting for permission from the teacher. Particularly on her second visit, she noted "a continual undercurrent of low level talking throughout the period." On January 29, 1980 and February 29, 1980, principal Seyfarth also encountered similar examples of inadequate classroom control. He attributed the problem to a failure on Littman's part to establish the proper authoritative tone at the outset of the school year. Nonetheless, Seyfarth recognized, on his last visit, that the frequency of calling out incidents had decreased.

With respect to the observation on February 12, 1980, Littman pointed out that the circumstances were hardly typical since it occurred during the last period immediately preceding the distribution of report cards. When Littman requested that another day be selected for making the observation, he was told that a teacher should be able to control his class under all kinds of conditions. Also on that day, the class period was twice interrupted by announcements over the public address system. Moreover, several students in Littman's class were already agitated as the result of an incident which had begun in a prior class.

By his own admission, Littman placed greater importance on establishing good rapport with his students than on keeping order in his classroom. He believed that some degree of spontaneous calling out was an indication of his students' enthusiasm and interest in the course material. In Seyfarth's view, however, the repeated disruptions seriously detracted from Littman's effectiveness as a teacher. Littman seemed genuinely powerless to control the situation. At times he made an honest effort to implement the specific suggestions of his supervisors for dealing with the problem. Although Littman's use of these recommended techniques was momentarily effective, the problem would later reappear in classes under his supervision.

Inadequate Lesson Planning

Another complaint of the Board was that Littman's insufficient lesson planning resulted in underutilization of the entire scheduled period for instructional activities. During an observation of Littman's class conducted by Seyfarth on February 29, 1980, for instance, the lesson ended early and students left their seats prior to the ringing of the bell. Supervisory staff also felt that poor planning might be one of the underlying causes behind the difficulty Littman was having in controlling his classes. Commenting upon the inadequacy of Littman's lesson plans, the head of the mathematics department, Eileen Garfunkel, criticized the lack of content of the plans. She thought that they did not provide sufficient information about what the students would be doing and why. Additionally, she did not think that the plans dealt adequately with pre-activities designed to prepare students for problem-solving. Some years ago, Garfunkel had distributed to all

teachers in her department, including Littman, a mimeographed outline of the elements constituting a good lesson. She did not consider the sketchy plans prepared by Littman to satisfy her criteria for a good lesson. Review of Littman's weekly plan book for the 1979-80 school year confirmed the substance of Garfunkel's testimony. Every entry gave a short description of the lesson's objectives and a list of page numbers for daily assignments, without indicating in any useful detail how the teacher intended to accomplish his goals.

At the end of each school year, Littman had always been required to submit his lesson plan book to the main office. Throughout his 24 years of service for the district, he could not recall ever having been criticized previously for inadequate lesson planning. To the contrary, in January 1979 he had received praise from his supervisors for preparing a well-organized and planned lesson. Since the space available for writing in the weekly plan book supplied by the school was so small, Littman insisted that he did not actually use the book for preparing his lessons. Instead, he claimed to use supplemental sheets of paper on which he planned his teaching approach in a much more thorough fashion. No samples of these more comprehensive plans were produced at the hearing, however, because Littman maintained that he customarily destroyed these supplemental sheets as soon as the lesson was over. Even though he might teach the same course over again, he never saved his supplemental sheets for possible future reference.

Teacher-Dominated Lessons

A related complaint by the Board was that Littman monopolized classroom discussions, thereby depriving his students of an opportunity to participate actively in the learning process. Prior to 1979-80, Littman had been commended more than once for his skill in questioning students and his use of a wide variety of teaching techniques. But the most recent evaluation of Littman's performance faulted him for overdependence on lecturing to the class at the expense of greater student involvement. Despite a strong recommendation made in March 1979 that students be given work to do at the blackboard "on an almost daily basis," Seyfarth found that board assignments were utilized in Littman's classes only during his last observation. Likewise, Garfunkel commented that

Littman did not make appropriate use of individual seat work, which would require students to solve problems by themselves. Both supervisors subscribed to the philosophy that the only way to learn mathematics is by doing mathematics. They further agreed that Littman spent too much time reading problems from the text, rather than encouraging students to read and interpret problems on their own. Their professional judgment was that excessive reliance on oral instruction from the teacher made Littman's classes uninteresting and less challenging for his students.

On his own behalf, Littman contended that he relied on oral presentation mainly to introduce new or difficult mathematical concepts. It just so happened that the observations of December 3, 1979 and February 12, 1980 were conducted on days when such kinds of topics were being taught for the first time. If the supervisors had returned a few days later, Littman suggested, they would have observed more emphasis on board work, seat work and other teaching methods directly involving the students. Moreover, Littman regarded the best measure of a teacher's effectiveness to be success in conveying knowledge to his students. As far as he knew, his students performed just as well as other students on standard mathematics tests administered in the district. Nothing was offered by the Board to show otherwise.

Use of Imprecise Mathematical Terminology

Lastly, the Board complained about Littman's usage of informal or colloquial expressions in place of exact mathematical terms. Seyfarth, who himself had been a mathematics teacher before his promotion to high school principal, testified that the language of mathematics was very precise. He objected to Littman's definition of "slope" as meaning "rise over run," because that phrase implies that all slopes are positive. In reality, a slope can also be negative or zero. Back in 1977, Seyfarth had cautioned Littman against using technically inexact language. Nonetheless, some textbooks actually use the less-than-completely-accurate description of "rise over run" in order to make the concept of slope more readily understandable to beginners. Littman said that he employed the looser terminology for the same purpose when teaching less advanced students.

Various other examples of imprecise terminology were cited by Littman's supervisors. Thus, Seyfarth disapproved of Littman's reliance on the mnemonic device "FOIL" (an acronym standing for First, Outer, Inner and Last) to help students learn the formula for multiplying binomial functions. Notwithstanding the obvious usefulness of this memory aid, Seyfarth believed that such a rote approach to learning detracted from a student's genuine understanding of mathematical relationships. Similarly, Seyfarth disagreed with Littman's explanation to his class that the graph of a linear equation necessarily results in a line. That statement could be misleading, Seyfarth indicated, because the graph conceivably might result in a circle, a parabola or some other shape.

Significantly, the Board did not challenge Littman's knowledge of his subject area or his dedication as a teacher. None of the mathematical terminology used by him was demonstrably wrong. While Littman clearly knew what he meant, the Board contended that occasionally he became careless in his choice of words. On the other hand, Littman insisted that he purposely used simplified language to clarify complex ideas and make them easier to understand.

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

1. During the 1979-80 school year, Littman failed to adequately maintain classroom discipline and prevent students from disrupting the class by calling out answers or comments.

2. On four out of five separate visits to Littman's classroom, supervisors observed incidents of inadequate classroom control.

3. Prior to 1978-79, Littman had received adequate notice from his supervisors that classroom discipline must be improved.

4. Standing alone, Littman's failure to maintain order in his classes is sufficient in itself to justify the Board's decision to withhold his 1980-81 salary increment.

5. Lesson plans prepared by Littman were insufficiently detailed and partly contributed to his inability to control his classes.

6. Although Littman had been a teacher in the district for 24 years, during that time he had never previously been apprised of any dissatisfaction with the adequacy of his lesson plans.

7. General reference by Littman's supervisors to inadequate classroom discipline was insufficient to put Littman on notice that his lesson plans also needed improvement. Therefore, inadequate lesson planning cannot form the basis for withholding Littman's 1980-81 salary increment.

8. In 1979-80, Littman relied too heavily on oral instruction. Until shortly before the close of the school year, he ignored earlier recommendations of his supervisor to vary his teaching approach by using more board and seat work.

9. Proofs failed to establish that Littman used mathematical terms carelessly or imprecisely. Rather, the proofs show that Littman was a knowledgeable mathematics teacher who used simplified language in a conscious effort to make his meaning more understandable to his audience.

Based on the facts developed 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.

N.J.S.A. 18A:29-14 provides that a board of education may withhold, for inefficiency or other good cause, the employment or adjustment increment, or both, by recorded roll-call majority vote of the full board. Appeals from such action may be taken to the Commissioner of Education, who may either affirm or direct that the increments be paid. A decision to withhold an increment is a matter of essential managerial prerogative which has been delegated by the Legislature to the local board. Bernards Tp. Bd. of Ed. v. Bernards Tp. Ed. Ass'n, 79 N.J. 311, 321 (1971); Clifton Teachers Ass'n, Inc. v. Clifton Bd. of Ed., 136 N.J. Super. 336 (App. Div. 1975). When reviewing such determinations, the Commissioner of Education is prohibited from substituting his own judgment for that of the local board. His scope of review is limited to assuring that there exists a reasonable basis for the decision. Exercise of the discretionary powers of the local board may not be upset unless patently arbitrary, without rational basis or induced by improper motives. Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288 (App. Div. 1960). The burden of proving unreasonableness rests upon the party challenging the board's action. 60 N.J. Super. at 297. At the hearing before the Commissioner or his designee, the obligation of the hearer is to make a de novo and independent decision on the facts. Trautwein v. Bound Brook Bd. of Ed., (N.J. App. Div., April 8, 1980, A-2773-78) (unreported), certif. den. 84 N.J. 469 (1980).

As a matter of fundamental due process, petitioner is entitled to receive advance notice of his unsatisfactory performance so that he has a meaningful opportunity either "to rectify his deficiencies or to convince the superior that his judgment is erroneous." Fitzpatrick v. Montville Bd. of Ed., 1969 S.L.D. 4, 7. Recently, the State Board of Education reaffirmed the continuing soundness of the

Fitzpatrick holding. Applegate v. Freehold Reg. High Sch. Dist. Bd. of Ed., 1981 S.L.D. ____ (February 4, 1981). Applying that rule to the present facts, it was improper for the Board to consider lesson planning as one of its grounds for withholding the increment because Littman had not been given prior notice that his lesson plans were deficient. Thus, he was effectively deprived of any chance to correct this perceived shortcoming during the course of the school year. From the record, it is equally clear that Littman did receive more than adequate warning of his deficiencies in the areas of classroom discipline and teacher-dominated lessons.

In the exercise of the duty to make independent factual findings, I have determined that it was also unreasonable for the Board to rely on the unsubstantiated charge relating to the use of imprecise mathematical terms. Absent a showing of personal bias or prejudice on the part of the evaluators (which does not exist here), generally the Commissioner will refrain from second-guessing the professional judgment of qualified administrators on the scene. Any evaluation of teaching competence must necessarily depend to some extent on highly subjective factors. Cf., Donaldson v. Wildwood Bd. of Ed., 65 N.J. 236, 247 (1947). Evaluation of a teacher's performance is a matter of total impression, based upon both objective evidence and subjective judgment. Hillman v. Caldwell Bd. of Ed., 1977 S.L.D. 218. Here, however, the Board failed entirely to prove underlying facts on which an evaluator reasonably could conclude that Littman used mathematical terms imprecisely. On the existing record, it is apparent that Littman taught technically correct definitions of mathematical terms to his classes, but also explained those words in simpler language so that students would understand the concepts.

Since two of the four reasons for the Board's action must be disregarded, the controlling issue becomes whether the two remaining reasons are sufficient to justify the Board's decision. Predictably, the petitioner argues that the Board's action must be invalidated unless all four reasons have been sustained, while the Board counters that proof of any one of the four reasons would be enough. The outcome in each individual case depends on the importance of the charges which

have been found to be true. Illustratively, in Ormosi v. Kingwood Bd. of Ed., OAL DKT. EDU 2726-79, adopted 1980 S.L.D. ____ (July 15, 1980), the Commissioner upheld the withholding of an employment increment, even though the petitioner was able to establish legitimate reasons for some of the conduct originally criticized by the local board. Insofar as the present case is concerned, the most serious of the charges levied by the Board has been substantiated. Over the years, supervisors were far more concerned with lack of classroom discipline that with other comparatively minor criticisms of Littman's performance. Petitioner suggests alternatively that the matter be remanded to the Board for reconsideration of its action in light of the factual findings. Under some circumstances a remand might be warranted, but it would be inappropriate here where the primary charge against petitioner has been sustained.

Finally, petitioner seeks to invalidate the Board's action because of the Principal's refusal to meet with him in the presence of a teacher association representative to discuss the annual evaluation report. An employer's denial of an employee's request that a union representative be present at an investigatory interview, which might result in disciplinary action, constitutes an unfair labor practice. Nat'l Labor Relations Bd. v. J. Weingarten, Inc., 420 U.S. 251 (1975). There is substantial doubt, however, that a meeting betwen a principal and teacher to review the final results of an annual evaluation is really an "investigatory interview" within the meaning of Weingarten. See, East Brunswick Bd. of Ed. v. East Brunswick Ed. Ass'n, (N.J. App. Div., April 8, 1980, A-277-78) (unreported). By the time that such meeting is held, the principal already has the benefit of several classroom observation reports, copies of which have been previously made available to the teacher for any comments. At this late stage, the meeting is intended more for the purpose of explaining the basis of the recommendation to the teacher than for conducting an inquiry on what recommendation to make. In any event, any procedural error which may have occurred was cured by the meeting which actually did take place a few days later between the teacher and his representative, the Superintendent of Schools and the Principal. Ample opportunity was thus provided for the teacher's representative to safeguard Littman's legitimate interests.

For the foregoing reasons, it is **ORDERED** that the determination of the Board of Education of Cranford to withhold petitioner's 1980-81 employment and adjustment increments is **AFFIRMED.**

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.

July 14, 1981
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

July 16, 1981
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

July 20, 1981
DATE

Elizabeth D. Lazzuri
FOR OFFICE OF ADMINISTRATIVE LAW

al

APPENDIX

LIST OF WITNESSES

1. Lawrence Littman

2. Eileen Garfunkel

3. Robert C. Seyfarth

Number	Description
J-1	Copy of Evaluative Report, dated March 31, 1980
J-2	Copy of Evaluative Report, dated March 31, 1979
J-3	Copy of Evaluative Report, dated March 18, 1978
J-4	Copy of Evaluative Report, dated March 29, 1977
J-5	Copy of Evaluative Report, dated March 31, 1976
J-6	Copy of Unscheduled Evaluation Report, dated February 13, 1976
J-7	Copy of Evaluative Report, dated March 31, 1975
J-8	Copy of Classroom Observation Report, dated February 29, 1980

J-9	Copy of Classroom Observation Report, dated February 12, 1980
J-10	Copy of Classroom Observation Report, dated January 1, 1980
J-11	Copy of Classroom Observation Report, dated January 24, 1980
J-12	Copy of Classroom Observation Report, dated December 24, 1979
J-13	Copy of Classroom Observation Report, dated January 31, 1979
J-14	Copy of Classroom Observation Report, dated January 31, 1979
J-15	Copy of Letter dated April 16, 1980, to Lawrence Littman from the Cranford Board of Education
J-16	Copy of a Letter dated March 24, 1980, to Lawrence Littman from Robert D. Paul, Superintendent of Schools
J-17	Copy of a Letter dated March 26, 1980, to Lawrence Littman from Robert D. Paul, Superintendent of Schools
J-18	Copy of a Letter dated March 28, 1980, to Lawrence Littman from the Cranford Board of Education
J-19	Copy of a letter dated April 11, 1980, to Lawrence Littman from the Cranford Board of Education
P-1	Agreement between Cranford Education Association and the Cranford Board of Education covering the 1978-79 and 1979-80 School years

P-2	Document entitled Procedures for Evaluation, dated September 1979
P-3	Diagram prepared by Lawrence Littman regarding definition of slope
P-4	Diagram prepared by Lawrence Littman regarding binomial multiplication
P-5	Diagram prepared by Lawrence Littman regarding intersection and union
P-6 for id.	Book entitled Intermediate Algebra by Edgerton and Carpenter published by Allen & Bacon, Inc. (1958)
R-1 for id.	Petitioner's Answers to Interrogatories propounded by Respondent
R-2	Teacher's Lesson Plan Book
R-3 for id.	Copy of Evaluative Report, dated September 1, 1972
R-4 for id.	Copy of Classroom Observation Report, dated December 9, 1971
R-5	Mimeographed Sheet entitled Good Lesson
R-6	Copy of Classroom Observation Report, dated February 3, 1977

LAWRENCE LITTMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CRANFORD, UNION 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 determination by the Honorable Ken R. Springer, ALJ that his failure to maintain order in his classes was sufficient to justify the Board's decision to withhold his 1980-81 salary increment. Petitioner claims that the administration failed to honor his request that he not be observed during certain difficult periods. Further, petitioner contends that the sole reason for the Board's action in withholding his employment and adjustment increments for the 1980-81 school year was a disagreement in personal philosophy between himself and the high school principal. Petitioner argues that, only if all four of the enunciated reasons were sustained, could there be sufficient reason established for an increment withholding. Respondent's reply exceptions generally affirm the initial decision and refute petitioner's exceptions. Respondent contends that the proofs herein more than adequately demonstrate that petitioner was given sufficient notice of the inadequacies of his lesson planning which conclusion disagrees with the finding therein by Judge Springer.

The Commissioner finds no merit in petitioner's exceptions. The Commissioner determines that in any classroom situation adequate pupil control through proper motivation must be achieved for learning to take place. The Commissioner does not find it necessary to address the Board's arguments concerning the adequacy of proof of the completeness of petitioner's lesson plans as the Commissioner determines that the Board had a sufficiency of reasons to withhold petitioner's employment and adjustment increments for the 1980-81 school year.

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

August 25, 1981

MARYANN MOLLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF HOBOKEN, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

For the Petitioner, Sauer, Boyle, Dwyer, Canellis & Cambria (William A. Cambria, Esq., of Counsel)

For the Respondent, Robert W. Taylor, Esq.

Petitioner is a fully certified teacher in the employ of the Hoboken Board of Education, hereinafter "Board." She alleges that the Board in reemploying her violated its policy in denying her credit on its salary guide for her previous years of employment service in the Hoboken School District. Petitioner seeks an order from the Commissioner of Education directing the Board to accord her such credit and appropriate placement on its salary guide with all back pay owing and due her. The Board denies petitioner's allegations herein and avers that its actions with respect to her reemployment were in all ways proper and legally correct.

Hearing was conducted in this matter on March 1, 1979 by a hearing examiner appointed by the Commissioner. The report of the hearing examiner follows.

The hearing examiner observes from the record herein that the following relevant facts giving rise to this controversy do not appear to be in dispute:

1. Petitioner is a fully certified teacher who was initially employed by the Board in September of the 1962-63 academic year. She was continuously reemployed by the Board for each subsequent academic year thereafter up to and including the 1965-66 academic year. Thereafter, petitioner requested and was granted maternity leave for the 1966-67 and 1967-68 academic years, subsequent to which petitioner resigned.

2. Petitioner was reemployed by the Board as of the 1974-75 academic year as a per diem substitute teacher for approximately six weeks (P-1) and thereafter as a Title I ESEA teacher of mathematics at an annual salary of $9,900, effective October 16, 1974. (P-2) The salary represented placement on the first step of the Board's then existing teachers' salary guide.

3. For each successive academic year of reemployment the Board advanced petitioner one step on its salary guide, up to and including the 1978-79 academic year when this matter was heard by the Commissioner.

4. At no time since her reemployment by the Board was petitioner granted credit on the teachers' salary guide for her previous employment service, 1962-63 through 1965-66.

The hearing examiner observes the following from the interrogatories (R-1) propounded by the Board to petitioner:

> ***
>
> "8. Attach a copy of the policy of the Board referred to in paragraph 6 of the Petition.
>
> "[Petitioner's written response] I am not aware of any written Board policy; however, since the Board was granting credit for prior service to other teachers with prior service, I am led to believe that there is an unwritten policy of granting credit. *see rider attached.
>
> ***
>
> "RIDER to page 3, Interrogatory #8
>
> "My conversations with Mr. Raslowsky have reinforced this view."
>
> (R-1, at p. 3 with attachment)

Petitioner's responses to the interrogatories reveal in pertinent part that the annual salaries she received for the academic years 1974-75 through 1977-78 were $9,900 (1974-75); $10,300 (1975-76); $12,031 (1976-77); and $13,572 (1977-78). (P-6, Item #3)

Petitioner testified as follows with respect to her break in employment service in the Hoboken School District:

> A. "I took a maternity leave. I had my son in October of that year.
>
> "I got a year's maternity leave and the next year I applied for an extension of the year and after that I just had to resign because they wouldn't give me any more, which is normal.

Q. "So, that was in 1968 when the resignation first occurred?

A. "Right."

(Tr. 11)

In regard to the Board's approved teachers' salary schedules for the 1974-75 through the 1978-79 academic years (J-1 through J-5) petitioner testified that had the Board granted her the four years' prior employment service credit (1962-63 through 1965-66), she would have been entitled to be paid the following annual salaries commencing with her second period of employment as a full time teacher:

1974-75	-	$11,700	
1975-76	-	$12,200	
1976-77	-	$14,188	
1977-78	-	$15,919	
1978-79	-	$17,000	(Tr. 16-20)

Petitioner testified that after she was reemployed as a full time teacher during the 1974-75 academic year, she learned in January 1975 that two other teachers similarly reemployed were granted credit by the Board for prior teaching experience. Petitioner further testified that when she questioned the Assistant Superintendent about the fact that she was not given credit on the salary guide for her prior teaching experience, he told her that her initial salary upon reemployment was based upon whatever arrangements she had made with the Superintendent at the time said employment became effective. (Tr. 21, 23, 35A) The record of petitioner's testimony reveals that she then spoke to a Board member regarding this matter and was told to write a letter to the Board President which she claimed to have done. The letter of reference which was marked as an exhibit for identification at the hearing (P-5) is dated January 4, 1977, approximately two years after petitioner was reemployed by the Board. Counsel for the Board placed an objection on the record in regard to this exhibit being placed in evidence on the basis that it was not a document which the full Board had officially received at any time. The hearing examiner reserved the right to determine the relevancy of this exhibit after the entire record of this matter had been finalized. It is hereby determined that the letter in question is relevant to the extent that it provides clarification with respect to the sequence of events in support of petitioner's claim and is now in evidence for that limited purpose.

It reads as follows:

"Dear [Board President],

"In October, 1974 I returned to teaching in the Hoboken Public Schools. I was previously employed by the Hoboken Board of Education from September, 1962 to June, 1966 at which time I took a Maternity leave. I decided to stay at home until my children began school. "At the time of my appointment in October, 1974 I was hired at minimum salary and received none of my four years experience. However, at that time and since, teachers have been appointed in Hoboken and have been given their experience. In two instances that I know of, the teachers worked for the Hoboken Board of Education, left to work for other Boards of Education, and then returned to Hoboken and were given experience years, I therefore feel that I should also be granted my four years experience--especially since all seven of my years have been here in Hoboken.

"Members of my family and I have spoken to several members of the Hoboken Board of Education, *** - all feel I am entitled to the four years experience, however nothing seems to be done.

"I sincerely hope you will give this matter your kind attention." (P-5)

The hearing examiner finds and determines from petitioner's own testimony and from the Board minutes of January 11 and February 8, 1977 (P-3, P-4) that there is no indication that such letter was acted upon or received by the Board. (Tr. 27)

Petitioner also testified that she again approached the first Board member with whom she had originally discussed the matter of credit for her prior teaching experience. She said that he had discussed her request with other Board members and that he was of the opinion the matter would be taken care of by the Board at a later date. Finally, petitioner testified that no such action had been taken by the Board thereafter. (Tr. 28)

The hearing examiner observes from the record of the testimony of the then Assistant Superintendent who was called to testify on petitioner's behalf that it is not dispositive of petitioner's claim herein. (Tr. 45-57)

Subsequent to the hearing in this matter petitioner filed a letter Brief summarizing her position herein. The Board indicated that no Brief would be forthcoming, but instead it would rely on the record developed thus far.

Petitioner argues that her resignation after the 1965-66 school year was required by the Board in 1968 after she had been granted two successive years' maternity leaves of absence. She relies on the testimony and exhibits in evidence to argue, further, that she had no knowledge when she resumed her second period of employment that any teacher returning to the Hoboken School System would be entitled to a higher placement than the first step on the salary guide.

Petitioner argues that it was only when she became aware that the Board did, in fact, credit two teachers with prior teaching experience on the salary guide did she then pursue such efforts on her own behalf with the Assistant Superintendent and certain Board members. Such efforts, however, were unsuccessful since the Board failed to take action in regard to her request.

Petitioner relies on the testimony of the Assistant Superintendent regarding the fact that, although certain teachers who were hired received credit for prior teaching experience, there was no recommendation to the Board in their personnel file to that effect.

Petitioner maintains that the applicable provision of N.J.S.A. 18A:29-4.1 has been interpreted by the Commissioner to mean that when a board does not adopt a written policy in its salary guide with respect to the equitable treatment of teachers and their placement on its salary guide, then, absent such policy, it may not differentiate between and among those teachers whom it hires in regard to placement on its salary guide as is the case herein.

The hearing examiner has reviewed the entire record of this matter and finds and determines as follows:

1. The Board acted within its discretionary authority not to renew petitioner's employment after the 1967-68 academic year when, by virtue of her own testimony, it would not grant her a third consecutive maternity leave of absence.

2. Petitioner was properly reemployed as of October 1974 (1974-75 academic year) as a new full time teacher on the first step of the teachers' salary guide without being credited for her years of prior employment service.

3. The Board complied with the provisions of N.J.S.A. 18A:29-9 in establishing petitioner's initial placement on its salary guide when it reemployed her as of October 16, 1974.

The hearing examiner finds no merit in petitioner's claim that the Board is required by the above-cited statute to treat petitioner the same as all other teachers it initially hired or rehired regarding credit for prior teaching experience.

4. Petitioner has failed to establish by a preponderance of credible evidence that the Board, absent a formal written policy with respect to granting all teachers credit for prior teaching experience, arbitrarily, capriciously or illegally determined her initial placement on the teachers' salary guide when it reemployed her during the 1974-75 academic year.

Accordingly, in view of the above findings and determination, it is recommended to the Commissioner that the instant Petition of Appeal be dismissed.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the entire record in this matter including the report of the hearing examiner. The Commissioner notes that exceptions were filed by petitioner in accordance with N.J.A.C. 6:24-1.17(b).

Petitioner takes exception to the hearing examiner's conclusion that the Board did not abuse its discretion in placing petitioner on the first step of the salary guide when she was reemployed as of October 6, 1974.

Petitioner contends that N.J.S.A. 18A:29-4.1 provides for boards of education to adopt salary policies for all teaching staff members and that such provision requires more than a single salary schedule. Petitioner further contends that when a board fails to adopt such policy and treats various individuals differently, such action is arbitrary. Petitioner cites in support of such argument Cusack v. Board of Education of the Borough of West Paterson, 1970 S.L.D. 144; Convery v. Board of Education of Perth Amboy et al., 1974 S.L.D. 372; and Cafarelli et al. v. Long Beach Island Board of Education, 1976 S.L.D. 989.

The Commissioner finds no merit in such arguments. The Commissioner notes that N.J.S.A. 18A:29-4.1 is permissive, not mandatory, in relation to the adoption of salary policies. In the absence of an adopted policy in regard to initial placement upon the salary guide, a board is governed by the provisions of N.J.S.A. 18A:29-9 which states:

> "Whenever a person shall hereafter accept office, position or employment as a member in any school district of this state, his initial place on the salary schedule shall be at such point as may be agreed upon by the member and the employing board of education."

The Commissioner further notes that these cases cited by petitioner represent disputes over interpretation of appropriate placement upon a salary schedule based upon existing salary policies.

Petitioner further argues that N.J.S.A. 18A:29-7 provides for credit for years of employment and thus petitioner should be accorded recognition of previous service in conformity with such statute. The Commissioner does not accept such interpretation. He notes that N.J.S.A. 18A:29-7 sets forth a minimum salary schedule which applies only in those instances where compensation for teaching staff members falls below the minimum level or where no schedule or policies exist. All other districts are governed by the provisions of N.J.S.A. 18A:29-4.1 which states, inter alia:

> "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.***"
>
> (Emphasis supplied.)

Further, assuming arguendo that N.J.S.A. 18A:29-7 did apply, the Commissioner is constrained to observe that the statute must be read in para materia with N.J.S.A. 18A:29-9, as cited ante. The term "years of employment" must therefore be read as years of employment as credited upon initial employment.

Accordingly, and for the reasons contained herein, the Commissioner affirms the findings and conclusions of the hearing examiner and adopts them as his own.

Petition is dismissed.

COMMISSIONER OF EDUCATION

August 25, 1981

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5261-80
AGENCY DKT. NO. 358-7/80A

IN THE MATTER OF:

LESLIE NEWMARK,
Petitioner
v.
BOARD OF EDUCATION
OF THE TOWNSHIP OF
WOODBRIDGE, MIDDLESEX COUNTY,
Respondent

Record Closed: April 26, 1981
Received by Agency: July 20, 1981

*Decided: July 17, 1981
Mailed to Parties: July 22, 1981
*Extension Granted

APPEARANCES:

Stephen E. Klausner, Esq. (Klausner & Hunter), for the Petitioner

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

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

Leslie Newmark (petitioner), employed as a teacher by the Board of Education of the Township of Woodbridge (Board), challenges the action of the Board by which his employment increment for the 1980-81 academic year was withheld as being unduly harsh under the circumstances.

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 prehearing conference was conducted in the matter, during which agreement was reached that the following two issues are presented for adjudication:

1. Whether or not the Board's action to withhold petitioner's salary increment for 1980-81, an amount of $1,662 for the reasons set forth in its letter to him dated April 25, 1980 (R-4), in light of the information it had (R-1 through R-4), is arbitrary, capricious, or unreasonably excessive for the infraction committed;

2. If the action of the Board is found to be arbitrary, capricious, or unreasonably excessive, what discipline, if any, should be imposed.

Because all relevant documents (R-1 through R-4) are stipulated and the essential facts of the matter, except as otherwise noted, are not in dispute, the matter shall be decided by way of cross-motions for summary decision.

Petitioner has been employed by the Board as a teaching staff member since 1966. From that time until September 30, 1979, his employment record has been unblemished. Petitioner was notified by letter dated April 25, 1980, that the Board determined at a meeting held April 24, 1980, to withhold his salary increment for 1980-81 for the following three reasons (R-4):

1. The misuse of a sick day on Tuesday, October 2, 1979, by having your brother-in-law call in sick for you while you were, in fact, vacationing in Acapulco.

2. The misuse of a sick day on Wednesday, October 3, 1979, by having your brother-in-law call in sick for you for that date while you were, in fact, not ill.

3. The misuse of a sick day on Friday, October 5, 1979.

There is no dispute that petitioner was absent from his teaching duties the entire week beginning Monday, October 1, 1979, and through and including the following

Monday, October 8, 1979. It must be noted that Monday, October 1, 1979, was a legitimate school holiday for all school teachers in the Board's employ, as was the following Monday, October 8, 1979. Additionally, it must be noted that Thursday, October 4, 1979, was a legitimately authorized personal leave day for petitioner. Sandwiched in between the legitimate days of absence are, of course, petitioner's absences on October 2, 3, and 5, 1979.

The principal of the school to which petitioner was assigned developed a suspicion on or about October 2, 1979, that petitioner was not ill when he attempted to contact petitioner that day for clarification of his substitute lesson plans. The principal was not successful in his attempts to contact petitioner at his home. The principal again unsuccessfully attempted to contact petitioner on the next day, October 3. The principal contacted the assistant superintendent in charge of personnel (assistant superintendent) to relate his suspicions to him. The principal had his suspicions further confirmed by petitioner's absence, albeit legitimately, on Thursday, October 4, followed by a sick day, October 5, which, in turn, led into the school holiday on Monday, October 8.

On October 9, 1979, when petitioner returned to his teaching duties, the principal inquired of him the reasons for his absences on October 2, 3, and 5. Petitioner was to have admitted he went to Acapulco but "...that the [petitioner] was in New Jersey on Friday [October 5, 1979] but did not feel like coming in that day..." (R-2B). The principal submitted an oral report to the assistant superintendent, followed thereafter by a written report. (R-2B)

The assistant superintendent then met with petitioner the same day, October 9, 1979, to discuss petitioner's whereabouts on October 2, 3, and 5. The assistant superintendent then submitted a report to the Superintendent, based on that conversation, which recommended

> "...a discussion be held before the Personnel Committee [of the Board] with the administrative recommendation being made that the following actions be taken: (R-2)
>
> 1. [Petitioner] should not receive any pay for October 2, 3, and 5, 1979.
>
> 2. That [petitioner] have his increment and salary adjustment withheld for the 1980-81 school year..."

A meeting with the Board's personnel committee and petitioner, represented by counsel, was held January 17, 1980, at which minutes were taken. (R-1) The personnel committee had before it the principal's report to the assistant superintendent (R-2B), the assistant superintendent's report to the superintendent (R-2), and, presumably, a hand-written note petitioner submitted to the assistant superintendent. (R-2c)

The following represents of the facts the personnel committee, hence the whole Board, had before it when it determined to withhold petitioner's salary increment for 1980-81.

Petitioner admits that on the Saturday preceding Monday, October 1, 1979, he and his wife, a part-time employee of Eastern Airlines, determined to vacation in Acapulco, Mexico. Petitioner suggests that because his wife is a part-time employee she is not normally entitled to regular blocks of vacation time. Consequently, it is implied, when time-off comes her way she must take it. In any event, petitioner admits that upon his departure for Acapulco on September 29, 1979, he had no intention of reporting for duty on October 2, 1979. In fact, petitioner had made arrangements with his brother-in-law to report him sick to school authorities on October 2, 1979. Petitioner was, in fact, reported to school authorities as being sick on October 2, 1979, but the record is not clear whether petitioner himself, or his brother-in-law, called him in sick. Regardless, petitioner was still in Acapulco at the dawn of October 2, and, he contends, he was in the process of contracting diarrhea.

Petitioner and his wife returned to New Jersey at approximately 11:30 p.m. on the evening of October 2, 1979. Petitioner contends his diarrhea affliction became worse on the flight back to New Jersey to the extent he could not report to work on Wednesday, October 3, 1979. Petitioner did not, in fact, report to work October 3, nor did he remain at his own residence that day. Petitioner travelled to his mother's home in Morgan, New Jersey. The assistant superintendent states that petitioner, in a face-to-face meeting on October 9, 1979, after school authorities suspected petitioner had been vacationing the prior week, states petitioner admitted he worked on the roof of his mother's home on October 3, 1979. Petitioner denies he worked on the roof of his mother's home and asserts he was not sufficiently recovered from the diarrhea to climb ladders to get on a roof. Petitioner explained that he was too afflicted to drive to his mother's house; she, his mother, had to come to his house to drive him to her house.

The following day, Thursday, October 4, 1979, was the legitimately authorized personal leave day granted petitioner for him to attend an anniversary party. Petitioner called in sick the following day, Friday, October 5, 1979, not for his diarrhea affliction but, as he explained in his own handwritten note submitted to the assistant superintendent: (R-2c)

> "Friday Oct. 5, was a sick day taken for I was not feeling well due to the party the previous night."

It is noted here that petitioner was not under a physician's care at any time material herein.

The assistant superintendent states that petitioner admitted to him in the face-to-face meeting held October 9, 1979 that he, petitioner, stated "... that on Friday, October 5, 1979, he did not feel like going to work and called in sick himself. He then went to his mother's house and again worked on her roof..." (R-2)

Subsequent to the meeting of the Board's personnel committee meeting of January 17, 1980, petitioner's mother filed the following certification with the Board on January 31, 1980:

> 2. [My son] advised me that Assistant Superintendent of schools, Norman Lunde has submitted a report to the Board of Education which states that my son came to my house on October 5, and October 7, 1979 and worked on my roof which at the time had a leak.
>
> 3. Although Leslie was in my house on both days while I nursed him for diarrhea and nausea, in point of actual fact, he performed no work, labor or services of any kind, shape or matter on either day, despite the fact that I attempted to have him do so. He was simply to ill to do anything.

This concludes a recitation of the facts of the matter as the Board had before it on April 24, 1980, through its personnel committee, when it determined to withhold petitioner's salary increment for 1980-81.

DISCUSSION OF LAW

N.J.S.A. 18A:29-14 provides authority for boards of education to "...withhold, for inefficiency or other good cause, the employment increment, or the adjustment

increment, or both, of any member in any year..." The issue, as earlier stated, is whether the Board had good cause to withhold petitioner's increment for 1980-81 and, if so, whether under the circumstances the withholding of the increment is excessive discipline. The measure of good cause is not whether one who reviews an action taken agrees with that action, but whether there is a reasonable basis for the action to have been taken. [See generally Kopera v. Board of Education of West Orange, 60 N.J. Super. 288 (App. Div. 1960)]

Petitioner argues that because of his unblemished fourteen year record in the Board's employ, together with his accum ulation of more than 100 available sick days, the withholding of a salary increment in the amount of $1,662 for his admitted wrongful use of one of his available sick days, October 2, is unduly harsh. Petitioner contends he was, in fact, sick on October 3 and October 5. Petitioner relies in support of his argument that the penalty imposed is excessive on the State Board of Education's ruling in Alan DeOld and the Verona Education Ass'n. v. Board of Education of the Borough of Verona, 1978 S.L.D. 1006 by which the State Board reversed the Commissioner's determination to affirm the board's action to withhold DeOld's salary increment. The State Board ruled that "other good cause" was not established for the increment to have been withheld and that the local board's action to withhold the increment was harsh and excessive. Id at 1007. Petitioner cites another case, Patricia Baumlin v. Board of Education of the Township of Woodbridge by which the State Board reversed the Commissioner's ruling to affirm Baumlin's salary increment withholding. 1980 S.L.D. - (July 2, 1980) The State Board reasoned that the board failed to consider Baumlin's excellent record as a teacher in its employ when it imposed the discipline of increment withholding for her absence from school without permission.

The circumstances here, (petitioner's departure for Acapulco on Saturday, September 29, 1979, knowing full well that Monday, October 1 was a holiday, and that on Tuesday, October 3 he had no intention of reporting to duty and, in fact, failed to report to duty that day, in conjunction with his planned personal leave day for Thursday, October 4, and the following Monday being a school holiday) are too coincidental for one to seriously believe he was "sick" on October 3 and October 5. He obviously was not sufficiently ill to leave his own residence to go to that of his mother's and, it is immaterial under the circumstances, whether he did work on his mother's roof. That petitioner should schedule himself to arrive from Acapulco at approximately midnight of Tuesday, October 2, leads me to conclude he had no intention of reporting to work on

Wednesday. Petitioner's asserted illness on Friday, stemming from a party on the preceding Thursday, simply stretches credulity to accept as truth that Friday was not intended by him to be used as a sick day —whether he was or was not sick.

In my view, the Board acted reasonably under the circumstances to withhold petitioner's salary increment for 1980-81. There is sufficient reason in the record to support that action as controverted here. Petitioner has failed to establish the Board acted arbitrarily, capriciously, unreasonably, or that the discipline is excessively harsh. In the Matter of the Tenure Hearing of Catherine Reilly, School District of the City of Jersey City, 1977 S.L.D. 403, 414 the Commissioner noted:

> ". . . 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 pupils. . ."

Petitioner has failed in his proofs to set aside the action of the Board by which it has withheld his salary increment for 1980-81. 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 5261-80

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

July 17, 1981
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

July 22, 1981
DATE

Gilbert J. Lamparello
OFFICE OF ADMINISTRATIVE LAW

plb

LESLIE NEWMARK,	:	
PETITIONER,	:	
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 by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Petitioner excepts to the determination by the Honorable Daniel B. McKeown, ALJ that in the matter presently controverted the Board's action in withholding his 1980-81 salary adjustment and increment was a valid exercise of its statutory authority. Petitioner, while admitting that sick leave was utilized for vacation purposes, contends that the rest and relaxation of vacation is so close to the purpose of sick leave that his use thereof was not serious enough to justify the withholding of his increment. The Board's reply exceptions refute those of petitioner and affirm the initial decision. The Commissioner finds no merit in petitioner's novel argument. Petitioner's reliance on Patricia Baumlin, supra, is inapposite to the present matter.

The Commissioner notes that N.J.S.A. 18A:30-1 as a definition of sick leave states in its entirety:

> "Sick leave is hereby defined to mean the absence from his or her post of duty, of any person because of personal disability due to illness or injury, or because he or she has been excluded from school by the school district's medical authorities on account of a contagious disease or of being quarantined for such a disease in his or her immediate household."

Nothing therein refers to sick leave as vacation time and, in the Commissioner's opinion, the use of sick-leave days for vacation time cannot be legitimatized. See Jean Warren v. Board of Education of the Borough of Brooklawn, 1976 S.L.D. 980.

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

August 26, 1981

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3808-80
AGENCY NO. 281-6/80A

IN THE MATTER OF:

THE TENURE HEARING OF PORTIA WILLIAMS, SCHOOL DISTRICT OF THE BOROUGH OF RED BANK, MONMOUTH COUNTY

Record Closed: May 27, 1981
Received by Agency: July 13, 1981

Decided: July 10, 1981
Mailed to Parties: July 15, 1981

APPEARANCES:

Martin M. Barger, Esq.(Reussille, Cornwell, Mausner & Carotenuto, attorneys) for the Petitioner, School District of the Borough of Red Bank

Arnold M. Mellk, Esq. (Greenberg & Mellk, attorneys) for the Respondent, Portia Williams

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

Written charges against Portia Williams, a teacher with tenure status, were certified to the Commissioner of Education by resolution of the School District of the Borough of Red Bank, Monmouth County. On June 16, 1980, this matter was transferred to the Office of Administrative Law for a determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq.

At the conclusion of the presentation of the petitioner's case, Mr. Mellk moved to dismiss the charges on the basis that the petitioner failed to show a prima facie case as to each of the three charges brought against the respondent. By order dated May 7, 1981, I dismissed Charges 2 and 3. This order was affirmed by the Commissioner of Education on June 9, 1981.

Prior to discussing the facts in the matter relevant to Charge 1, it is appropriate to consider two matters raised by Mr. Mellk in his trial brief. The first deals with the standard of proof in tenure matters.

Mr. Mellk argues that the standard of proof should be clear and convincing evidence rather than the preponderance of evidence standard which heretofore has been applied in such cases. He relies on a recent Appellate Division decision which held that the standard of proof in a medical license disciplinary proceeding is clear and convincing evidence, the standard used in disbarment proceedings against attorneys, In the Matter of the Revocation of the License of Polk, 178 N.J. Super. 191 (App. Div. 1981).

Although Mr. Mellk recognizes that the removal of a teacher from a tenure position is not the same as the revocation of the teaching certificate, he notes that the statutory grounds for both matters are the same, N.J.S.A. 18A:6-38, N.J.A.C. 6:11-3.7 and N.J.S.A. 18A:6-10. Additionally, Mr. Mellk argues that the removal of a teacher from a tenure position may have the same effect, that of depriving the person of his ability to obtain comparable employment within the State of New Jersey.

Mr. Barger disagrees and relies on the prior school law decisions holding that the standard of proof in tenure matters is the preponderance of credible evidence. See, In the Matter of the Tenure Hearing of Madeliene Ribacka, 1978 S.L.D. 929, 936; In the Matter of the Tenure Hearing of Arlene Dusel, 1978 S.L.D. 526, 529 aff'd by the State Board of Education, 1979 S.L.D. _____ (August 8, 1979); In the Matter of the Tenure Hearing of John Orr, 1973 S.L.D. 40, 48.

Having considered the matter, I **CONCLUDE** that the removal of a teacher from a tenure position is not tantamount to the revocation of the teaching certificate. In a tenure matter, the issue is whether a teacher is entitled to a specific position and another proceeding must be initiated prior to the revocation of the teaching certificate, N.J.A.C. 6:11-3.7. The fact that a teacher who loses a tenure position may have

difficulty finding another teaching position is clearly distinguishable from the situation in which, after revocation of a license, a person is absolutely precluded from practicing the licensed occupation. The respondent has not produced any convincing evidence to show that the removal from a tenure position is equivalent to the revocation of the teaching certificate. Therefore, I **CONCLUDE** that the rationale of the Appellate Court in Polk, supra, is not applicable in teacher tenure matters and that the standard of proof in these cases is the preponderance of evidence.

The second matter deals with the testimony of the pupils.

On the first day of the hearing, Mr. Mellk requested that the students to be called as witnesses be limited to those students mentioned in the Statement of Evidence attached to the charges, namely, "K.L.", "S.W.", "N.H.", "A.S.", "T.R." and "C.C." * At the Prehearing Conference, Mr. Barger indicated that the petitioner would be calling additional students as witnesses and later submitted lists of these witnesses to Mr. Mellk. Thereafter, Mr. Mellk deposed the students on these lists. It was not until the first day of the hearing that Mr. Mellk raised an objection to the testimony of students not listed in the Statement of Evidence. I ruled that Mr. Mellk's objection was out of time and admitted as witnesses those students who were deposed by Mr. Mellk.

In his trial brief, Mr. Mellk requests that the testimony of the students not listed in the Statement of Evidence be excluded from consideration. Of the six students mentioned in the Statement of Evidence, three testified at the hearing.

Mr. Mellk has presented no valid reason for striking the testimony of the students not listed in the Statement of Evidence. Charge I alleges that the respondent hit some of her students. The respondent had ample notice of the names of the students who were to be witnesses and, as already stated, Mr. Mellk deposed the students prior to the hearing.

Therefore, I **CONCLUDE** that none of the testimony of the students will be excluded from the record.

* Initials will be used instead of the names of the students, who are all minors, in this initial decision.

The remaining charge, Charge I, alleges that:

> Portia Williams, on several occasions, has struck pupils in her class with a ruler. This conduct is in direct violation of N.J.S. 18A:6-1, which specifically prohibits corporal punishment of pupils.

Joan Abrams, Superintendent of Schools of the Borough of Red Bank, testified that on March 12, 1980, she received a telephone message from her secretary stating that an unidentified person had called her about a teacher hitting pupils (P3, 2 T 86). The caller gave the secretary a telephone number. On the next day, Ms. Abrams called the number and spoke to Mrs. Lucas who stated that her son, "K.L.", was in the respondent's first grade class at the Primary School. Mrs. Lucas claimed that Ms. Williams hit her pupils (2 T 88-9).

Ms. Abrams called Richard Frushon, the principal of the Primary School and told him to speak to "K.L." (2 T55, 88-9). Thereafter, at the request of Ms. Abrams, Mrs. Lucas sent Ms. Abrams a letter, dated March 26, 1980, setting forth her complaint against the respondent (2 T 90).

Mr. Frushon informed Ms. Abrams that he received a complaint about the respondent from Mr. and Mrs. Clark (2 T 55, 93-4). The Clarks claimed that the respondent was humiliating their son, "C.C.", in front of the class and that she hit "C.C." At the request of Mr. Frushon, Mr. and Mrs. Clark sent a letter to him, dated March 24, 1980, setting forth their complaint. Ms. Abrams testified that she also received a complaint from Mrs. Clark about the respondent's comments regarding "C.C."'s personal hygiene (2 T 97, 122).

According to Mr. Frushon and Ms. Abrams, it was the petitioner's policy that complaints against teachers should be in writing (2T 65, 112). Two parents of students in the Primary School testified that they complained to Mr. Frushon that their children were hit by a teacher (not the respondent) and they were not asked to submit complaints in writing (3 T 105, 109).

Mr. Frushon, stated that the school policy gave him the option of deciding whether or not to consult with Ms. Williams regarding these complaints (2 T 65-6). He elected not to discuss the matters with the respondent or any of her colleagues, and he did not make any observations of respondent's classroom activities to determine if the complaints were true (2 T 66, 72-3, 78-9).

As a result of the complaints received from Mrs. Lucas and the Clarks, Mr. Frushon interviewed "K.L." and "C.C." in his office. He then called to his office and interviewed the other students mentioned by either "K.L." or "C.C." as having been hit by Ms. Williams. Mr. Frushon's secretary was present during these interviews and Ms. Abrams was present during some of the interviews (2 T 89, 108, 66-7, 81). A written summarization of the interviews, dated March 18, 1980, was prepared by Mr. Frushon and submitted to Ms. Abrams.

After the initial interview of pupils by Mr. Frushon, the pupils were later interviewed by Mr. Frushon, togther with Mr. Barger (2 T 81). Some of the pupils were interviewed a third time by Mr. Frushon to see if they could identify the alleged ruler used by Ms. Williams (2 T 81).

Ms. Abrams presented the matter to the Red Bank Board of Education in April 1980. Augustino Monteiro, a member of the Board at that time, was concerned about the timing. Ms. Williams had made a controversial statement at the Board meeting of March 11, 1980, which received wide publicity (3 T 7). Mr. Monteiro recalled that the Board was told about a complaint that Ms. Williams hit a student sometime in the fall of 1979 (3 T 6). Mr. Frushon stated that there had been a complaint against the respondent in September on October 1979, but the parent decided not to pursue the matter and there was no investigation by his office (3 T 182-4). Except for the complaints mentioned herein, Mr. Frushon had received no other complaints about Ms. Williams during her employment at the Primary School (2 T 129-31).

Mr. Frushon testified that he was aware that Ms. Williams made a controversial speech at the March 11, 1980 meeting of the Red Bank Board of Education (2 T 75-7). Ms. Abrams, who was present at the March 11, 1980 meeting, considered Ms. Williams' remarks to be racist and anti-semitic (2 T 126) but denied any connection between respondent's speech and the filing of charge 1 against her (2T 126-7).

In June, 1980, Ms. Williams was suspended with pay pending the resolution of the charges by the Commissioner of Education.

At the hearing, the Board called 16 former pupils of Portia Williams as witnesses, but only 14 testified. One student, "C.S.", was excused after she failed to show an ability to distinguish between right and wrong (1 T 195-7). Another student, "L.Y." was

excused because her name was not on petitioner's list of witnesses and Mr. Mellk did not depose her prior to the hearing (1 T 139-41). The students who testified had different types of social and economic backgrounds, some were quiet and others misbehaved in class, and some were slow learners and others were bright. All of the students were between seven and nine years old at the time of the hearing.

Of the students who testified, six were in respondent's first grade class during the 1979-80 school year. These five students are "K.L.", "C.C.", "J.B.", "A.S.", "L.M." and "D.B.".

"K.L." stated that he was not hit by Ms. Williams (1 T 53) but that she hit a number of students on the hand with a ruler (1 T 50-1). "K.L." was afraid that the respondent would hit him (1 T 53-4). He admitted being upset in the beginning of the school year about being in school. The respondent comforted him and had him call home for assurance (1 T 58-9). The mother of "K.L." filed a complaint about the respondent with Ms. Abrams and he was transferred out of the respondent's class.

"C.C." stated that Ms. Williams punished him by hitting him on the hand with a ruler and that this upset him (2 T 29-30). He was visibly upset about the fact that the respondent asked him if he washed and changed his clothes and about being sent to the nurse to clean up (2 T 30-2).

"J.B.", "A.S." and "L.M.", testified that they got into trouble in Ms. Williams' class and she punished them by hitting them on the hand with a ruler (1 T 29-30, 68, 135). These students liked the respondent, were not scared of her and were not hurt when she hit them with the ruler (1 T 41-2, 72, 74, 138).

"D.B." testified that she was not hit by Ms. Williams, but that she saw other students being hit on the hand with a ruler (1 T 156-7). She liked Ms. Williams (1 T 158).

"K.L." and "L.M." stated that they told their respective parents that the respondent hit her pupils (2 T 57, 138).

The remaining eight students who testified had Ms. Williams as their first grade teacher during the 1978-79 school year. Five of these students, "G.D.", "B.G.", "M.W.", "B.J.", and "S.B." testified that Ms. Williams on one occasion lined up the entire

class and hit each student on the hand with a ruler because the class was noisy while she spoke to another person in the doorway (1 T 80-81, 113, 145, 165, 2 T 9). One student, "B.D.", testified that he did not recall such an incident (1 T 189). The other two students, who had the respondent as their teacher in the 1978-79 school year, "S.D." and "T.D.", were not asked whether there was a time when Ms. Williams hit the entire class.

"G.D.", "S.D.", "B.G.", "B.J.", "B.D.", "T.D." and "S.B." testified that Ms. Williams hit them individually on the hand with a ruler when they got into trouble in her class (1 T 78-9, 96-7, 110-1, 166-7, 178-9, 198-200, 2 T 6-7). These students liked Ms. Williams and were not afraid of her (1 T 93, 102, 107, 116, 152, 172, 202, 2 T 19-22).

"B.G." and "S.B." testified that they told their parents that they had been hit by Ms. Williams (1 T 117-8, 2 T 18).

Ms. Williams, who had been employed by the petitioner for nine years (3 T 117), denied that she has ever hit any children in her class with or without a ruler (3 T 119, 121). When "K.L." was transferred from her class in April or May 1980, Mr. Frushon refused to give any reason for the transfer (3 T 132-3). She was not informed about the complaints made against her until a copy of the formal charges were presented to her by Mr. Frushon's secretary (3 T 129). About the same time, she received a formal evaluation for the 1979-80 school year which made no mention of the allegation that she hit children (3 T 140). Ms. Williams could think of no reason why the students would lie about her.

Margaret Noble, a third grade teacher at the Primary School, testified that she now has several students who were taught by Ms. Williams during the 1978-79 school year (3 T 17-19). Mr. Frushon called several of these students to his office for an interview and Ms. Noble was aware that the children discussed the matter among themselves at that time (3 T 20) and also when their depositions were taken by Mr. Mellk (3 T 21). None of Ms. Williams' former students ever told Ms. Noble that the respondent had hit them (3 T 22-3). In her opinion, the former students of Ms. Williams were fond of the respondent and would tell the truth about her (3 T 30).

Judith Pryor, a first grade teacher at the Primary School, stated that she had certain classes and activities together with the respondent and her class (3 T 33). Ms. Williams had a good relationship with her students and none of the respondent's students ever complained to Ms. Pryor about being hit (3 T 34-5). Ms. Pryor could think of no reason why the former students of Ms. Williams would lie about her (3 T 45).

Ms. Margaret Mann testified that prior to her retirement on April 1, 1978, she had visited Ms. Williams' class on an informal and formal basis to evaluate her performance (3 T 56-8). During these visits, she observed that the pupils loved Ms. Williams, there was a relaxed atmosphere in her class, the respodent understood the curriculum, and the pupils responded to her teachings (3 T 60-61, 63).

Ms. Williams had Board Aides in her class for approximately thirty-five to forty-five minutes each day to assist her. Three of these Board Aides, Barbara Joyce Vales, Alice Mote and Angelica Santiago, testified that Ms. Williams had good rapport with the children in her class and that they never saw her hit any of her pupils (3 T 68-70, 74-76, 83). Ms. Santiago, in particular, had a good recollection of the students who had Ms. Williams as their teacher during the 1978-79 school year. Several of these students were friendly with Ms. Santiago and, in her opinion, would have told her if Ms. Williams had hit them (3 T 89, 91, 95-6). Ms. Santiago could think of no reason why the children would lie about Ms. Williams (3 T 102).

I **FIND** that the facts set forth above are not in dispute, except for those relating to the main issue, whether the respondent hit various pupils in her class during the 1978-79 and 1979-80 school years.

There are numerous school law decisions in which the Commissioner of Education has recognized the need to examine the testimony of children of tender age with great caution. See, In the Matter of the Tenure Hearing of William Simpson, 1978 S.L.D. 368, 374 aff'd by the State Board of Education, 1978 S.L.D. 377; In the Matter of the Tenure Hearing of John Birch, 1978 S.L.D. 63, 79; In the Matter of the Tenure Hearing of Edward J. Quinn, 1975 S.L.D. 397, 410-411; In the Matter of the Tenure Hearing of Fredrick J. Nittel, 1974 S.L.D. 1269, 1278-9, aff'd by the State Board of Education, 1975 S.L.D. 1111.

Since the decision in Palmer v. Board of Education of Audubon, 1939-49 S.L.D. 183, the Commissioner of Education has frequently stated:

> . . . testimony of children, especially of those ten years of age, against a teacher, whose duty it is to discipline them, must be examined with extreme care. It is dangerous to use such testimony against a teacher; it is likewise dangerous not to use it. The necessities of the situation sometimes make it necessary to use the testimony of school children. If such testimony were not admis-

> sible, the children would be at a teacher's mercy because there is no way to prove certain charges except by the testimony of children. Palmer, supra, at 188

In this matter, the former pupils of Ms. Williams are the only witnesses presented by the Board to substantiate the corporal punishment charge.

Although there are minor inconsistencies, all 14 pupils who testified said that the respondent hit some of her students on the hand with a ruler. No reason or explanation was presented by the respondent as to why these children would lie about her.

Mr. Mellk would have me believe that the testimony of these pupils was fabricated by Mr. Frushon in order to "get even" with Ms. Williams because of her speech at the March 11, 1980 meeting of the Red Bank Board of Education. Except for the close proximity of the date of this speech and the presentation of the charges against Ms. Williams, no convincing evidence was presented by the respondent to support this position.

Mr. Frushon spoke to the students on three different occasions about Charge 1. Having listened to the students and having observed their demeanor, I cannot believe that Mr. Frushon, even if he wanted to, could get these students to lie about Ms. Williams' behavior in the classroom with such consistancy. All the children were positive that the respondent hit students on the hand with a ruler to discipline them, all of them described same type of the ruler and mentioned the same students as being subject to this discipline. Those students who testified about the respondent hitting the entire class, gave basically the same account of the incident.

Although, as noted by Mr. Mellk, the children who testified had numerous opportunities before the hearing to discuss the matter among themselves, this in itself does not invalidate their testimony. No evidence was presented to show any reason why any of the students would get together and decide to lie about the respondent.

Although I do not question the veracity of the witnesses offered by Ms. Williams, their testimony is based on observations made during the limited periods they were in Ms. Williams' classes or on their conversations with some of the students taught by the respondent. Most of the students liked Ms. Williams and it is reasonable to expect that they would be reluctant to complain about her. Some of the students

appeared to feel that being hit on the hand was an acceptable form of discipline and nothing to complain about. Also, some of the students felt that they deserved to be punished, based on their own admissions of wrong doings, and possibly were afraid of further punishment if they mentioned the matter. These factors probably also explain why many of the students testified that they did not tell their parents that Ms. Williams had hit them.

Based on the testimony, I **FIND** that:

(1) Ms. Williams hit various students in her class lightly on the hand with a ruler for disciplinary purposes during both the 1978-79 and 1979-80 school years.

(2) None of the students was hurt.

(3) Ms. Williams had good rapport with her students during the 1978-79 and 1979-80 school years and the students were not afraid of the respondent.

(4) "K.L." is a sensitive student who had problems adjusting to the first grade environment and was upset when Ms. Williams hit other students in the class.

(5) "C.C." was upset about being hit by Ms. Williams, but he was primarily upset about the fact that Ms. Williams critized his personal hygiene.

The first legal issue in this matter is whether the conduct of Ms. Williams constitutes corporal punishment.

N.J.S.A. 18A:6-1 provides:

> No person employed or engaged in a school or educational institution, whether public or private shall inflict or cause to be inflicted corporal punishment upon a pupil attending such school or institution; but any such person may, within the scope of his employment, use and apply such amounts of force as is reasonable and necessary:
>
> (1) to quell a disturbance, threatening physical injury to others;

(2) to obtain possession of weapons or other dangerous objects upon the person or within the control of a pupil;

(3) for the purpose of self-defense; and

(4) for the protection of persons or property:

and such acts, or any of them, shall not be construed to constitute corporal punishment within the meaning and intendment of this section. . . .

The underlying philosophy of this statute has been described by the Commissioner as the right of the student to freedom from offensive bodily touching even though there is no physical harm, In the Matter of the Tenure Hearing of Frederick L. Ostergren, 1966 S.L.D. 185, 186.

Based on the facts, I **CONCLUDE** that Ms. Williams is guilty of the use of corporal punishent.

The remaining issue is whether Ms. Williams should be removed from her tenure position or be subject to some other penalty.

In order to assess the proper penalty, it is necessary to take into consideration the nature of the offenses, any mitigating circumstances and the teacher's performance record, In the Matter of the Tenure Hearing of William H. Kittell, 1972 S.L.D. 535, 541. In this matter, Ms. Williams did not intend to inflict any physical pain on her pupils. She hit them lightly on the hand when they were disruptive in class. There was no evidence of lack of self-control on the part of the respondent. Ms. Williams is a competent teacher and, prior to this matter, had an unblemished record of nine years of service as a teacher in Red Bank.

I **CONCLUDE** that the conduct of Ms. Williams as herein shown was unprofessional, but does not warrant the forfeiture of her tenure rights. Therefore, I **CONCLUDE** that the respondent be continued in her tenure status as an employee of the petitioner and that she be denied her salary increment for the 1980-81 school year.

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.

July 10, 1981
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

7/13/81
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

July 15, 1981
DATE

Elizabeth J. Regan, CJ
OFFICE OF ADMINISTRATIVE LAW

plb

WITNESSES

FOR THE PETITIONER:

"J.B."
"K.L."
"A.S.
"G.D."
"S.D."
"B.G."
"L.M."
"M.W."
"D.B."
"B.J."
"B.D."
"T.D."
"S.B."
"C.C."
Richard Frushon
Joan Diane Abrams

FOR THE RESPONDENT:

Augustino Monteiro
Margaret Noble
Judith Ann Pryor
Margaret Mann
Barbara Joyce Vales
Alice Mote
Angelica Santiago
Marie Rose Kennedy
Nattie Melvin
Colette Johnson
Portia Williams

ADDENDUM

EXHIBITS ADMITTED INTO EVIDENCE:

P 1 - Not admitted into evidence.

P 2 - Not admitted into evidence.

P 3 - March 12, 1980 telephone message for Joan Abrams.

P 4 - Tape containing the statement of Portia Williams at the March 11, 1980 meeting of the Red Bank School Board.

IN THE MATTER OF THE TENURE	:	
HEARING OF PORTIA WILLIAMS,	:	
SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
BOROUGH OF RED BANK,	:	DECISION
MONMOUTH COUNTY.	:	
	:	

The Commissioner has reviewed the record of this matter which includes the initial decision issued by the Office of Administrative Law, Beatrice S. Tylutki, ALJ, and the exceptions and the reply exceptions of counsel taken thereto.

The Board's position is that the actions of which respondent has been found guilty, namely corporal punishment committed on certain of her pupils over a two year period are sufficient to warrant her dismissal from her teaching position in the Red Bank School System.

Respondent, by way of her exceptions to the initial decision, rejects the findings and determination of the Administrative Law Judge insofar as respondent has been found guilty of corporal punishment. Respondent maintains that the Board relied solely on the testimony of pupils who were in her classes at the time the alleged incidents occurred during the 1978-79 and 1979-80 school years in its attempt to prove the charge of corporal punishment. Respondent denies that she ever used corporal punishment.

Moreover, respondent argues that, while she does not accuse the pupils who testified against her of deliberate falsehoods, the record of this matter clearly establishes that their testimony is tainted because of the passage of time and the opportunities they had to talk with each other at the time of the hearing. Respondent further maintains that the interrogation by the school authorities of these pupils prior to the time the Board certified its charges against her undoubtedly influenced their testimony at the hearing. Finally, respondent points out that none of the testimony adduced from these pupils with respect to the charge of corporal punishment was corroborated by any of the adult witnesses who testified and had professional or paraprofessional contact with her during the periods of time the alleged incidents occurred. Respondent demands that the tenure charge against her be dismissed by virtue of the Board's failure to establish by the preponderance of sufficient credible evidence that any of her alleged actions pertaining to these pupils rise to the level of corporal punishment.

The parties in support of their positions in their exceptions rely on a number of previous school law decisions rendered by the Commissioner and the courts which are incorporated by reference herein.

The Commissioner has carefully reviewed the entire record of the matter controverted herein. In the Commissioner's judgment, the findings and determination of Judge Tylutki are sufficiently documented in the record of this matter for a determination to be reached herein that respondent is guilty of the charge of corporal punishment, notwithstanding the fact that such evidence is based solely upon the testimony of pupil witnesses. The Commissioner is fully cognizant of the weight to be given to establish the credibility of pupil testimony in view of the serious nature and the consequences of the charge of corporal punishment against respondent herein.

The Commissioner notes that there is no indication that respondent's actions were premeditated, cruel or vicious, or done with specific intent to inflict corporal punishment upon her pupils. Moreover, there is no indication in the record of this matter that respondent's actions had any lasting effect on the continued operation of the school. From the testimony of pupils who were in respondent's classes during the school years in question, it appears that they liked respondent and she in turn expressed genuine concern and affection toward them. There is no evidence that the experiences involving these pupils in connection with the incidents complained of herein may be characterized as other than temporarily traumatic, or that they had a continuing effect on these pupils in their relationship with respondent.

In the Commissioner's judgment there is no question that the actions of respondent with respect to incidents leading to the guilty charge of corporal punishment are serious and may not be condoned. However, in light of respondent's prior record, length of service and the sincere concern she has shown for the pupils in her classes, the Commissioner does not find the charge of corporal punishment sufficiently flagrant to warrant her summary dismissal. The Commissioner so holds.

Accordingly, the Commissioner concurs with the findings, determination and recommendation set forth in the initial decision of this matter and adopts them as his own.

The Commissioner hereby directs that respondent be continued in her tenure status as an employee of the Board and that she be denied her salary increment for the 1980-81 school year.

COMMISSIONER OF EDUCATION

August 27, 1981
Pending State Board

E.N. AND R.N., in behalf of their son, C.N.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

For the Petitioners, E.N. and R.N., Pro Se

For the Respondent, Henry Gill, Esq.

Petitioners appeal to the Commissioner of Education from the decision of the Chief Classification Officer rendered in the above-captioned matter on March 11, 1981 (Case #80-563). This appeal is taken pursuant to the provisions of N.J.A.C. 6:28-1.9(j)(8) which require the Commissioner to conduct an appellate review of the impartial de novo hearing and determination previously rendered in the instant matter by the Chief Classification Officer.

The entire record of this matter is now before the Commissioner for his review and determination.

The Commissioner observes from the pleadings that petitioners appeal the Chief Classification Officer's decision on the following grounds:

1. Petitioners maintain that the Chief Classification Officer ignored the overwhelming facts and pertinent testimony of qualified witnesses in reaching a determination that residential school placement for C.N. was unwarranted.

2. Petitioners reject that part of the decision which recommends that family and individual counseling be pursued in this matter in lieu of residential school placement for C.N. Petitioners maintain that, on their own initiative during the past five years, they have sought and employed professional counseling and diagnostic services in connection with the problems they were experiencing with C.N. at home.

The Board, in its Answer to the pleadings, takes the position that petitioners have failed to establish that C.N.'s classification and placement in a day school program for emotionally disturbed pupils is inappropriate to accommodate his

educational needs. The Board maintains that it has complied with the controlling statutory prescription and the applicable regulations of the State Board of Education in providing a day school program of education for C.N. The Board asserts that there is ample evidence in the record of this matter developed in the de novo proceedings before the Chief Classification Officer in support of its position.

The Board concurs with the findings and determination of the Chief Classification Officer with respect to C.N.'s placement in a day school program which is grounded on the provisions of N.J.A.C. 6:28-4.3(g).

The Commissioner observes that petitioners have filed an additional exhibit to supplement their claim that C.N. should be placed in a highly structured residential program. This exhibit (C-1) is in the form of a letter opinion filed with the Commissioner on petitioners' behalf by a clinical psychologist.

The Commissioner has carefully reviewed the entire record of this matter including the transcript of the testimony of the witnesses and the exhibits marked in evidence.

In the Commissioner's judgment, there has been no clear and compelling reason established by petitioners in the record of this matter to warrant a modification or reversal of the Chief Classification Officer's determination that C.N.'s educational classification in a day school program for emotionally disturbed pupils is adequate for his educational needs and that such placement constitutes the least restrictive environment to be afforded C.N., pursuant to N.J.A.C. 6:28-2.2.

The Commissioner, in reaching this determination, does not wish to convey an attitude of indifference with respect to petitioners' claims that C.N. requires placement in a residential facility; however, he cannot agree that the record of this matter supports such a determination for placement and expenses to be incurred by the Board pursuant to N.J.A.C. 6:28-4.3(g) which reads in its entirety as follows:

> "(g) Residential costs shall be assumed by the public agency which places a pupil in a residential school. A local school district shall not be responsible for residential costs when reason for placement is due to home conditions or parental choice and a free and appropriate education can be made available in a nonresidential school. Placements of pupils in residential schools by public agencies other than local school districts shall be subject to regulations governing such agencies and these regulations. These provisions do not eliminate the responsibility of a local school district to

pay the day school education cost portion of a handicapped pupil's special education in a residential program when the pupil has been placed under the authority of a public agency empowered to make such placement."

Accordingly, the Commissioner hereby concurs with the decision of the Chief Classification Officer and adopts the findings and conclusions therein as his own.

The instant Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

September 4, 1981

Pending State Board

J.M. AND R.M., in behalf of L.M.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF OAKLAND, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

For the Petitioners, J.M. and R.M., Pro Se

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

This matter has been opened before the Commissioner of Education on April 8, 1981 by Petition of Appeal from the decision of a classification officer dated February 11, 1981.

Petitioners herein object to the placement provided for their son and contend that such placement has failed to meet his speech and cognitive needs. Petitioners urge an independent evaluation at respondent's expense. Petitioners base such claim upon their contention that L.M.'s classification was changed without conformity with regulations and without their participation as required by regulation. Petitioners likewise allege failure on the part of respondent's child study team (CST) to properly inform them of their due process rights.

Petitioners also allege that respondent's placement failed to provide adequate speech therapy and that respondent failed to grant access to L.M.'s record when requested. Petitioners further allege that medication prescribed for L.M. was improperly administered by the school nurse.

In addition to the allegations contained above, petitioners object to the conduct of the hearing by the classification officer contending such hearing was unduly influenced by the attorney for respondent in that procedural objectives were invariably sustained. Petitioners, who appeared without professional counsel, contend such action on the part of the classification officer impeded their ability to present their case effectively. Petitioners' final objection to the conduct of the hearing involves the ruling by the classification officer that witnesses could be permitted to hear the testimony of those witnesses who preceded them.

Respondent generally denies the allegations contained in the Petition and contends that the actions of its CST were legal and proper and in no way violative of regulation or petitioners' rights. Respondent also raises very strong objection to petitioners' criticism of the classification officer's conduct of the proceeding, alleging such conduct to have been proper in all respects. Respondent characterizes such contention by petitioners on being "scandalous and scurrilous" and urges their being stricken. Respondent urges that petitioners' request for an independent evaluation at respondent's expense be denied as being contrary to N.J.A.C. 6:28-1.6(m) which requires an independent evaluation only upon disagreement with the evaluation of the CST. Insofar as respondent contends that the parents have failed to provide consent for such evaluation to be conducted by the district's CST, petitioners are not entitled to an independent evaluation. In the interest of the child who is the subject of the dispute herein, respondent urges that the classification officer's directive to the district's CST to conduct a re-evaluation be implemented.

The Commissioner has reviewed the entire record in the instant matter including the decision of the classification officer and the arguments presented by the parties. As a consequence of such review, the Commissioner observes that the classification officer's conclusions as to the procedural shortcomings of the original evaluation and classification of October 18, 1977 are confirmed by the evidence as presented herein. He likewise concurs with the conclusion that L.M.'s reclassification on June 15, 1978 as emotionally disturbed was likewise flawed by virtue of the failure to carry out a comprehensive evaluation as required by regulations in effect at that time.

The Commissioner further determines that respondent erred in its placement of L.M. in a program during the 1979-80 and 1980-81 school years other than one specifically designated for multiply-handicapped pupils without filing a request for an exception as required under N.J.A.C. 6:28-3.2(d)6 which came into effect on August 11, 1978.

Petitioners' contentions regarding failure of respondent's CST to inform them of their due process rights cannot clearly be determined on the record and thus the classification officer's determination in regard to such alleged shortcoming is affirmed. The Commissioner likewise finds no evidence in the record to sustain an allegation of bias on the part of the classification officer. In the Commissioner's view, the classification officer's sustaining of objections on the part of respondent's counsel was appropriate and for good cause as was his ruling to permit witnesses to remain in the hearing room during testimony. The Commissioner finds and determines that the classification officer's conduct permitted petitioners full

opportunity to place their case upon the record and that petitioners herein were not harmed by their inability to provide professional counsel.

Having disposed of those matters dealt with above, the Commissioner must render a determination on petitioners' request for an independent evaluation at respondent's expense. While the Commissioner in no way seeks to cast doubt upon the ability and integrity of respondent's CST to carry out an objective and valid evaluation procedure, it seems abundantly clear that petitioners' faith in such process has been severely shaken by virtue of past procedural shortcomings as elaborated, ante. Accordingly, and in order to expedite the evaluation and classification process so as to assure an early determination and an appropriate placement for L.M., the Commissioner directs that respondent take immediate steps to provide an independent evaluation without expense to petitioners.

The independent evaluation as directed herein is to be completed within the earliest possible time period in order to assure that L.M. may be appropriately classified and placed for the 1981-82 school year. No stay in this matter will be granted except by application to the Commissioner and only for good cause shown.

IT IS SO ORDERED this 8th day of September 1981.

COMMISSIONER OF EDUCATION

September 8, 1981

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO. EDU 4302-81
AGENCY DKT. NO. 265-7/81A

NEW JERSEY EDUCATION ASSOCIATION, and EDUCATIONAL SERVICES TEACHERS ASSOCIATION,

Petitioners,

vs.

ESSEX COUNTY EDUCATIONAL SERVICES COMMISSION, an educational services commission established in accordance with Title 18A of the New Jersey Statutes, and the Members of its Board of Directors, individually, EDUCATION AND TRAINING CONSULTANTS, INC., a corporation of unknown domicile, V.J.L., INC., a corporation of unknown domicile, VINCENT J. LASPROGATA, and S. WAYNE ROSENBAUM, individually, and an Associate Director of the Essex County Educational Services Commission,

Respondents.

INITIAL DECISION

Record Closed: August 4, 1981 Decided: August 10, 1981

Received by Agency: Mailed to Parties:

APPEARANCES:

William S. Greenberg, Esq.,
Attorney for Petitioners

Edward F. Petit-Clair, Esq.
Attorney for Respondent Essex County Educational Services Commission

Kevin F. Wall, Esq.
Attorney for Respondents Education and Training Consultants, Inc., V.J.L., Inc. and Vincent J. Lasprogata

BEFORE HOWARD H. KESTIN, CALJ:

PROCEDURAL BACKGROUND

The litigation underlaying this matter was commenced on December 5, 1980 in the Superior Court, Chancery Division (Essex County) as a challenge to the legality of a contract between the respondents Essex County Educational Services Commission (Commission) and Education and Training Consultants, Inc. (ETC) for the academic year 1980-81 (1980-81 contract). The plaintiffs in that suit, petitioners here, sought declaratory, injunctive and legal relief on the grounds, inter alia, that ESC lacked legal authority to contract with private vendors for the provision of instructional services under L. 1977, c. 192 and c. 193 (chapter 192 and 193 services); that, for a variety of reasons, the 1980-81 contract was null and void; and that variously based interferences with contractual relationships had occurred.

A petition was also filed with the State Public Employment Relations Commission (PERC) asserting that respondent Commission had engaged in unfair labor practices.

After issue had been joined in the Chancery Division proceeding, the parties filed cross motions for partial summary judgment returnable before Hon. Arthur C. Dwyer, J.S.C. on March 12, 1981. Judge Dwyer rendered an oral opinion on April 10, 1981 and entered an order on May 12, 1981.

Judge Dwyer ruled that the Commission "has the statutory authority pursuant to N.J.S.A. 18:6-51 et seq. to contract with private vendors for the provision of services mandated by the provisions of N.J.S.A. 18A:46A-1 et seq. and N.J.S.A. 18A:46-19.1 et seq. Any statements to the contrary in Formal Opinion 1-1981 by the Attorney General are hereby overruled." This ruling has been appealed and is presently pending before the Superior Court, Appellate Division.

Judge Dwyer further ruled that "to the extent that the Complaint and Amended Complaint duplicate unfair labor practice charges already filed with the Public Employee Relations Commission, that Commission has jurisdiction of those complaints pursuant to the provisions of N.J.S.A. 34:13A-5.4(c)".

Finally, Judge Dwyer ordered "that all aspects of the Complaint and Amended Complaint which concern the approval of the particular contract in question ... by the State Commissioner of Education or the State Board of Education are hereby referred to the State Commissioner of Education pursuant to the provisions of N.J.S.A. 18A:6-9".

Not decided in the ruling on the cross motions for partial summary judgment and, therefore, reserved by Judge Dwyer

were those aspects of the complaint seeking declaratory, equitable and legal relief arising from alleged interferences with contractual relationships and prospective advantages, ultra vires acts, and deprivations of statutory and constitutional rights.

Those aspects of the matter referred by Judge Dwyer to the Commissioner of Education in his order of May 12, 1981 were, on July 9, 1981, declared by the Commissioner of Education to be a contested case. They were filed with the Office of Administrative Law (OAL) on July 10 with a request for expedited treatment.

In the meantime, since the commencement of the Chancery Division proceeding, the Commission had solicited and received bids for the provision of services for the 1981-82 school year. ETC was once again the successful bidder and the Commission was preparing to award the contract. Upon learning of the Commission of Education's determination that the matter would be heard, the Commission quite properly deferred its action to award the 1981-82 contract until the scope of the contested case and its impact upon the 1981-82 contract could be determined.

The attorneys for all the parties have been extraordinarily cooperative in expediting the conduct of this case. Thus, it was possible to hold a pre-hearing conference beginning in the late afternoon of Friday, July 10, 1981, the very day the matter was filed with OAL, in order to determine the scope of the controversy and to establish a schedule for the trial of the case. As a result of this conference, a Partial Pre-hearing Order was entered on July 13, 1981 which established the next day, July 14, 1981, as the first day of the hearing, which, with seven full days of testimony and argument concluded on Monday, July 27, 1981.

The scope of the case as discussed at the pre-hearing conference and treated in the July 13 Order was a matter in issue then and throughout the proceedings. For reasons to be articulated below, this court determined that the issues to be addressed included not only the matters referred to the Commissioner of Education by Judge Dwyer on the 1980-81 contract (the only transaction before the Chancery Division) but also similar and related questions arising from the 1981-82 contract into which the respondents proposed to enter. In the July 13 Order, I attempted to structure the inquiry into two phases so that those questions related to the 1980-81 contract could be separately addressed from those related to the 1981-82 contract. This plan proved to be unsuccessful. Notwithstanding the substantial efforts of the parties to tailor their proofs accordingly, so many of the apsects of each contract bore upon the other that, in retrospect, it is not possible to deal with the proofs discretely.

Additionally, the July 13 Order provided that Judge Dwyer's determination that the Commission possesses the statutory authority to contract with private vendors for educational services was res judicata in this contested case unless and until overruled by the Appellate Division in the pending appeal.

Finally, the parties were alerted by the July 13 Order that the pending matter before the Public Employment Relations Commission was eligible for consolidation with the instant matter under N.J.A.C. 1:1-14.1 et seq. A motion to consolidate was made by counsel for the Commission but was withdrawn before the trial concluded.

During the trial, counsel for the Commission, joined by counsel for ETC, moved for provisional approval to enter into a month-to-month arrangement for the provision of services pending a final determination in this matter. The court reserved on this motion pending the receipt of supporting testimony, either oral or in affidavit form, establishing the financial capacity of respondent ETC to fulfill its obligations under such an arrangement. An affidavit of Vito A. DeLisi was received by the court on July 30, 1981 and oral argument was held by telephone conference call on August 4, 1981. Because the motion embodied questions bearing upon the ultimate outcome of the case, a ruling was reserved until the issuance of this initial decision.

THRESHOLD ISSUES

The Scope of the Contested Case (conclusion)

The parties agree that all aspects of the matter before Judge Dwyer which concern the approval of the 1980-81 contract between the respondents are before this court. The parties do not agree as to whether the 1981-82 contract and the status and relationships of the parties are properly before this court.

It is manifest that the jurisdiction conferred by N.J.S.A. 18A:6-9 "to hear and determine ... all controversies and disputes arising under the school laws" includes the issues posed herein in relation to the 1981-82 contract. Those issues arise directly from statutes governing the operations of respondent Commission, or from the manner in which the powers conferred upon the Commission have been exercised; from statutes governing the provision of the educational serviced involved, or from the manner in which they have been provided; or from the powers of the Commissioner of Education, in his administrative capacity or as Secretary to the State Board of Education, to oversee and regulate the field of elementary and secondary education including relationships between educational service commissions, private vendors, local boards of education,

private schools and students. There are aspects of the 1980-81 contract between the respondents which do not arise under the school laws and which were therefore reserved by Judge Dwyer. These issues arise instead from other statutes or from common law or from the State or the United States Constitutions because they relate to the rights of parties under existing contracts or to demands for legal or equitable relief which the Commissioner of Education is not empowered to grant. But the issues arising from the 1981-82 contract deal with prospective questions of public policy; the manner in which the education laws are to be applied and administered in providing the educational services involved here; and the standards which will govern relationships in the field. Framed thusly, only the Commissioner of Education has the jurisdiction to consider these questions in the first instance subject to the exclusive reviewing authority of the Appellate Division. Jenkins v. Township of Morris School District, 58 N.J. 483, 501-04 (1971); Fisher v. Union Township Board of Education, 99 N.J. Super 18, 21-22 (App. Div. 1968).

There is some question, however, whether the Commissioner intended to transmit questions relating to the 1981-82 contract as part of the contested case. While the Commissioner's letter of July 9, 1981 is ambiguous in this regard, a close reading compels the conclusion that he did so intend. After referring to Judge Dwyer's order and his (the Commissioner's) authority under N.J.S.A. 18A:6-9, the Commissioner framed the "precise issues" in the case as he saw them: "the validity of the contract in question; its sufficiency under the education statutes; the reasonableness of its rates and the ability and qualifications of ETC to undertake its performance." Taken by themselves and in the light of the matter transmitted as the initial papers in the case (Judge Dwyer's order and the transcript of his oral opinion), it would not be illogical to conclude that the Commissioner was transmitting for hearing and initial decision only those questions referred to him by Judge Dwyer. But, the penultimate paragraph of his letter clearly broadened the scope of the case. The Commissioner stressed the importance of the case and particularly the need for expedited treatment, even as early as July 17, 1981. Obviously, the Commissioner, in conscientious discharge of his obligations to oversee primary and secondary education in this State and to assure the provision of the highest quality education services, was preeminently concerned with the provision of such services during the coming 1981-82 school year. If the issues to be considered related to the 1980-81 contract alone, there was no need for expedition. And, to the extent that the issues arising from the 1980-81 contract were sufficiently serious and the subject of sufficient controversy to require a contested case hearing, the similar or related issues arising from the proposed 1981-82 contract were equally serious and equally controverted.

Clearly, there are common questions in respect of both contracts and, equally clearly, certain aspects of performance under the 1980-81 contract impinge upon the resolution of the issues surrounding the 1981-82 contract. It is plain from the tone of the Commissioner's letter, particularly the paragraph referred to, that his primary concern was with the coming school year.

I, therefore, CONCLUDE that the issues framed in the second paragraph of the Commissioner's letter must be taken to establish the scope of the contested case in relation to both the 1980-81 contract and the 1981-82 contract.

Estoppel and Potential Notice Defects (findings and conclusions)

Although not strenuously urged, it has been suggested by counsel for ETC, seemingly joined by counsel for the Commission and resisted by counsel for petitioners, that the Commissioner might be estopped from now determining that the 1981-82 contract cannot be approved. The suggestion stems from the assertion and the supporting evidence submitted that some short time before this matter was declared to be a contested case, ETC was advised, at least informally, that it had been approved to provide services under chapters 192 and 193.

I FIND that counsel for ETC was advised, in a telephonic conversation with a member of the Commissioner's staff on or about July 2, 1981, that ETC had been approved to provide services under chapters 192 and 193; but that this determination was never formally confirmed.

I FIND further that, shortly thereafter, counsel or other representatives of ETC and the Commission knew or should have known that the approval, as informally conveyed on or about July 2, 1981, was being challenged and was subject to reconsideration before being formally confirmed.

And, I FIND further that there is no evidence that either ETC or the Commission materially altered its position to its detriment in reliance upon the information received on or about July 2, 1981, before it knew or should have known that the approval was being reconsidered.

I CONCLUDE, therefore, that the Commissioner of Education is not estopped from considering the approval of the 1981-82 contract at this time because (a) the elements giving rise to an estoppel are not present, Carlsen v. Masters, Mates & Pilots Pension Plan Trust, 80 N.J. 334, 339 (1979); and (b) principles of estoppel have extremely limited application against a governmental agency, the circumstances permitting their application not being present here. See East Orange v. Livingston, 102 N.J.

Super 512, 521 (Law. Div. 1968) and Feldman v. Urban Comm. Inc., 70 N.J. Super 463, 477-78 (Ch. Div. 1961), Cf. Thornton v. Ridgewood, 17 N.J. 499 (1955).

Embodied in ETC's estoppel position is the additional suggestion that it received inadequate notice of the Commissioner's decision to review ETC's eligibility for approval as a vendor of Chapter 192 and 193 services. It should be noted here that the Commissioner's approval was an on-going process, at least from the time Judge Dwyer's order of May 12, 1981 was brought to his attention. Except for the very brief period following the informal information transmitted on or about July 2, 1981, ETC was or should have been constantly aware of the need for the Commissioner's approval. As for the shortness of time between the filing of this matter with OAL on July 10, 1981 and the actual commencement of the hearing on July 14, 1981, the expedited process could work only to the advantage of ETC and the Commission. By urging expedited treatment, these parties may be taken to have waived any objection on this ground. Furthermore, as the especially able presentations of all counsel demonstrate, they were, particularly in the light of their involvement in the litigation before Judge Dwyer for more than seven months preceding, well prepared to litigate fully. The shortness of time did not act to the disadvantage of any party. This discussion assumes that any party possessed a sufficient interest to which a notice requirement might attach. In the context of these proceedings as they relate to the 1981-82 contract, ETC had no established rights. Rather, at most, it had an expectancy which, at the latest, since May 12, 1981, it knew or should have known was subject to the Commissioner's approval.

Accordingly, I CONCLUDE that no notice requirement to which the respondents were lawfully entitled was withheld. Brown v. Commuter Operating Agency, 149 N.J. Super 132, 137-38 (App. Div. 1977); Campbell v. Atlantic County Board of Freeholders, 145 N.J. Super 316, 324-26 (Law Div. 1976), aff'd 158 N.J. Super 14 (App. Div. 1978).

The Standing of Petitioners (conclusion)

The respondents have challenged the standing of the petitioners to pursue the claims before the Commissioner which, if the petitioners succeed, will invalidate the 1980-81 agreement and result in withholding approval for the 1981-82 agreement. A similar challenge was raised before Judge Dwyer who held that, to the extent the same petitioners were seeking declaratory and injunctive relief, their interests as organizations representing teachers were in common with those of their members. Therefore, he held, they possessed the standing to litigate. Judge Dwyer also held, however, that these organizations lacked the standing to assert individual claims for damage which any or all their members might have unless the individuals themselves were joined as parties.

To the extent that one aspect of this case - the validity of the 1980-81 contract - is before this tribunal upon referral from Judge Dwyer after he determined the standing issue in favor of the petitioners, that ruling may be regarded as res judicata on the question. Even if not a required result, in the absence of any clear administrative standards or policy at variance with the legal tests applied by Judge Dwyer, every good reason exists why identical standing criteria should be applied in each facet of the same case regardless of the forum.

The Uniform Administrative Procedure Rules, N.J.S.A. 1:1-1.1 et seq. do not establish criteria governing standing. By the terms of N.J.S.A. 1:1-1.1(a), therefore, the rules of the Commissioner of Education which were extant when the Uniform Rules were adopted may be looked to in determining the outcome of such an issue.

Under N.J.A.C. 6:24-2.1 "any interested person(s) may petition the commissioner for a declaratory ruling ...." N.J.A.C. 6:24-1.1 defines interested person(s) as those "having a direct and substantial interest in the subject matter of a controversy ... and whose rights, status or legal relations will be affected by a determination thereof".

This is a broad standing criterion which has been liberally applied in the past. The teacher associations involved as petitioners in these proceedings have organizational rights and relationships which will be affected by the outcome of these proceedings. For that reason alone they should be accorded standing. Winston v. Board of Education of South Plainfield, 125 N.J. Super 131, 142 (App. Div. 1973), aff'd, 64 N.J. 582 (1974); Camp v. Board of Education of Glen Rock, SLD 706, 709. Furthermore, the standing criteria embodied in N.J.A.C. 6:24-2.1 and 1.1 are not so clearly different from those applied by Judge Dwyer that a different result is mandated. Even though Judge Dwyer's standing determination was made solely in respect of issues arising from the 1980-81 contract, it would be illogical to reach a different conclusion in respect of the issues arising from the 1981-82 contract. The latter issues are also raised in the framework of declaratory and injunctive relief. They involve many similar questions and often implicate the same proofs.

It is also significant that the petitioners, motivated as they may be by their special associational interests and the rights of their members, also seek to vindicate the public interest. That they and their members may derive special benefits from the outcome of these proceedings does not detract from the fact that they raise serious issues of public administration and statutory interpretation which should always come as swiftly as possible to the attention of those administatrive officials charged with regulating or overseeing an area of governmental concern. It is the obligation of public officials to be open

and receptive to the assertion of such issues. It follows that rules of law or procedure which develop to govern the area should make it easier rather than more difficult for a matter of public interest to come before a responsible public official in a way which requires him or her to act as quickly as the need for reflective determination allows. Restrictive principles of standing developed for good reason to apply in law suits between private parties, should be applied with greater flexibility in the field of administrative law where, unavoidably, those who render final adjudications are also policy makers in their roles as overseers and regulators. See Hudson Bergen County Retail Liquor Stores Association v. Board of Commissioners of Hoboken, 135 NJL 503, 510 (Ct. Err. & App. 1947).

Accordingly, I CONCLUDE that petitioners have the standing to raise all issues relating to the approval of the 1980-81 and 1981-82 contracts between the respondents.

FACTUAL BACKGROUND

By statute, N.J.S.A. 18A:46A-1 et seq. and N.J.S.A. 18A:46-19.1 et seq. (L. 1977, chaps. 192 and 193 respectively), each board of education in the State of New Jersey is obliged to provide to each child residing in the school district who attends a non-public school, remedial and auxilliary services which are equivalent to those provided in the public schools. These services are set out in the statutes as applying to handicapped children classified as having articulation disorders requiring the services of a certified speech correctionist, N.J.S.A. 18A:46-19.4; and compensatory education services; English-as-a-second-language instruction; supplementary instruction services; and home instruction services, N.J.S.A. 18A:26A-2c.

At least in respect of students attending church or sectarian schools, the public school districts are proscribed by prevailing constitutional standards from providing such services on the premises of such schools. Thus, although the services are mandated, they can be provided for most non-public school students only with some difficulty and expense not required when public school students are to be served. A prevailing method of choice is to offer the educational services in special facilities (converted school busses which serve as mobile classrooms, converted trailers or mobile homes which tend to be set in place, and others). The statutes and administrative rules adopted in pursuance thereof, N.J.A.C. 6:28-5.1 et seq. and N.J.A.C. 6:28-6.1 et seq. contain further standards governing the provision of such educational services. The mandated examination, classification and special correction services known as chapter 193 services are required to be fully paid by state revenues.

The amount of state support for Chapter 192 services varies from year to year based upon formulae provided in the statute and the rules. Whatever the amount due from state revenues, they are paid to each board of education individually.

A board of education may provide the mandated services directly; but it is also authorized to "contract with an educational improvement center, an educational service commission or other public or private agency, other than a church or sectarian school, approved by the commissioner" of Education for the provision of such services. An educational service commission is a creature of statute, N.J.S.A. 18A:6-51, et seq., a public body designed to perform certain types of service for two or more boards of education, and which may come into existence only upon petition to and approval by the State Board of Education. N.J.S.A. 18A:6-52. The powers of educational service commissions are circumscribed by statute and further, by the terms and conditions of the State Board's approval.

For the first two years under chapters 192 and 193, school years 1977-78 and 1978-79, the boards of education in Essex County and elsewhere arranged for or provided the mandated services directly or through educational improvement centers. Beginning in 1979-80 a number of school districts contracted with the respondent Commission for the provision of these services, which the Commission provided directly, i.e., hiring teachers to provide instructional services and developing its own staff to plan and administer the program. Some difficulties were experienced in administering and offering the program. Not the least of these was characterized as a "cash flow problem". Because the payments from State revenues for these mandated services are made to the school districts involved, and because the funds may not be paid to the entity providing the services until the services are rendered, there was an unavoidable time lag until the Commission could receive reimbursement from the districts for its start up costs. Advice received by the Commission from the Attorney General's office that it could not lawfully borrow money, was a factor in the decision to contract with a private vendor for the provision of the services. Also, the Commission had established a relationship with ETC during the 1979-80 school year, leasing a number of mobile classrooms from the corporation so as to be able to provide the required off-site instruction for students in sectarian or church schools.

As preparations for the 1980-81 school year were under way, the Commission undertook to expand its operations to serve about 100 school districts in six counties (see Table A of Exhibit P-2) with one or more of the services mandated by chapters 192 and 193. In order to avoid the problems which it was experiencing in 1979-80 in financing, administering and offering these programs; and anticipating greater logistical, administrative, and educational difficulties from the increased size of the program; the Commission determined to contract with a private

vendor for the provision of such services. Bid specifications were prepared and published. See Exhibit P-2. ETC was the successful bidder, with a maximum bid of $3,900,000 for the specified services, to be paid according to the formulae set out in the specifications. The teachers and administrative personnel theretofore employed by the Commission would be discharged, but paragraph 2 of the contract to be executed upon award of the bid (Exhibit P-2, Appendix C) obligated the contractor to offer employment opportunities to all such employees of the Commission. The compensation to be paid to such employees was established in a salary schedule (Exhibit P-2, Appendix C, Schedule A) which was somewhat higher in all particulars than the salary schedule which had governed the administrators and teachers whey they were employed by the Commission.

There is no allegation that ETC as the contractor did not fully comply with its obligations under paragraph 2 of the form agreement or that it failed to pay personnel at least the amounts established in the salary schedule. It was alleged, to the contrary, proved and undisputed, that some administrative personnel were paid more than was provided by the salary schedule while teachers were paid strictly according to the salary schedule.

The primary initial impact upon the teachers as a result of the changed relationship was that they were no longer public employees. Instead they had become employees of a private entity, and had been required to give up, in the process, many of the benefits of public employment including the possibility of acquiring tenure in position.

ETC is a Pennsylvania corporation authorized to do business in New Jersey. Its principal place of business in this State is in Cherry Hill and it also maintains offices in East Orange. Respondent Vincent J. Lasprogata is the president and sole stockholder of the corporation. He is the corporation's alter ego. Mr. Lasprogata claims to have developed the mobile classroom concept for providing supplementary educational services to religious school students in Pennsylvania.

THE CONTENTIONS AND THE PROOFS

The petitioners contend that three basic reasons exist why the 1980-81 contract between the Commission and ETC should be nullified and the proposed 1981-82 contract should be disapproved. They are (1) that ETC was not and is not an approved vendor of educational services and that it could not and cannot qualify for approval; (2) that the contracts are unavoidably defective by reason of an inpermissible conflict of interest, and (3) that the 1980-81 contract has been grossly mismanaged and that, in performing under the contract, ETC has violated various provisions of law.

The respondent Commission contends: (1) that issues relating to the qualification or disqualification of bidders are not properly before this court because the State Board of Education has ceded jurisdiction over such matters by delegation to the Department of the Treasury in N.J.A.C. 6:20-7.2 and 7.3, that ETC was approved as a vendor of educational services in July 1980 and has not been disapproved since, and that, in any event, ETC has met and does meet all significant requirements for approval; (2) that a disabling conflict of interest does not and never did exist; and (3) that, by a consideration of all significant aspects of its performance under the 1980-81 contract, ETC has substantially met its obligations thereunder.

Respondent ETC joins in the Commission's arguments and urges, in addition, that the question of a conflict of interest is beyond the scope of these proceedings.

The petitioners presented their case almost entirely through the testimony of individuals connected with the respondent entities, primarily respondent Vincent J. Lasprogata, the president and sole stockholder of ETC, Howard E. White, Jr., the Essex County Superintendent of Schools and a member of the Commission, Warren W. Buehler, Executive Director of the Commission and Sister Ellen M. Kenny, the President of the Commission. The only non-party connected witness called by the petitioner was Enrico Savelli, Supervising Buyer in the Division of Purchase and Property, Department of the Treasury, State of New Jersey. Because petitioners chose to prove their contentions essentially through the lips of principals and others connected with the respondent bodies the factual picture presented was a consistent one with few major facts in controversy.

Respondent ETC introduced the testimony of Theodore Packman, an employee of ETC, and for a portion of its case, recalled Mr. Lasprogata as its own witness. At the suggestion of counsel for respondent Commission, the court called John R. Flynn, Assistant Deputy Commissioner in the State Department of Education. Respondent Commission then briefly recalled Assistant Deputy Commissioner Flynn as its witness and introduced the testimony of William Brooks, also an Assistant Deputy Commissioner in the State Department of Education.

Petitioners at a subsequent stage of the case recalled Assistant Deputy Commissioner Brooks as their witness.

The 1980-81 Contract (findings and conclusions)

Petitioners' contention that ETC was not a qualified bidder when the 1980-81 contract was executed and has not been accorded qualified bidder status since then is based, primarily, upon the provisions of N.J.S.A. 18A:18A-1 et seq., specifically 18A:18A-27 et seq. It is petitioners' position that ETC in 1980

lacked, and in 1981 still lacks, the "financial ability" and "organization" as established in N.J.S.A. 18A:18A-27 and 28, to perform its responsibilities under the contracts in question. Petitioners have submitted extensive proofs to support their position on these grounds. The sparse proofs in the case which go to "adequacy of plant and equipment" and "prior experience", also statutory standards, support respondents' position in the case.

An analysis of the statutory framework is essential to a determination of this issue. N.J.S.A. 18A:18A-27 provides that "the State Board of Education may establish reasonable regulations" for qualifying bidders and "may fix the qualifications required according to the financial ability and experience of the bidders...." This provision is clearly permissive and it is uncontroverted that no such regulations have ever been adopted by the State Board of Education or any other instrumentality of the Department of Education. The statute also provides that "the State Board may ... delegate by regulation to the Department of the Treasury ... the authority to qualify bidders...." The State Board of Education has so delegated both the authority to qualify bidders, N.J.A.C. 6:20-7.2, and the authority to debar, suspend and disqualify, N.J.A.C. 6:20-7.3. The Department of the Treasury has not promulgated specific standards for qualifying bidders under this education statute or for debarring, suspending and disqualifying persons thereunder.

The provisions of N.J.S.A. 18A:18A-28, notwithstanding their mandatory tone, clearly depend upon the discharge of a permissive authority which was never executed. Since the standards underlaying a system of qualification have not been established pursuant to N.J.S.A. 18A:18A-27, the statement mandated by N.J.S.A. 18A:18A-28 cannot be required. The existence of the introductory words "Any person desiring such classification" in N.J.S.A. 18A:18A-28 supports this conclusion. Thus, N.J.S.A. 18A:18A-28 cannot be viewed as having any force and effect independent of N.J.S.A. 18A:18A-27. Only when the standards and classifications referred to by N.J.S.A. 18A:18A-27 have been established, does the requirement for a statement, contained in N.J.S.A. 18A:18A-28, have any meaning. Similarly, the seemingly mandatory directive of N.J.S.A. 18A:18A-32 that "no person shall be qualified to bid... who shall not have submitted a statement as required by N.J.S. 18A:18A-28...." has no meaning apart from the establishment of qualifications and standards underlying a system of classification pursuant to the permissive authority granted in N.J.S.A. 18A:18A-27.

Under existing procedures, therefore, a potential provider of educational services is not called upon to file a statement designed to "develop fully the financial ability, adequacy of plant and equipment, organization and prior experience of the prospective bidder...." Consequently, in the absence of controlling regulations, these and other determinations are left

to the educational entity which proposes to award a bid, here the Commission. In discharging its functions in this regard, the Commission is, of course, governed by the specific requirements of form and substance contained elsewhere in N.J.S.A. 18A:18A-1 et seq. and other applicable bidding and contracting statutes.

Much was made in this proceeding of the approved status of ETC because its name appeared on a list published by the Division of Purchase and Property in the Department of the Treasury (Exhibits Rb-3 and P-7). The testimony of Enrico Savelli clearly establishes the contrary. Mr. Savelli, a supervising buyer for the Division of Purchase and Property with eleven years of experience, testified cogently and persuasively that Exhibit P-7 (the original of Exhibit Rb-3) was purely and simply an informational list designed to alert public bodies to the availability of vendors for indicated services and supplies. Although designed originally to contain some evaluative information, the list does not at this time contain such data. A form (Exhibit Rb-6) is provided to potential vendors on request and, after they supply the information requested, they are placed on the list. No evaluative judgments are made of any vendor and none were made regarding ETC (See Exhibit P-8, ETC's completed form). Mr. Savelli testified further that evaluations of bidders to fulfill their potential contractual responsibilities are made as part of the bidding process itself. The inference is that this responsibility belongs with the public agency, here the Commission, vested with the authority to award the bid.

John R. Flynn, Assistant Deputy Commissioner of Education in charge of the Office of County and Regional Services (including oversight responsibilities for educational service commissions), testified that the Department of Education does not pass upon individual contracts which are made by local boards of education or comparable bodies such as educational service commissions. It issues guidelines to county superintendents of schools to aid them in assisting local school districts in their contracting activities, but does not become directly involved in the contracting process. On June 10, 1981, for the first time, the Department issued guidelines relating to chapters 192 and 193 services. Assistant Deputy Commissioner Flynn testified further that the Department of Education had become aware of a controversy concerning ETC's approved status in connection with preparations for the 1981-82 contract, sometime well into the 1980-81 school year. At that time, the Department, having delegated the standard-setting function to the Department of the Treasury in N.J.A.C. 6:20-7.2 and 7.3, made an inquiry concerning ETC. It discovered that ETC was on the vendors' list (Exhibits Rb-3 and P-7) and was either advised or assumed that this meant ETC had been approved.

Assistant Deputy Commissioner Brooks' testimony on this point corroborated that of Assistant Deputy Commissioner Flynn.

He became actively involved in matters relating to the proposed 1981-82 contract between ETC and the Commission but was not aware of any departmental records or involvement in respect of the 1980-81 contract.

Accordingly, I FIND

That at the time ETC and the Commission entered into the 1980-81 contract no standards or systems for classifying or approving vendors under N.J.S.A. 18A:18A-27 et seq. existed.

and I, therefore, CONCLUDE

(a) That, in the absence of such standards or systems, the responsibility for determining the capacity of ETC as a proposed vendor to discharge its contractual obligations rested with the Commission, governed by the specific requirements of the bidding and contracting statutes then extant; and

(b) In the absence of proof to the contrary, that the Commission fully discharged its obligations as the contracting agency in entering into the 1980-81 contract with ETC; and

(c) That at the time the 1980-81 contract was executed, and in the light of the controlling determination that the Commission possessed the legal capacity to enter into the contract, all existing requirements of law were met and the 1980-81 contract was valid.

The petitioners have also contended that performance features which characterized the administration of the 1980-81 contract require a determination that that contract be nullified. We are faced presently with the uncontroverted facts that the contracting year is over; that ETC has discharged the responsibilities under the contract in a manner acceptable to the Commission, although not to the petitioners; that, irrespective of whether a determination could or should have been made during the contracting year to suspend the operation of the contract, no such determination was ever made. The Commission and the boards of education which it serves have received the educational services for which they contracted and ETC has, from their point of view, substantially complied with its service obligations under the contract.

The petitioners raise many questions regarding the manner in which the services were provided, alleging violations of law, financial improprieties, maladministration, conflicts of interest, etc. These are serious questions and will be dealt with below. But until now they have been of arguable validity and significance. Notwithstanding the existence of these questions, there is almost no evidence in the record which connects the alleged deficiencies with the quality of the services provided. The only exception is the uncontroverted fact that some of the children did not receive the number hours provided in the

contract for the types of educational services indicated. For reasons to be amplified, I am satisfied that the shortage has not been demonstrated to be significant, that attendance and logistical problems beyond the control of ETC or the Commission were the cause, and that such shortages are inherent in a wide-ranging program of the type involved here. Additionally, the record amply dremonstrates that, notwithstanding the maximum contract price of $3.9 million, ETC has only been paid for the actual services satisfactorily rendered, about $2.1 million. At the time of hearing, the final payment by the Commission on a statement in the amount of $300,000 had not yet been made.

The points made by the petitioners, as serious and far-ranging as they may be, should not be the basis of denying ETC the fair value of the services it has provided which are acceptable to the Commission in a valid exercise of its discretion. Such allegations, if appropriately proven, might have been adequate basis upon which to suspend the administration of the contract during its term, but they cannot now be fairly used as the basis for denying ETC a proper return for the services it has rendered.

I CONCLUDE further therefore, that in respect of the issues raised in this proceeding, the Commission may remit to ETC whatever sums it determines are due on the 1980-81 contract.

The 1981-82 Contract (findings and conclusions)

It is in connection with the 1981-82 contract that the remaining allegations of the petitioners are material. Whether focused on the contractual prohibition against violations of law, the quality of the services, real or apparent conflicts of interest, financial ability, or management practices, all are relevant to the ultimate question: based upon facts capable of proof, including features of past performance, did the Commission validly exercise its discretion in proposing to award the 1981-82 contract to ETC?

A. The contractor's violations of law

In addition to its validity as a matter for consideration whenever a contract for public work is contemplated, this issue also goes to ETC's performance under the 1980-81 contract which mandated the contractor's compliance with all requirements of law.

1. Payment of Wages - N.J.S.A. 34:11-4.1 et seq. (findings and conclusions)

Petitioners allege and, through the testimony of respondent Lasprogata and the introduction of some 52 affidavits of teachers (collectively received as Exhibit P-5 along with 39 other affidavits which were irrelevant to this issue), have

submitted evidence to establish that between November 15, 1980 and January 30, 1981, ETC's payroll checks to a number of teachers were returned for insufficient funds. These checks were drawn on Continental Bank of Norristown, Pennsylvania. During 1980-81 ETC employed approximately 190 teachers for its contract with the Commission and an additional 80 teachers or so for all other geographic areas in New Jersey and Pennsylvania in which it furnishes educational services. During the latter part of the 2-1/2 months in question, approximately 130 checks were returned in one pay period. On other occasions only a few were returned.

Respondents, for their part, through the testimony of Mr. Lasprogata and that of Warren W. Buehler, have not denied the fact of the returned checks but have sought to characterize the circumstances in which they were returned. The problem, according to this evidence, sprang from the methods governing payment for the rendition of chapters 192 and 193 services. Not only were the local boards of education the recipients of the state moneys which funded the programs, but they were obliged not to pay for them until the services had been rendered and properly accounted for. Typically, therefore, ETC would provide the Commission with a monthly statement of services rendered, the Commission staff would verify and process the statement and present it to the Commission at a monthly meeting for authorization. At some point in the process each school district involved in the program would verify the level of its students' participation and process payment to the Commission which, in turn, would satisfy its periodic obligation to ETC. Since the spring of 1981, ETC vouchers have also been reviewed and approved by the State Department of Education.

The delay in receiving reimbursement for services already rendered created a "cash flow" problem for ETC as a result of which a number of checks, including those to the teachers mentioned earlier, were returned marked "not paid" because of insufficient funds. ETC cash revenues, its loan proceeds of $500,000 and its line of credit in the amount of $600,000, all with Continental Bank had been exhausted. Mr. Lasprogata testified that the line of credit expired in early December, 1980, yet checks began to be returned on November 15, 1980 and continued thorugh January 30, 1981. Finally, and after being so ordered by Judge Dwyer, ETC obtained an agreement from its Pennsylvania bank to underwrite ETC's payroll and to advise Midlantic Bank in New Jersey of the arrangement. Thus, it is asserted by respondents, if ETC had not been in compliance with the requirements of N.J.S.A. 34:11-4.2 during the period in question, it came to be and so remains.

In the light of the foregoing, I FIND

(a) That between November 15, 1980 and January 30, 1981 ETC's payroll checks to a number of teachers were returned for insufficient funds. These checks were drawn on Continental Bank of Norristown, Pennsylvania.

(b) That the precipitating causes of the return of these checks were (1) the delay in payments to ETC for services already provided, for which ETC has incurred salary and other obligations; and (2) the exhaustion of ETC's line of credit with Continental Bank.

(c) That, after being ordered to do so by Judge Dwyer, ETC modified its dealings with Continental Bank to secure the Bank's commitment to guarantee ETC's payroll and to so advise Midlantic Bank in New Jersey. The terms of this arrangement and any limitations which may exist have not been disclosed.

I CONCLUDE, therefore, based upon the evidence before me, that petitioners have demonstrated by a proponderance of the evidence that ETC was in violation of N.J.S.A. 34:11-4.2 from November 15, 1980 to January 30, 1981.

The obligation established by N.J.S.A. 34:11-4.2 is, by its own terms, mandatory and absolute, admitting of no exceptions or excuses. If cash flow problems, whatever their cause, could be regarded in mitigation of the obligation therein conferred, the obvious purpose of the statute, to assure employees that they may fully expect their salaries to be paid on schedule, would be merely a promise too easily frustrated. Every employer experiences cash flow problems from time to time. The statute clearly confers a positive obligation upon every employer to have sufficient capital to meet its payroll on time, and establishes the wages of employees as having a primary claim upon the capital of the employer.

I further CONCLUDE that ETC has taken steps to prevent a recurrence of the events of November 15, 1980 to January 30, 1981 during the term of a 1981-82 contract, but since the record does not disclose the terms, conditions or limitations of the arrangement with Continental Bank and Midlantic Bank, I am unable to determine with any certainty whether sufficient protective steps have been taken.

There was also evidence introduced to establish that some teachers were paid a week or more late, but the evidence before me is insufficient upon which to base a finding of fact in this regard. Other alleged violations of N.J.S.A. 34:11-4.1, et seq. were not proven.

2. New Jersey State Income Tax Liability (findings and conclusions)

Petitioners have alleged and established through the admission of Mr. Lasprogata that he has not filed a personal gross income tax return with the State of New Jersey for the years 1979 or 1980, and I so FIND. The contention of petitioner is that Mr.

Lasprogata has incurred a state income tax liability by virtue of having earned a salary from the New Jersey operations of his corporation or because he is a resident of New Jersey or both.

Under an agreement between the State of New Jersey and the Commonwealth of Pennsylvania, however, Mr. Lasprogata has no New Jersey income tax liability if he is a resident (domiciliary) of Pennsylvania even if his earnings were paid in New Jersey by a firm doing business here on operations attributable to this State. See, Report of Reciprocal Personal Income Tax Agreement Between Commonwealth of Pennsylvania and Commonwealth of New Jersey, (effective January 1, 1978), 1980 Guidebook to New Jersey Taxes, Sect. 1201 (Commerce Clearing House).

The question therefore is that of Mr. Lasprogata's domicile. The uncontroverted testimony before me establishes, and

I so FIND, that Mr. Lasprogata has homes in both Bryn Mawr, Pennsylvania, and Ocean City, New Jersey; that he has resided in Pennsylvania longer than he has resided in New Jersey; that he regards himself as a Pennsylvania domiciliary; and that he uses his home in Ocean City at certain times of the year.

I FIND further that Mr. Lasprogata is registered to vote in New Jersey.

Generally, to acquire a domicile of choice, one must actually reside in a particular locality and have an intention to remain there or to make it one's home. Cromwell v. Neeld, 15 N.J. Super 296 (App. Div. 1951). A determination that Mr. Lasprogata is a domiciliary of Pennsylvania is indicated on the basis of the evidence before me, except for the fact that he has chosen to register to vote in New Jersey. Normally, a person registers to vote in that state which he considers his permanent residence. Nevertheless, the law does not regard voter registration as conclusive on the question of domicile although it is considered to be strong evidence thereof. Baker v. Keck, 13 F. Supp. 486 (E.D., Ill. 1936). Some corroboration is necessary. McCormack v. McCormack, 3 N.J. Misc. (Ch. Ct. 1925). It has been held further that voting raises a presumption that a voter is a citizen of the state in which he votes, but the presumption may be rebutted by evidence showing a clear intention that the domicile be otherwise. Messick v. Southern Pennsylvania Bus Co., 59 F. Supp. 799 (E.D. Pa. 1945) (citizenship and domicile were regarded as essentially synonymous terms.) The court held that the state in which a person was a registered voter was not the state of domicile, since it was the person's intention not to have that state as his domicile.

In the absence of further proof to the contrary,

I CONCLUDE that, notwithstanding that Mr. Lasprogata is registered to vote in New Jersey, he is domiciled in Pennsylvania. He is therefore not obligated to the State of New Jersey for taxes on his income.

B. The Quality of ETC's Services (findings and conclusion)

Petitioners contend that ETC should not be awarded the 1981-82 contract because it did not properly discharge its service obligations under the 1980-81 contract. The respondents contend that ETC substantially complied with the contract to the Comission's satisfaction and the satisfaction of the school districts, parents and students who were served.

Mr. Lasprogata, Sister Kenny, the President of the Commission, Mr. Buehler, the Executive Director of the Commission, and Theodore Packman, ETC's Director of Educational Services for Essex County, were examined extensively by counsel for the petitioners on this issue and were cross examined as extensively by counsel for the respondents. Based upon the evidence presented,

I CONCLUDE

that the petitioners have not demonstrated by a preponderance of the evidence that ETC did not properly discharge its service obligations under the 1980-81 contract. To the contrary,

I FIND

based upon the evidence before me, a picture of consistent compliance. With the exception of one feature, no major aspect of ETC's service or reporting obligations to the students, the schools or the Commission failed. Nor has the Commission itself failed to discharge its responsibilities or exercise proper oversight or control over the rendition of the services involved. The relationship between the entities was professional and productive, characterized by continuing communication and cooperation. Those connected with the commission and the school districts, as well as the parents of the students served were satisfied with the quality of the services provided and the equipment used. The same picture of general satisfaction existed in the other New Jersey School districts served by ETC. (See exhibits Ra-1, Ra-2, Ra-3, and Ra-4). There were no complaints of major shortcomings. All individuals connected with ETC, particularly Mr. Lasprogata himself, were available and immediately responsive whenever difficulties arose, moving as quickly as possible to correct day-to-day problems as they appeared and were called to ETC's attention. The Commission engaged in a continuing monitoring effort of ETC's performance which was characterized by full cooperation on the part of ETC personnel. (See Exhibits Rb-1 and Rb-2).

I FIND further

based upon the evidence before me that a shortcoming existed in one area, that feature of the contract which provided the number

of hours to be offered to the students enrolled in each service component of the contract. In many of the programs some of the students did not receive the number of hours designated. Most of the students did receive the specified hours, however. The reasons for the shortcoming arose from factors beyond the control of either ETC or the Commission. In some instances the principals of the non-public schools involved refused the number of hours offered. Other problems arose from common scheduling difficulties and still others because non-public schools have special and, frequently, individualized schedules. For a period of time during the term of the contract, there was a shortage of teachers to field the program because the Commission's estimates of the extent of the program were in error. Mr. Lasprogata and his staff moved speedily to address scheduling problems and others in this category and to meet exigencies as they arose, including a complete revision of the teachers' schedules.

I FIND further

based upon the evidence before me, that ETC was not paid for any service not actually delivered.

Petitioners argue that the shortcoming in performance in this area of the contract, because it relates to an essential feature thereof, is sufficient to support a determination of non-compliance. Public contracts, however, are not in this regard different from private contracts. Substantial compliance, good faith efforts and compensation for services actually performed are the key ingredients for determining whether or not a party has discharged its contractual responsibilities. In respect of the extent of the educational services required to be rendered, therefore, I am unable to find from the evidence before me that ETC did not satisfy its contractual obligations.

Finally in this connection, although I am unpersuaded by Mr. Buehler's testimony, based upon his experience, that the Commission itself could not have operated the program for the contract amount of $3.9 million on the terms provided,

I FIND further

that, notwithstanding the staffing, scheduling and other problems which the dramatic growth of the program produced, more services were provided to more students under the 1980-81 contract with ETC than had been provided under the direct operation of the program by the Commission in the preceding year.

I CONCLUDE, therefore

based upon the foregoing findings and in the absence of sufficient evidence to the contrary, that ETC fulfilled its service obligations under the 1980-81 contract and that, based upon past performance, it possesses the organization, plant, equipment and professional expertise to do so in the future.

C. Conflict of Interest

Petitioners allege the existence of a conflict of interest which so taints the contractual relationship between ETC and the Commission as to render it legally impermissible. The relationship giving rise to this conflict is asserted to be between Howard E. White, Jr., who, as Essex County Superintendent of Schools, is a member of the Commission and its three-person Executive Committee, and respondent Lasprogata, individually and in connection with a business entity other than ETC, in which he has had a substantial interest.

Much testimony was elicited from Dr. White and Mr. Lasprogata on this issue, focusing the conflict of interest question on a corporation known as EDMOCO. It is uncontroverted and I so FIND that

(1) Respondent Lasprogata over a period of time beginning June 18, 1980 provided $70,000 or $71,000 to EDMOCO as a capital investment and for the payment of the business' expenses;

(2) EDMOCO was headed by Douglas Henderson who had developed an educational product, the idea for which had come to Mr. Lasprogata's attention previously and in which he had displayed a substantial interest even to the extent of making an investment of $21,000 in April and May, 1980 with a Mr. Stinson, which investment did not produce a product and which was eventually returned to him.

(3) Mr. Lasprogata first came to know Mr. Henderson after seeing him demonstrate his product on a television program. Mr. Lasprogata reached out to Mr. Henderson and offered to invest the capital for the development and marketing of the educational product. Mr. Lasprogata had come to know Mr. Stinson earlier in 1980 when Mr. Stinson made a sales presentation to him on another educational product.

(4) Mr. Lasprogata sought Dr. White's advise about the Stinson and Henderson projects on two or three occasions in the Spring of 1980.

(5) Dr. White has known Mr. Henderson for many years and knew Mr. Stinson before Mr. Stinson's relationship with Mr. Lasprogata developed. Dr. White and Mr. Lasprogata have known each other since 1977 as a result of Mr. Lasprogata having engaged in conversations in 1976-77 with officials of the State Department of Education about his mobile classroom concept and having followed the discussions with some outreach to local and county educational officials including Dr. White.

(6) Dr. White was present at a meeting in the early spring of 1980 during which Messrs. Lasprogata and Stinson first explored their business relationship.

(7) At Mr. Henderson's request, Dr. White, in the early summer of 1980, at home during his personal time, edited a collection of educational materials for EDMOCO. There is no evidence that Dr. White was compensated for this work.

(8) In August 1980, during his vacation from his official duties, Dr. White traveled to Chicago, Las Vegas, Minneapolis and Grand Rapids, Michigan for the purpose of "site testing" EDMOCO's materials, conferring with other educational administrators about them and gauging their reaction to the materials. For this trip he received payment in the amount of $1,717.31 in addition to his airline ticket, which amount was paid by ETC check signed by Mr. Lasprogata made payable to "cash" and endorsed by Dolores White, Dr. White's wife.

(9) Beginning on or about July 17, 1980, Dr. White's brother, William, who was unemployed at the time, began working for EDMOCO in an unsalaried capacity. He obtained this position after Dr. White suggested his employment to Mr. Henderson.

(10) Dr. White knew that Mr. Lasprogata was an investor and officer of EDMOCO.

(11) Dr. White's brother, William, presently works in a salaried capacity for GET READY, a subsidiary of EDMOCO. He is applying his sales manager experience in that position although he has never previously sold educational products.

(12) Mr. Lasprogata was unaware of the existence of GET READY before hearing the testimony in these proceedings.

(13) In early 1980, Dr. White participated in a meeting with Mr. Lasprogata, Mr. Buehler and counsel for the Commission to discuss the Commission's plans for rendering chapters 192 and 193 services for the coming year, 1980-81.

(14) Dr. White refrained from voting on the Commission's award of the 1980-81 contract to ETC.

(15) Dr. White never disclosed to the Commission, its Executive Committee, nor to the State Commissioner of Education his relationship with EDMOCO, Henderson, Stinson or Lasprogata during the spring and summer of 1980, nor has he disclosed the fact that he had received a reimbursement from ETC for a trip made on EDMOCO's behalf.

(16) Dr. White's reponsibilities as Essex County Superintendent of Schools include conveying information and rendering advice to the Commissioner of Education concerning, inter alia, the operations of the respondent Commission, the manner in which it or its vendors are rendering the chapters 192 and 193 services for which they are responsible, compliance with the standards contained in a memorandum dated June 10, 1981 (Exhibit C-1) and, generally, representing the Commissioner of Education and his authority in overseeing the rendition of chapters 192 and 193 services.

Further, Dr. White testified and, in the absence of sufficient countervailing evidence,

I FIND

that the check in the amount of $1,717.31 was reimbursement for expenses incurred during Dr. White's trip on behalf of EDMOCO and did not, in any way, represent compensation for services.

Mr. Lasprogata testified and, in the absence of sufficient countervailing evidence,

I FIND

that the ETC check for $1,717.31 made payable to cash, which he signed at the request of Mr. Henderson, was one of several drafted for the purpose of paying EDMOCO expenses during its start-up period, and is included in the amount he determines to have invested in EDMOCO.

The task of determining whether an impermissible conflict of interest exists where public officers are involved is difficult and delicate. The public interest is not served by a heavy-handed approach, for it is implicated on both sides of such a question.

The delicacy of such a question arises from a potential dilemma. On the one hand, the highest standards of conduct must be seen to govern the actions of public officers in this State. They are required to avoid not only that conduct which is at variance with the performance of public duty or those situations in which they are tempted to serve their own ends to the detriment of the public, Board of Education of West Orange v. International Union of Operating Engineers, 109 N.J. Super 116, 120 (App. Div. 1970), but also those relationships and acts which present the appearance or potential for a conflict of interest. Id. at 123. On the other hand, there exists the need for officials in whose discretion and ability public confidence is reposed to be as free as possible to act in the public interest without substantial inhibitions that such acts will be misinterpreted in excessively zealous applications of hindsight.

The difficulty in deciding such questions is in common with issues in other areas involving personal conduct and states of mind. The proofs are rarely direct and there exist no objective, determinative tests. Yet fair inferences must be drawn from the circumstances established, common experience and the credibility of the witnesses. See Aldom v. Borough of Roseland, 42 N.J. Super 494, 503 (App. Div. 1956). For an impermissible conflict of interest to be found, the facts need not establish actual fraud, dishonesty or influence, but the realistic potential for such results. Ibid.

Disqualifying conflicts have been found where the public officer is subject to a direct pecuniary interest, Bracey v. Long Branch, 73 N.J. Super 91, 102 (Law Div. 1962); where the pecuniary benefit lies with the officer's employer, Dover Township Homeowners & Tenants Association v. Dover, 144 N.J. Super 270, 276 (App. Div. 1971); Griggs v. Borough of Princeton, 33 N.J. 207, 219-20 (1960); and Aldom v. Borough of Roseland, supra; where a pecuniary benefit will inure to a close relative, such as a brother, Township Committee of Freehold v. Gelber, 26 N.J. Super 388, 392 (App. Div. 1953), unless the relationships involved are too remote, see Bracey v. Long Branch, supra at p. 98. As significant, a conflict of interest may be determined to arise where the duties pertaining to a person's public and private employments clash. Newton v. Demas, 107 N.J. Super 346, 350 (App. Div. 1969), cert. den. 55 N.J. 313 (1970). In the light of the high standards imposed upon public officials in this State, the test of Newton v. Demas must be taken to include personal and institutional loyalties as well as technical employments.

The decision as to the remedy to be applied when a disqualifying conflict is found can be as delicate and difficult as the determination of the conflict itself. It follows that any official

action which is tainted by a disqualifying conflict must be invalidated. See, e.g., cases cited above. Nevertheless, that result should not be automatic. It must always be determined whether an adequate connection exists between the conflict and the action, or whether appearances are such that the connection or risk thereof can be fairly assumed.

In the light then, of the findings of fact which I have made; fair inferences which can be drawn therefrom, the surrounding circumstances and my impressions of the witnesses; and avoiding hindsight evaluations; can it be determined that a disqualifying conflict of interest existed in this matter based upon the relationships between Dr. White and Mr. Lasprogata or those involved with them?

Dr. White first met Mr. Lasprogata in connection with his official responsibilities when, in 1977, Mr. Lasprogata was exploring with various educational administrators in New Jersey the possibilities of applying the systems and methods he had developed in Pennsylvania to New Jersey's new mandate for chapters 192 and 193 services. There is no evidence which even suggests that when Mr. Lasprogata met with Dr. White, Mr. Buehler and counsel for the Commission in early 1980 any relationship other than a remote professional one between White and Lasprogata had yet developed. This was the meeting which set in motion a series of dealings between Mr. Lasprogata and the Commission culminating in the 1980-81 contract. Dr. White had brought the parties together. Shortly after this meeting, a more intense relationship began to develop; he and Mr. Lasprogata were becoming friends and developing mutual interests in educational endeavors. Perhaps they were anticipating some mutual pecuniary advantage from these endeavors, but there is no evidence upon which to make a finding in this regard. In view of this developing relationship, Dr. White substantially disengaged himself from any dealings which personnel of the Commission were having with Mr. Lasprogata and declined to vote on the contract award. The finding in this regard was based upon Dr. White's testimony and that of Mr. Buehler which corroborated it. I am unable, however, to base a finding on Dr. White's testimony that he never spoke to any personnel of the Commission about Mr. Lasprogata or ETC.

The facts as found, therefore, in respect of the formation of the relationship between the Commission and Mr. Lasprogata and ETC are that, aside from bringing the parties together, Dr. White did little or nothing to cause the contractual relationship to develop. He did not disclose his relationship with Mr. Lasprogata because it was, at the time, a developing one on a personal basis and he seems not to have permitted his official position to be used to

foster the contractual relationship. He would have been well advised to disclose the relationship nevertheless but, based on the evidence before me, I cannot find that he was clearly obliged to do so. He did exercise the good judgment to refrain from voting on the grant of his friend's contract. It cannot fairly be held, under the circumstances, that it was a disqualifying lack of judgment to him to fail to disclose the developing friendship.

I CONCLUDE, therefore, that when the 1980-81 contract between ETC and the Commission came into being in the Spring of 1980, it was not tainted by a disqualifying conflict of interest.

But, once the contractual relationship came into existence, the qualities of the connection between Dr. White's official responsibilities and his personal relationship changed. As Essex County Superintendent of Schools he was obliged to oversee the rendition of Chapters 192 and 193 services, to evaluate it and report on it to his superior, the Commissioner of Education, and to regulate the individuals and entities involved on behalf of the Commissioner. At this point, Dr. White should certainly have avoided two developments which followed: performing professional services on behalf of a business entity in which Mr. Lasprogata had a significant interest, whether compensated or not; and aiding his brother to be employed by EDMOCO, albeit through his old friend, Mr. Henderson, rather than Mr. Lasprogata.

Certainly educators and educational administrators should not be prohibited from offering consultative services at times and on terms separate from their official duties. Such involvements improve the educational process and aid those doing the consulting in their professional development. But, such services must be avoided where the individuals to whom or on whose behalf they are rendered are subject to the regulatory authority of the consultant in another official connection. In short, an official with regulatory responsibility should not work, directly or indirectly, with or without compensation, for or for the benefit of an individual whose activities he is obliged to oversee, evaluate and regulate. The obligation to avoid such relationships rests equally upon the public officer and those over whom he or she has regulatory responsibilities.

It may be that a public officer's brother would qualify for a position with a business entity in which an individual subject to regulation by that public officer holds an interest. And, actual employment of the public officer's brother will be permitted if all involved are particularly circumspect. But, the high standards of conduct which govern public officers do not permit them to solicit the employment of a relative or anyone else. The appearance of impropriety is manifest and inescapable as is its connection with the public responsibility and powers of the administrative official involved.

These disqualifying acts should have been avoided. Even if not avoided, they could have been substantially cured by a disclosure to the Commissioner of Education and a reassignment of Dr. White's oversight responsibilities to someone else. They should have been disclosed to the respondent Commission as it prepared to award the 1981-82 contract to ETC.

Nevertheless, I CONCLUDE that they do not, by themselves in the circumstances, at this time, disqualify ETC from consideration for the 1981-82 contract. The matter is no longer before the respondent Commission but rather before me and, ultimately, before the Commissioner of Education for an independent judgment, in the light of facts now disclosed of record. There is, at this point, no officially taken action to invalidate, but rather a determination subject to review. I am obliged to determine on the basis of the record before me whether, in the public interest, ETC should be an approved vendor for the rendering of educational services under Chapters 192 and 193. The manner in which it deals with public officials may aid in arriving at an ultimate conclusion, but in the circumstances of the case it cannot, by itself, be dispositive.

D. ETC's Financial Standing and Fiscal Practices (findings and conclusions)

It is the essence of petitioners' contentions on these issues that public contracts should not be awarded to contractors who 1) are lacking in adequate financial resources which will assure their ability to perform their obligations or 2) engage in fiscal practices which place public funds or programs substantially at risk. In the basic contention, the petitioners are correct. Statutory and other requirements for financial ability, e.g., N.J.S.A. 18A:18A-27, have been established precisely for this reason. The position assumes even greater significance when the public contract, as here, relates to the performance of a continuing service mandated by statute.

The respondents argue that the safeguard contained in New Jersey's system for the rendition of chapters 192 and 193 services, that a provider is not to be paid until the services have been rendered, vitiates the force of the petitioners' position on this issue. They also point to the safeguard adopted by the Commission under the 1980-81 contract of withholding $300,000 from moneys due to ETC in lieu of a performance bond. These contentions, however, fall short in two ways which implicate the public interest. The first relates to the complexity of the program here involved in addition to its nature as a continuing service required by statute. If, because of a lack of adequate financial resources or because of unsound fiscal practices, there is a significant likelihood that the provider of these services will be in position of being unable to perform, the program would cease for some time until another contractor could be found or other alternatives pursued. For a period of time, the mandated services would not be provided, an eventuality which the amount withheld (approximately one month's payment) might not cure.

Secondly, the public interest demands that contractors dealing with public funds, function in ways which reflect acceptable business practices, if not the best, and which permit them properly to account for the application of the proceeds. While a contract for public work is a business transaction, the contractor also undertakes a public trust. And, where a continuing, statutorily mandated service is to be performed, the contracting agency identifies itself with the contractor. It is not the least acceptable marketplace practices which must govern therefore, but a higher level of business administration, accountability and responsibility. The proofs will be evaluated in the light of these principles.

Notwithstanding that his corporation has experienced a loss in excess of one million dollars from the 1980-81 contract with a limit of 3.9 million and actual receipts of about 2.4 million, Mr. Lasprogata seeks to be awarded the 1981-82 contract with a limit of 3.1 million. He testified to his belief that the knowledge and experience he has gained will permit him to avoid or

minimize the effect of errors and misjudgments which occurred last year. He feels that his reputation is at stake, particularly in the light of much adverse press during the past year in Essex County, and he wishes to preserve the excellent relationships which he has had with educators in both Pennsylvania and New Jersey based upon his concern for the welfare of the school children and his years of providing contracted educational services in both states.

In examination by counsel for the Commission, Mr. Lasprogata testified

AND I SO FIND that Mr. Lasprogata is prepared to post a certified check or cash with the Commission in the amount of $280,000 in lieu of a performance bond and that he has a line of credit for $600,000 from Continental Bank and a supportive relationship with that institution.

I FIND further that ETC will not need to purchase equipment for the coming year as it was required to do for the 1980-81 contract.

Additionally, in support of respondents' motion to permit the Commission and ETC to enter into a month-to-month contract pending the outcome of these proceedings, an affidavit of Vito A. DeLisi, Vice President of Continental Bank, was filed which, although not subject to cross-examination, indicates

and I FIND that Continental Bank has made an additional commitment to loan ETC as much as $200,000 for operations provided that, to the extent such sums are advanced, Continental Bank will have a perfected first security interest in proceeds from the Commission which are to be made to both ETC and Continental Bank as joint payees.

On examination of Mr. Lasprogata by counsel for petitioners, it was established

and I FIND that ETC is presently indebted to Continental Bank in the amount of $1,200,000, to First Pennsylvania Bank in the amount of $600,000 and to Mr. Lasprogata himself for $240,000. Additionally, it owes back payroll taxes to the U.S. Government of about $250,000 for the last two or three months, a legal obligation which it has been dilatory in discharging. He valued the capital of the corporation at 1.5 to 1.7 million dollars, almost entirely in equipment against which Continental Bank has a creditor's lien for approximately $650,000. The corporation's capital and accounts receivable, as well as Mr. Lasprogata's personal assets, are also pledged to the extent of his $600,000 line of credit with Continental Bank, for all the corporation's dealings. The corporation has accounts payable of $75,000 to $100,000 and accounts

receivable of about $400,000 from Essex County, Camden County, and the City of Paterson.

I FIND, therefore, on the basis of the evidence before me that ETC presently has a negative net worth of approximately $980,000.

Mr. Lasprogata also testified that he made an informal pledge of his personal assets to the Commission in 1980-81 and is willing to do so again in 1981-82. He was uncertain which of his assets were available to be pledged, i.e., not already pledged to others. It appears that a certificate of deposit owned by him and his wife in excess of $140,000 is the only certain available asset. The others consist of an approximately $55,000 interest in a pension and profit sharing plan if it is determined that he is entitled to it at this time, and the value of his Bryn Mawr home over and above its $176,000 mortgage (he estimates an additional value of about $174,000) if it is not already pledged. He testified that it might already be pledged to Continental Bank on other loans. Mr. Lasprogata also testified to a $95,000 personal tax liability to the U.S. Government.

I FIND that it is uncertain what amounts are available for Mr. Lasprogata to pledge on behalf of ETC from his personal assets which he is willing to pledge. It may be nothing because everything is already pledged; it may be $140,000; or it may be as much as, but not more than $370,000.

Mr. Lasprogata also testified and

I SO FIND that his Pennsylvania contracts for 1981-82 are, in the aggregate, about one million to 1.1 million dollars and that he projected about $830,000 in expenses. His anticipated profit from the 1981-82 contract with the Commission was about $250,000.

There is also substantial testimony from Mr. Lasprogata and

I SO FIND that many checks drawn on ETC accounts during the 1980-81 year were for his personal expenses. Such amounts were reported by him as income and were set off against the corporation's debt to him in the corporation's loans and exchanges account. The $240,000 indebtedness which presently remains is the net debt to him after the set offs.

I FIND further that the fiscal practices of the corporation during the 1980-81 year were careless and disorganized at best. The corporation was operated as the one person business it was with apparent minimal concern for a proper segregation of expense items.

I FIND further that a number of the ETC checks which were

written for Mr. Lasprogata's personal expenses were drawn during or around the time period, November 15, 1980 to January 30, 1981, when a number of checks, including many teachers' salary checks were being returned for insufficient funds and when re-imbursement for teachers' travel expense vouchers were being delayed.

I FIND further that a number of the checks which were issued by ETC during 1980-81, although not in payment of Mr. Lasprogata's personal expenses, were written on behalf of other business entities in which Mr. Lasprogata, not ETC, had made a substantial investment.

I CONCLUDE based upon the immediately foregoing findings alone, the delay in the corporation's payment of payroll taxes to the U.S. Government, and the fact that the situation of returned checks, salary and otherwise, was permitted to continue for a 2-1/2 month period and was not remedied until a court order directed ETC to make better arrangements for the honoring of employees' salary checks, that there has been a substantial disregard on the part of ETC and its principal for their business and corporate obligations.

On examination by his counsel, Mr. Lasprogata acknowledged that during the past year, in December, 1980 or January, 1981, it had become evident to him that, largely as a result of the 1980-81 contract with the Commission, his company had grown to such a point that new accounting and fiscal practices were indicated. A series of new accounts was established so that his Pennsylvania business could be segregated from his New Jersey business and that various New Jersey accounts could be segregated from each other. He testified once again to his arrangement with Midlantic Bank in honoring teachers' salary checks based upon a letter of credit from Continental Bank. Mr. Lasprogata testified additionally that he has restructured management practices, has determined that ETC will no longer make personal payments for him and that executive salaries would be held down. His own salary was to be decreased from the $150,000 which he drew in 1980-81. At the urging of the officers of Continental Bank, a new position of controller has been established in the corporation and has been filled by an individual who came highly recommended and with whom the officers of Continental Bank are apparently well satisfied. Since February the controller signs the checks of the corporation rather than Mr. Lasprogata. These facts were uncontroverted and I FIND them to have been established.

Nevertheless, notwithstanding Mr. Lasprogata's efforts at restructuring his corporation's practices and reordering his corporations' priorities, an existing state of facts is undeniable. By every conventional measure, ETC is an insolvent corporation. Mr. Lasprogata's personal assets, some of which he is of a mind to pledge on behalf of the corporation's activities, are so heavily encumbered and pledged already that, to the extent they are available for pledging and if they could be added to the asset side of the corporation's balance sheet they would still be insufficient to render the corporation solvent. Notwithstanding Continental Bank's past willingness to come to the aid of ETC and Mr. Lasprogata with guarantees, letters of credit, etc., and its apparent willingness to continue doing so, the financial condition of the corporation is so precarious that a single major miscalculation or unforeseen loss could very well destroy it and do considerable damage to the program it proposes to operate. Such a miscalculation occurred during 1980-81 when the corporation lost 1.2 million dollars on the Essex County contract and experienced, as a result, a net loss of one million dollars from its New Jersey operations. Becuase of that loss, ETC is in considerably worse financial condition now than it was at this time last year. The absence of any need to purchase new equipment for 1981-82 and the efforts of the school districts to make payment for services more promptly are positive features for ETC. But ETC's financial guarantees for 1981-82, which essentially duplicate those for the previous year, coupled with the fact that ETC is one million dollars worse off now than it was at the beginning of the 1980-81 contract term, place ETC's financial responsibility seriously in question.

Mr. Lasprogata claims to have learned from last year's errors and believes that he can turn a losing operation into a profitable one during the coming year. Without questioning his good faith and his desire for whatever reason to demonstrate not only his willingness to undertake a contract with the Commission again, but also his determination to perform it successfully, I am unable in the light of his business judgment and practices during the 1980-81 year, to afford the credence to his present judgment which would permit me to conclude with confidence that there is a substantial likelihood that ETC will perform its contract for the entire term of the 1981-82 year. This, in the light of Mr. Lasprogata's testimony and that of Mr. Packman, ETC's Director of Educational Services for Essex County. Whether due to the nature of their business or their own inadequacies, I am persuaded after hearing them testify, that the nature and level of their planning for the coming year is not materially different, in the light of their experience, from that engaged in last year. There is no evidence of any safeguards undertaken against the effects of serious miscalculations. Of course, no new equipment will need to be purchased during the coming year, but the maximum contract price is also down from 3.9 million to 3.1 million. Even Continental Bank, as supportive, cooperative and forebearing as it has been with ETC and Mr. Lasprogata, has indicated sufficient reservations by conditioning its newest commitment for an additional $200,000 loan on obtaining, with the cooperation of the Commission, a perfected first security interest in payments from the Commission to ETC.

Certainly risk-taking is to be expected and encouraged in private sector business affairs. It is through the taking of calculated risks and the application of energy and talent that entrepreneurs and those who finance them succeed, i.e., make a profit. Neither Mr. Lasprogata nor Continental Bank can be faulted for their enterprising efforts to turn a substantial loss operation into a profit making venture. But where public moneys and the public trust are at stake, particularly when a service mandated by legislation is to be provided by a private sector vendor, business risk must be held to a minimum if not entirely eliminated; and the business enterprise involved must be held to a level of accountability duplicating the level of responsibility which the public bodies charged with the obligation to provide such services would be expected to discharge.

The facts before me do not permit a conclusion that the level of risk in the Commission dealing with ETC is sufficiently low so that the mandated service involved will most assuredly be provided; nor can I conscientiously conclude that the business practices of ETC as established by events during the last year, even in the light of attempts to restructure and reform its operations, approximates the level of responsibility which inheres in the public body charged with the primary obligation.

Although the quality of the services provided is of great importance, it is not the only concern of significance to which the responsibility of the Commission goes. That responsibility is owed to all involved with the service, not only the boards of education, the parents and the students but also the teachers and other employees of the corporation. And it is a responsibility owed to the public which places governmental functions, relationships and practices at a higher level than those of the marketplace.

On the basis of the foregoing findings relating to the manner in which ETC or its principal has failed or delayed in discharging its obligations under law, its disregard for proper relationships with a public official charged with oversight responsibilities, its financial standing and pattern of fiscal practices,

I CONCLUDE

that ETC is not a suitable vendor for the rendition of chapters 192 and 193 services for the 1981-82 school year.

I, therefore, ORDER

the respondent Essex County Educational Services Commission to refrain from entering into a contractual relationship with respondent Educational and Training Consultants or its principal for the rendition of educational services under N.J.S.A. 18A:46A-1 et seq. and N.J.S.A. 18A:46-19.1 et seq. during the 1981-82 school year.

For the reasons, heretofore expressed, the motion of respondent Essex County Educational Services Commission to be permitted to enter into a month-to-month contractual relationship with respondent Education and Training Consultants or its principal pending the final outcome of these proceedings is hereby DENIED.

This recommended decision may be affirmed, modified or rejected by the Commissioner of Education, Fred G. Burke, who 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.

August 10, 1981
DATE

HOWARD H. KESTIN, CALJ

Receipt Acknowledged:

[illegible] 12, 1981
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

Aug 13, 1981
DATE

Ronald I. Parker TAZ
FOR OFFICE OF ADMINISTRATIVE LAW

EXHIBITS IN EVIDENCE

C-1	Memo June 10, 1981 - To County Superintendents from J. R. Flynn
P-1	(By stipulation) Specifications for 1980-81 Contract (copy)
P-2	(By stipulation) Specifications for 1981-82 Contract (copy)
P-3	(By stipulation) Bid Proposal for 1980-81 (photocopy)
P-4	(By stipulation) Bid Proposal for 1981-82 (photocopy)
P-5	Folder of approximately 90 separate affidavits (copies)
P-7	Original computer printout of Rb-3
P-8	ETC's application for placement on P-7 (copy) 2 pages
Ra-1	Letter (April 1, 1980) from Beineman (copy)
Ra-2	Letter (March 31, 1980) from Conroy (copy)
Ra-3	Letter (March 31, 1980) from Levin (copy)
Ra-4	Letter (April 1, 1980) from Sylvestri (copy) 2 pages
Rb-1	Year-end report from ETC (copy)
Rb-2	Compliance survey for 1980-81 (copy)
Rb-3	Print-out from Department of Treasury (copy)
Rb-4	Proposed revision of NJAC 6:20-7.1 and covering memo (9/26/79) from Deputy Attorney General Burgess (copy)
Rb-6	Purchase and Property Form - Bidders Mailing List Application (4 pages including instructions)
Rb-7	Letter (June 11, 1981) from Mr. Wall
Rb-8	Transcript dated February 2, 1981 (except for Dr. White's testimony)
Rb-9	Transcript dated February 3, 1981

EXHIBITS MARKED FOR IDENTIFICATION
BUT NOT MOVED IN EVIDENCE

C-2	Excerpt from NJAC 6:20-7.1, .2, .3
Rb-5	Letter (June 18, 1981) to ETC from Brooks in response to Rb-7 (copy)
P-6	Brooks' Telephone Log (not retained by court)

NEW JERSEY EDUCATION ASSOCIATION AND EDUCATIONAL SERVICES TEACHERS ASSOCIATION,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
ESSEX COUNTY EDUCATIONAL SERVICES COMMISSION ET AL., ESSEX COUNTY,	:	DECISION
RESPONDENTS.	:	

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision. The Commissioner notes that exceptions and cross-exceptions were filed in a timely manner by Respondent Educational and Training Consultants (ETC) and Petitioner NJEA in accordance with the provisions of N.J.A.C. 1:1-16.4a, b and c.

Respondent ETC takes exception to Judge Kestin's determination that ETC is not a suitable vendor for the rendition of chapters 192 and 193 services for the 1981-82 school year. Respondent ETC finds such determination at variance with Judge Kestin's determination that ETC had fulfilled its service obligations under the 1980-81 contract. Such finding, argues Respondent ETC, coupled with the financial guarantees offered personally by Mr. Lasprogata and by the Continental Bank offset Judge Kestin's determination that ETC had a negative net worth of approximately $980,000. Respondent ETC further argues that the contracts it holds in Pennsylvania would create accounts receivable in the aggregate of $1 million to $1.1 million to offset anticipated expenses of $830,000 and that such accounts receivable constitute an asset to the company not accorded full recognition by Judge Kestin. Respondent ETC further urges consideration of the fact that business errors and miscalculations attendant to the 1980-81 contract have been corrected and thus reduce the danger of miscalculation referred to by Judge Kestin as a major reason for reaching the conclusion that ETC was not a suitable contractor.

Notwithstanding any determination reached by the Commissioner in the matter herein controverted relative to ETC's suitability as a contractor to provide services for the Essex County Educational Services Commission, respondent urges that the Commissioner limit application of the instant decision solely to the issue of the 1981-82 contract with said Essex County Educational Services Commission and not extend the findings herein to any other contract which ETC may undertake with other commissions or local school districts.

Petitioner's cross-exceptions refute those of Respondent ETC and argue that even those assets ascribed to ETC by respondent's exceptions leave that company far short of compensating for its huge debt and do not address themselves to Judge Kestin's conclusion that "ETC is in considerably worse financial condition now than it was at this time last year.***" Initial Decision, at p. 32

Based upon such conclusions and additional facts cited by Judge Kestin, petitioner urges the Commissioner to affirm the decision of Judge Kestin in its entirety.

In assessing the relative merit of the exceptions and cross-exceptions herein, the Commissioner finds that Respondent ETC has failed to demonstrate that the financial status of ETC has improved, if it has improved at all, to that degree consistent with permitting it to assume responsibility for providing the services for which it seeks to contract. The Commissioner's standard in such assessment must be the assurance that the thousands of nonpublic school children entitled to those services mandated under chapters 192 and 193 will receive such services without interruption. No financial argument presented by Respondent ETC is sufficiently assuring to the Commissioner to permit him to reach a conclusion contrary to that reached by Judge Kestin when he stated:

> "***The facts before me do not permit a conclusion that the level of risk in the Commission dealing with ETC is sufficiently low so that the mandated service involved will most assuredly be provided***."
> (Initial Decision, at p. 33)

In reaching his determination herein, the Commissioner is further persuaded that Judge Kestin's decision is amply supported by factors above and beyond those strictly related to ETC's financial health wherein Judge Kestin said:

> "On the basis of the foregoing findings relating to the manner in which ETC or its principal has failed or delayed in discharging its obligations under law, its public official charged with oversight responsibilities, its financial standing and pattern of fiscal practices,
>
> I CONCLUDE
>
> that ETC is not a suitable vendor for the rendition of chapters 192 and 193 services for the 1981-82 school year." (Emphasis supplied.)
> (Initial Decision, at p. 34)

Finally, the Commissioner, in addressing Respondent ETC's exception which seeks to limit the application of Judge Kestin's decision to the particular contract between ETC and the Essex County Educational Services Commission, is constrained to observe that Judge Kestin's determination as to Respondent ETC's status does not limit its application solely to the issue of the specific contract controverted herein but addresses itself to the suitability of ETC as a vendor. Were the findings of Judge Kestin limited solely to the question of ETC's financial health, a reasonable argument could be made for permitting Respondent ETC to undertake those services for which it could provide reasonable assurances of its fiscal capability for so doing. However, given the fact that Judge Kestin's determination speaks to the more fundamental question of Respondent ETC's "suitability" as a vendor, the Commissioner rejects Respondent ETC's argument and finds that ETC is indeed, based upon the evidence presented herein, an unsuitable vendor for the providing of educational services pursuant to chapters 192 and 193. Accordingly, and for the reasons contained therein, the Commissioner affirms the findings and conclusions of Judge Kestin's initial decision and makes them his own.

In rendering a determination in the instant matter, the Commissioner wishes to call attention to the unusual circumstances which pertain in the matter herein controverted by virtue of the Court's remand.

The Commissioner observes that his action herein should not be construed as an assumption on his part of the responsibility for determining the qualification, debarment, suspension and disqualification of vendors which by virtue of N.J.S.A. 18A:18A-27 and N.J.A.C. 6:20-7.1 et seq. are delegated to the Department of the Treasury. Despite the fact that the matter herein controverted revealed that those standards required by statute for the prequalification of bidders have not been promulgated by Treasury, the Commissioner notes that such prequalification is an essential prerequisite to the fulfilling of his function for approving the provision of auxiliary services by public or private agencies other than an educational improvement center or an educational services commission. N.J.S.A. 18A:46-19.1 and N.J.S.A. 18A:46-7 Notwithstanding the fact that Judge Kestin concluded that "***in the absence of such standards or systems, the responsibility for determining the capacity of ETC as a proposed vendor to discharge its contractual obligations rested with the Commission, governed by the specific requirements of the bidding and contracting statutes then extant***" (Initial decision, at p. 14), the Commissioner cannot escape the conclusion that past practices should not be continued and that appropriate standards for effectuating the will of the Legislature should be promptly established and implemented.

COMMISSIONER OF EDUCATION

September 9, 1981

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 792-81
AGENCY DKT. NO. 17-1/81A

APPEARANCES:

JANE WEIR,
Petitioner
v.
BOARD OF EDUCATION OF THE BOROUGH OF CLOSTER, ET AL.,
Respondents.

Record Closed: June 12, 1981 Decided: July 27, 1981
Received by Agency: Mailed to Parties:

APPEARANCES:

Harold N. Springstead, Esq., for Petitioner, Jane Weir
(Aronsohn & Springstead, attorneys)

Thomas W. Dunn, Esq., for Respondents,
Board of Education of the Borough of Closter
and William R. Hanley, Superintendent
(Wittman, Anzalone, Bernstein, Dunn & Lubin, attorneys)

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

In a reduction in force for 1979-80, petitioner Jane Weir, a tenured, full-time certificated music teacher employed by the Board of Education of the Borough of Closter since 1969, was reduced to music teacher four-fifths time (see OAL DKT. EDU 3078-79), an employment category in which she presently serves. When, in October 1980, the Board employed another, untenured person to teach a stringed music program one-fifth

time, petitioner alleged abridgment of her tenure, seniority and preferred eligibility rights under N.J.S.A. 18A:28-12 and N.J.A.C. 6:3-1.10(b),(h). She seeks categorical reinstatement (including ouster of that other), back pay and emoluments. The Board, while conceding petitioner's status generally and its employment of that other, denies abridgment of petitioner's rights and raises defenses of collateral estoppel and the bar of the doctrine of res judicata (OAL DKT. EDU 3078-79).

The petition was filed in the Division of Controversies and Disputes of the Department of Education on January 20, 1981. The Board's answer was filed February 9, 1981. On February 17, 1981, 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 15, 1981, a prehearing conference was held in the Office of Administrative Law and an order entered establishing that the matter should be addressed and decided as if on cross-motions for summary decision on pleadings, stipulations, documentation and memoranda of law, in accordance with N.J.A.C. 1:1-13.1, et seq. The matter was set down for oral argument on the cross-motions for June 12, 1981, at which time the record was closed. In the interim, before oral argument, stipulations and memoranda of law were filed by the parties as agreed.

STIPULATION OF FACTS ADOPTED HEREIN AS FINDINGS OF FACT

1. Petitioner Jane Weir holds the position of part-time (four days per week) teacher of music in the Closter school district and has held that position since the beginning of the 1979-80 school year. She holds a standard certificate as teacher of music.

2. During the 1979-80 school year and for five years prior thereto, the Board of Education of Closter contracted with the Northern Valley Regional High School District ("Northern Valley") for a

stringed instrumental music program. The person assigned by Northern Valley to Closter was Mrs. Whittaker in 1979-80. Before that, the teacher was Mrs. Kosma. The teacher assigned under the Northern Valley contract worked one day a week in Closter and worked elsewhere in constituent districts for the balance of her schedule.

3. For the 1980-81 school year, the contracted stringed instrumental music service was terminated.

4. In or about October 1980, the Closter school district created a stringed instrumental music position that was a one-day (six hours) position at a total cost not to exceed $2,000.

5. On or about October 21, 1980, the Closter Board of Education hired Arlene Antebi to fill the stringed instrumental music position.

6. Petitioner claims entitlement to that one-day (six hours) per week position by reason of her tenure and seniority.

7. Prior to the 1979-80 school year, petitioner was employed as a full-time teacher of music.

8. On April 24, 1979, the Board of Education, by a resolution reciting the effects of declining enrollment and budget caps limiting the resources available to the school district, abolished one position of full-time teacher of music.

9. On the same date, in the same resolution, the Board created a new part-time (four days per week) teacher of music position.

10. Petitioner, the person with least seniority as a full-time teacher at that time, was terminated as a full-time teacher because of abolition of the full-time position and offered the new part-time (four days per weeks) position, which she accepted, reserving her rights, however, to contest the Board's action.

11. Petitioner was placed and remains upon a preferred eligibility list should the Board ever create a new full-time position of teacher of music.

12. Petitioner did, in fact, contest the Board's action in a petition to the Commissioner of Education in an action entitled Jane Weir v. Board of Education of the Borough of Closter and William R. Hanley, Superintendent, OAL DKT. EDU 3078-79, Agency Dkt. No. 260-7/79A.

13. By an initial decision of February 8, 1980, the Honorable Robert P. Glickman, ALJ, concluded his initial decision, which became a final agency decision when not reversed or modified by the Commissioner of Education within the time limits of N.J.S.A. 52:14B-9, 10. The record of that case is stipulated herein by these parties.

14. Petitioner has never taught instrumental music in the Closter district.

15. Under her music teacher certification, she can teach instrumental music. See Popovich v. Board of Education of the Borough of Wharton, 1975 S.L.D. 737, 745.

PROCEDURAL HISTORY

In previous litigation between these parties, under OAL DKT. EDU 3078-79, petitioner contended before the Commissioner the Board had violated her tenure and seniority rights under N.J.S.A. 18A-28-9, 10 in abolishing her full-time music teaching position and in creating a new four-fifths position, to which she was assigned. Her argument was the Board should instead have reduced one of two other three-fifths time positions to a two-fifths time position and kept her then full-time position intact. The Board, on the other hand, contended the choice of abolishing either a full-time position and creating a four-fifths position or of abolishing a three-fifths time position and creating a two-fifths time position was within its discretion under its managerial powers under N.J.S.A. 18A:11-1(d) and thus entitled to a presumption of correctness. Judge Glickman in that matter agreed, upon the authority of Boult v. Board of Education of Passaic, 136 N.J.L. 521, 523 (E.& A. 1948). He found the Board's action then was based on sound educational reasons (that is, avoidance of fragmentation of music instruction at Hillside School) and was thus consistent with the general power it had to abolish positions and reduce staff for reasons of economy or for reasons dictating administrative or supervisory organizational changes in the district under N.J.S.A. 18A:28-9. At the time of that action, the Board, as seen in Stipulation No. 2, was under contract with Northern Valley Regional High School District ("Northern Valley") for a stringed instrumental music program staffed in the Closter district by a Northern Valley stringed music teacher assigned thereto. For 1980-81, the contractual relationship was terminated and in October 1980, the Board employed its own stringed instrumental music teacher. Thus, contends the Board, the same issue presently to be litigated, that is, the right of petitioner to a one-fifth stringed instrumental music position was actually litigated in the previous case, or if not actually litigated, could have been so litigated and thus is barred from relitigation by issue-preclusion doctrines of res judicata and/or collateral estopped.

MATTERS AT ISSUE

At issue herein, therefore, are the following:

1. Whether, by Board employment of another untenured person as stringed instrument music teacher one-fifth time, petitioner's preferred eligibility rights as a tenured, senior, certificated music teacher previously reduced from full to four-fifths time were abridged within the meaning of N.J.S.A. 18A:28-12 and N.J.A.C. 6:3-1.10(b),(h).

2. Whether adjudication of issues by the Commissioner in the prior action between the parties under OAL DKT. EDU 3078-79 precludes litigation of some or all of the issues in (1) hereinabove.

DISCUSSION

Issue-preclusionary doctrines of res judicata and collateral estoppel are applicable to adminstrative proceedings. City of Hackensack v. Winner, 82 N.J. 1, 31-32 (1980). The selective application of these doctrines should clearly take into account policy considerations that support these doctrines, such as avoidance of duplication and elimination of conflicts. Id., 31-33. These doctrines should not be applied where application would obviously frustrate the purpose of a statute. Clear Television Corp. v. Board of Public Utility Commissioners, 85 N.J. 30 (1981).

Requirements for invoking the doctrine of res judicata are a final judgment on the merits (Kramer v. Board of Adjustment of Sea Girt, 45 N.J. 268, 278 (1965)), by a court of competent jurisdiction, and identity of parties and claim or cause of action (Bango v. Ward, 12 N.J. 415, 420 (1953)). Determination of what constitutes the same claim or cause of action is perhaps the most perplexing element. To render a prior judgment res judicata, the record must show the issue was taken on the same allegations

that are the foundation of the second action. The test is whether the proof that would fully support the one case would have the same effect in tending to maintain the other. Temple v. Scudder, 16 N.J. Super. 576, 579 (App. Div. 1951). When a different judgment in the second action would impair or defeat rights established in the first action, then there exists the requisite "sameness." Bango v. Ward, supra.

Unlike res judicata, application of the doctrine of collateral estoppel does not require identity of claims. Collateral estoppel "bars relitigation of any issue that was actually determined in a prior action, generally between the same parties, involving a different claim or cause of action." State v. Gonzalez, 75 N.J. 181, 186 (1977). Traditionally, collateral estoppel applies where there are identity or privity of parties, mutuality, i.e., the party invoking collateral estoppel would have been bound by the decision in the earlier case, if that determination were adverse to him, and identity of issues. The requirement of mutuality is no longer rigidly enforced, so long as there was a fair opportunity to litigate the issue. Continental Can Co. v. Hudson Foam Latex Products, 129 N.J. Super. 426, 430 (App. Div. 1974). Where there is no mutuality and where there was no full and fair litigation of an issue, the courts will not apply collateral estoppel on grounds of public policy. Garden State Fire and Casualty Co. v. Keefe, 172 N.J. Super. 53, 59-60 (App. Div. 1980), certif. den., 84 N.J. 389 (1980).

Analysis of the prior litigation between these parties under OAL DKT. EDU 3078-79 suggests clearly the factual issues in that case differ from the factual issues here: that is, that there is no identity of issues. According to the administrative law judge in the earlier case, the real thrust of petitioner's argument then was that the board should have reduced one of two three-fifths positions to a two-fifths position, leaving intact petitioner's full-time position instead of reducing her, as the Board did, to a four-fifths position. The Board, on the other hand, contended the choice of abolishing either a full-time position and creating a four-fifths position or of abolishing a three-fifths position and creating a two-fifths position was within its managerial discretion. N.J.S.A. 18A:11-1(d). It argued, and the administrative law judge determined, its judgment was entitled to a presumption of correctness and could be overturned only if it were found to have acted arbitrarily. Stipulated facts in evidence in the earlier case, as the

administrative law judge found and considered in his judgment supporting the Board, contained a finding that the Board did not act arbitrarily, and therefore not unreasonably, since one avowed purpose administratively for the action it took was avoidance of fragmentation of music instruction at one of the affected schools. The reduction of petitioner to a four-fifths time position, therefore, was found justified. The circumstance in that case that the Board continued to employ a stringed instrument teacher from another district, as it had done in prior years, was effectually not reached as an issue by the administrative law judge. To that extent, therefore, it cannot be said that there was either an actual or tacit litigation of it. It follows, therefore, that no basis either by res judicata or collateral estoppel exists here to bar petitioner's present claim.

It seems clear, moreover, that the factual complex in this case is distinguishable, since the Board's determination not to continue employment of the contract employee for stringed instrument programming created a vacancy in that person's one-fifth position. Clearly at issue here, therefore, are petitioner's eligibility rights to reemployment in it under N.J.S.A. 18A:28-12 and N.J.A.C. 3-1.10(h). The Board's employment of another person for that position abridges petitioner's rights at least to be offered that categorical employment. The latter provides:

> 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.

No question is raised here as to petitioner's senior status over the new employee, nor is there any question, properly so, that under her music teacher certification she can lawfully teach instrumental music. Popovich v. Board of Education of Borough of Wharton, 1975 S.L.D. 737, 745.

In Popovich, it appeared petitioner there was a certified and tenured teacher of music. Like petitioner here, her employment had been devoted exclusively to vocal music teaching. Purporting to effect a reduction in force, the Board in that case reduced petitioner's employment to three-fifths time, while maintaining as a full-time instrument music teacher one, who though similarly certificated as teacher of music, had less

seniority than petitioner in the district. The Commissioner held the Board's action was tantamount to abolishment of a portion of its full-time vocal music teacher position and triggered petitioner's tenure and seniority rights vis-a-vis the retained instrumental music teacher with less seniority. He held petitioner was entitled to full-time employment with the Board so long as a full-time position is maintained in her category.

And so, here, petitioner Weir likewise is entitled to full-time employment in her category so long as the Board maintains the position. The position maintained, that of one-fifth time, is within petitioner's category of music teacher generally and is, therefore, a position for which she by law is preferentially eligible.

CONCLUSION

Based on the foregoing, therefore, I hereby **CONCLUDE** that petitioner is entitled forthwith to the one-fifth teaching position presently occupied by another. The Board is directed to provide petitioner with salary and other emoluments equal to the difference between that which she received and that which she would otherwise have been provided as a full-time teacher from October 21, 1980 to date.

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 792-81

I hereby **FILE** this Initial Decision with **FRED G. BURKE** for consideration.

July 27, 1981
DATE

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

July 31, 1981
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

Aug. 3, 1981
DATE

Ronald I. Parker TAB
FOR OFFICE OF ADMINISTRATIVE LAW

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EXHIBITS MARKED IN EVIDENCE:

J-1 Minutes of regular meeting of Board of Education of Borough of Closter, October 21, 1980, page 7, approving employment of Arlene Antebi "not to exceed six hours per week, $11.25 per hour, total expenditure not to exceed $2,000 to continue the stringed music program as offered in the Closter schools in 1979-80."

J-2 Department of Education (State Board of Examiners) certificate issued to Jane Weir as "Teacher of Music," dated September 1970.

JANE WEIR,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF CLOSTER ET AL., 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 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 Closter Board of Education is directed forthwith to accord petitioner the full-time status to which she is entitled and make her whole as to salary and other emoluments from October 21, 1980 to the date of this decision.

COMMISSIONER OF EDUCATION

September 9, 1981

ISABELLA LETTIERI AND MARILYN CATANIO,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BAYONNE ET AL., HUDSON COUNTY,	:	DECISION
RESPONDENTS.	:	

For the Petitioners, Isabella Lettieri and Marilyn Catanio, Pro Se

For the Respondents, John V. Gill, Esq.

Petitioners, residents of Bayonne, allege that the Board of Education of the City of Bayonne did wrongfully adopt a racially balanced plan to provide equality in educational programs by the creation of a magnet school and the redistricting of others resulting in the forced transfer of some students. Petitioners pray that a stay be granted pending a final adjudication of the controversy which would bar respondents from transferring any pupils, transferring any school personnel, moving any equipment, or renovating any school facility to implement what is hereinafter referred to as "the Plan."

Petitioners pray further that approval of the Plan be revoked by the Commissioner and that an opportunity be granted for an alternative plan, known as "the Community Plan," to be presented to the Board and to the Commissioner for review and implementation.

The Board admits submitting the controverted plan to the Commissioner on or about December 16, 1976 to improve the racial balance within the school system. The Plan was developed in response to a State Department of Education request in April 1975 that the Board develop a racially balanced plan to end imbalance in the schools. The Board prays for dismissal of the Petition of Appeal because it does not set forth a cause of action upon which the Commissioner can grant relief.

A conference on the controverted matter was held in the office of the Hudson County Superintendent of Schools on May 4, 1977 at which the following issues were defined:

1. Was the desegregation plan adopted by the Board procedurally correct?

2. Was the proposed plan developed with the cooperation and adequate input of the Bayonne Educational Support Team?

3. Was the Plan, as adopted, of equal educational value to the pupils and the school system, or was it discriminatory to some?

4. Was there substantiated modification of the Plan by the Board subsequent to its initial adoption without adequate or proper input from community representatives?

5. If the Plan is defective, should the Commissioner revoke or set aside the Plan and order the Board to develop a plan with adequate input from all groups involved?

Hearings were held in the office of the Hudson County Superintendent of Schools on September 8, 9, 12, 14, 15 and 16, 1977. Briefs were filed on April 11, 1979 by petitioners, who represented themselves pro se after the attorney withdrew, and by respondents on December 8, 1980.

The hearing examiner finds the facts in the case to be these:

1. At the request of the State Department of Education, the Board filed a racial balance plan for the Bayonne school system with the Department on December 16, 1976.

2. The Plan adopted by the Board was developed with the advice of the Bayonne Educational Support Team, a group of citizens chosen by the Board to ensure the cooperation and input of the community.

3. Petitioners were members of the EST.

4. The Plan succeeded an Open Enrollment Plan which failed to solve the problem of racial imbalance in the Bayonne Schools.

5. The Plan, when adopted by the Board, required redistricting plus the conversion of the Vroom School into a gifted and talented learning center.

6. In April 1977 the Board approved a modification of the Plan through additional boundary adjustments of elementary districts to reduce student movement among schools.

7. The Plan, sent to the Commissioner in December 1976 and modified in April 1977, was implemented by the Board in September 1977.

The hearing examiner has reviewed the testimony adduced over six days of hearings, examined the briefs, and supplements thereto, filed by the parties involved, and evaluated the evidentiary documents submitted during the proceedings.

Petitioners argue that the effort of the Board to racially balance all the schools in the district, as determined in the Plan, is not required by statute or rule of the State Board of Education or by relevant court decisions. Petitioners base their argument on Booker v. Board of Education of Plainfield, 45 N.J. 161, 212 A.2d 1 (1965). Petitioners aver that, by attempting to racially balance all its schools in the same manner, the Board is illegally expanding the New Jersey Supreme Court's position in Booker,:

> "***(1) racial imbalance, when it is 'substantial', requires correction since it presents much the same disadvantages as are presented by intentionally segregated schools, (2) that exact apportionment of minority group students amont the schools of a particular school district is not required, and (3) that a plan to correct substantial racial imbalance must take into consideration all relevant factors.***"
> (Petitioners' Brief, at pp. 14, 15)

Petitioners also note that the State Board of Education did not adopt a proposal of the Commissioner's that would have prohibited the maintenance of racially imbalanced schools (Proposed N.J.A.C. 6:8-2.6) when it promulgated Chapter 8 of the Administrative Code. (The Thorough and Efficient System of Free Public Schools Act pursuant to the authority of N.J.S.A. 18A:11-1 et seq. as supplemented and amended by N.J.S.A. 18A:7A-1 et seq.)

Petitioners also find no mandate for widespread changes in the Guidelines for Developing Equal Educational Opportunity adopted by the State Board of Education on November 5, 1969. Therein it is stated:

> "***Educational considerations are primary in eliminating school segregation. The elimination of racial imbalance is not to be sought as an end in itself but because such imbalance stands as a deterrent and handicap to the improvement of education for all." (Emphasis petitioners')
> (Petitioners' Brief, at p. 18)

Petitioners likewise contend that the adoption and implementation of the Plan were unnecessary since the Bayonne School District already provided equality in educational programs for all students in every school in the district. (Petitioners' Brief, at p. 24)

Petitioners argue additionally that the creation of the Vroom Learning Center to operate a gifted and talented program violates the State guarantee of equality in educational programs under N.J.S.A. 18A:36-20 and N.J.A.C. 6:4-1 et seq. by giving preferential treatment to those students attending the magnet school.

> "***The inequality in educational programs resulting from the implementation of the Racial Balance Plan [The Plan] is further exacerbated by the facts that (1) the special equipment, supplies and activities offered in the gifted and talented program are not available in other schools in the school district, and (2) the existence of a gifted and talented program and the denial of admission of students into such a program stands to engender the very same sense of stigma and resulting feeling of inferiority which the New Jersey Supreme Court in Booker, supra, and the Commissioner of Education*** indicate to be educationally harmful and resulting in inequality in educational programs.***"
>
> (Petitioners' Brief, at pp. 26-27)

Petitioners charge that the Plan, as implemented, is discriminatory and unlawful. The Plan places a disproportionate burden on students who come from the school district's economically handicapped families and minority families in violation of N.J.S.A. 18A:36-20 which provides that:

> "No pupil in a public school of this State shall be discriminated against in admission to, or in obtaining any advantages, privileges, or courses of study of the school by reason of race, color, creed, sex or national origin."

Furthermore, the Plan, petitioners argue, is unlawful since it was adopted without meaningful and sufficient community input in accordance with the rules and regulations of the State Board of Education and the guidelines for equal educational opportunity. (Petitioners' Brief, at p. 33)

In refutation the Board contends that the Commissioner has the right, power and duty to end de jure and de facto segregation in the schools of the State. Morean v. Board of Education of Montclair, 42 N.J. 237 (1964) The Board, in complying with a State Department of Education order, developed and chose the Plan to end a de facto segregation issue in order that each child in Bayonne would receive a quality education. (Respondents' Brief, at pp. 3-4.)

The Board also believes that inclusion of a magnet school in the Plan for a gifted and talented program is sound educational theory in use in major cities throughout the country. (Respondents' Brief, at p. 4) The Board likewise defends its decision to redistrict thereby causing some children to move from a neighborhood school to a more distant one by pointing out that in no case is a child asked to walk more than 12 blocks to get to his/her new school.

The Board denies that it acted on the Plan before it received adequate input from the community. It points out that it organized an Educational Support Team (EST) to ensure community involvement and that petitioners admitted at the hearing that several alternate plans were discussed with the EST before the Board adopted and implemented the Plan (Tr. 6).

After reviewing the voluminous testimony and balancing the arguments of the contending parties, the hearing examiner concludes that the Board in making the decision to implement a plan to racially balance the Bayonne Public Schools was acting within its statutory powers granted by N.J.S.A. 18A:11-1 which states, inter alia:

> "The board shall -
>
> ***
>
> c. Make, amend and repeal rules*** for the government and management of the public schools***."

In determining that it would select one of several alternative plans to meet a mandate of the Commissioner that the schools of Bayonnne be desegregated, the Board was performing its duty. True, the Board had a duty to consult with concerned citizens in carrying out its function, but the final decision was the Board's.

The Commissioner faced a somewhat similar issue as to whether it is proper for a local board of education to submit delicate or controversial decisions to voters of the district in the form of a nonbinding referendum in Beatrice M. Jenkins et al. v. Board of Education of the Township of Morris et al., 1970 S.L.D. 389, rev'd 58 N.J. 483 (1971)

> "***to permit boards to submit any questions to the voters might lead to hesitancy on the part of boards to take positions on touchy subjects and lead ultimately to a passing off of their fundamental statutory obligations.***" (at 413)

Petitioners' claim in the instant case that the Board should have ascertained and followed the wishes of the EST is analogous to holding a nonbinding referendum, in the hearing examiner's opinion. The Board may appoint whatever advisory committees it wishes to assist in finding solutions to a school problem but it cannot in any way allow non-members of the Board to make decisions which are ultimately the Board's responsibility.

The Board, in the hearing examiner's view, obtained adequate input from the community and was guided by the advice of its professional staff. It made a decision in the best interest of the students and the community. The Commissioner has not in the past substituted his judgment for that of a local board when it acts within the parameters of its authority. (Committee to Save Bayard School v. Board of Education of the City of New Brunswick, 1978 S.L.D. 451, 453) It is recommended that there is no good reason for him to do so in this instance.

Petitioners in the instant matter impute lack of good faith in the Board's action in not following the wishes of petitioners. The hearing examiner does not agree. Perhaps the Board did not allow petitioners sufficient time to voice all their objections the night the Board acted, but certainly there is adequate testimony that the Board established an advisory committee (EST) from which its executive officers obtained valuable input as to the impact of the several plans suggested on the pupils and their families involved.

The hearing officer recommends that, having failed to provide credible evidence that the Board's decision to implement a racially balanced plan of its choice was arbitrary, capricious or otherwise improper, the Petition of Appeal be dismissed with prejudice.

The hearing examiner also recommends that petitioners' plea that the Commissioner revoke his approval of the Plan and conduct an investigation into petitioners' allegations that the Plan is discriminatory in that the Vroom School Learning Center "is being operated as a 'private public school' for children of persons in the school district who have influence with school administration as a result of political applications, connections with the school system, stature in the community resulting from their business or profession or monetary inducement" be denied.

This concludes the report of the hearing examiner.

* * * *

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

The Commissioner observes that no exceptions were filed by the parties to the report of the hearing examiner in the instant matter. The Commissioner hereby concurs with the findings of fact, conclusions and recommendations of his hearing examiner and adopts them as his own.

Accordingly, the instant Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

September 11, 1981

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4000-80

AGENCY DKT. NO. 303-6/80A

IN THE MATTER OF:

LOIS SHELKO,
Petitioner
v.
BOARD OF EDUCATION OF THE MERCER COUNTY SPECIAL SERVICES SCHOOL DISTRICT, MERCER COUNTY,
Respondent.

Record Closed: June 15, 1981
Received by Agency:

Decided: July 27, 1981
Mailed to Parties:

APPEARANCES:

Richard A. Friedman, Esq., (Ruhlman & Butrym, attorneys) for the Petitioner

Henry E. Kirchoff, Esq., for the Respondent

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

This matter presents the question of whether Lois Shelko (petitioner) may combine her service of employment as a teacher with the Ewing Township Board of

Education, not a party to the action here, with her service of employment as a teacher with the Mercer County Special Services School District (Board) for purposes of tenure acquisition in the employ of the Board. Petitioner alleges that the refusal of the Board to continue her employment for the 1980-81 academic year violates her asserted tenure rights.

The Commissioner of Education 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. A hearing was conducted in the matter, subsequent to which the parties filed Briefs in support of their respective positions. The record was readied for disposition on June 15, 1981, the day after receipt of petitioner's reply letter memorandum.

The basic undisputed facts of the matter are these:

Petitioner was initially employed by the Ewing Township Board of Education in September 1976 as a substitute teacher assigned to teach kindergarten. Petitioner was in possession of an elementary teaching certificate. Petitioner remained as a substitute only for the month of September 1976, when the Ewing Board offered, and she accepted, a regular teacher's contract, effective October 1, 1976, for the remainder of the 1976-77 academic year (P-1). That contract required petitioner to be in possession of an elementary teacher's certificate. Petitioner explained that her assignment at the commencement of employment was in a program called "Project Child."

It is noticed here that Project Child, as operated by the Ewing Township Board of Education, was a multifaceted program, funded annually through unspecified state and/or federal grants, to provide instruction to multiple-handicapped infants, preschoolers, and kindergarten youngsters. The Director of Special Services in the Ewing Board's employ prepared and submitted annual applications for program funds. The Ewing Board acted as the local education agency for purposes of applying for such grants, on an annual basis, for receiving the grants through the Department of Education, and for administering the program in regard to employment of personnel, purchase of supplies and equipment, and maintenance of the program in suitable facilities. No support for Project Child was provided by the Ewing Board from its current expense operating budgets. Furthermore, the pupils enrolled in Project Child were infants (to age three), preschoolers (ages three to five), or kindergartners (ages five and above) and were residents of districts throughout Mercer County, including Trenton, Ewing Township, the Windsors, Hamilton Township and Hopewell.

Petitioner began her assignment in Project Child on October 1, 1976, at the Presbyterian Church located on Prospect Street, Trenton (IT-175). She, along with a co-teacher, worked with approximately fifteen preschool handicapped youngsters: eight in a morning session and seven in an afternoon session. Petitioner explained that though the pupils with whom she worked did not have an Individualized Education Program (IEP), as is required for every child who is classified as educationally handicapped by State Board Rule N.J.A.C. 6:28-1.8, she did in fact prepare her own plan for each child (IT-182).

Petitioner explained that when she began her assignment with the preschool handicapped youngsters on or about October 1, 1976, she was advised to secure a certificate to enable her to be a teacher of the handicapped. Petitioner secured the necessary college credits during the subsequent months to become eligible to possess a teacher of the handicapped certificate and a certificate as a nursery school teacher. She applied for those certificates during the 1977 summer and was issued a combined teacher of the handicapped and nursery school teacher certificate during November 1977 (P-5).

In the meantime, the Ewing Board reemployed petitioner as a teacher for the 1977-78 academic year by way of a regular teacher's contract, dated September 14, 1977, but effective September 1, 1977 (P-2). This employment contract required petitioner to be in possession of a "valid Elementary certificate to teach," as did her initial contract for 1976-77.

Petitioner, for 1977-78, was assigned to the Project Child's location known as the Kisthardt Center, Hamilton Township. Here, petitioner worked again with preschool age handicapped youngsters, ages three to five, or, as she explains, the nursery school group. Petitioner had seven or eight youngsters in each of two sessions, a session during the morning and another in the afternoon.

Petitioner's testimony, uncontradicted, establishes as a fact that during her employment by the Ewing Board in 1976-77 and 1977-78, she was employed pursuant to a regular teacher's contract; she was a member of the New Jersey Teachers' Pension and Annuity Fund since October 1, 1976; she maintained records on all youngsters assigned her; she prepared daily lesson plans; she conducted parent-teacher conferences; and she was paid according to the teachers' salary policy then in effect in Ewing Township. Petitioner received all emoluments afforded all other teachers by the Ewing Board including sick days, accumulated sick days, and hospitalization. Finally, petitioner's

performance was evaluated on two occasions in 1976-77 (P-14, P-15) and on two occasions in 1977-78 (P-16, P-17) by the Ewing Board's Director of Special Services who, it has been reported, submitted the annual applications for Project Child funds.

During 1977-78, specifically during November 1977, the Mercer County Board of Chosen Freeholders acted to create the Mercer County Special Services School District pursuant to the Freeholders' authority at N.J.S.A. 18A:46-29. The legislative authority provides, "The board of chosen freeholders of any county may establish a county special services school district for the education and treatment of handicapped children, as such children are defined in N.J.S.A. 18A:46-1." N.J.S.A. 18A:46-1 defines a handicapped child to mean and include "any child who is mentally retarded, visually handicapped, auditorily handicapped, communication handicapped, neurologically or perceptually impaired, orthopedically handicapped, chronically ill, emotionally disturbed, socially maladjusted or multiply handicapped."

It is reasonable to presume, even absent direct evidence before me, that the Department of Education, through its Bureau of Special Education and the Mercer County Child Study Team, encouraged the creation of the Mercer County Special Services School District because the organization, management and control of such a district is governed by rules prescribed by the State Board of Education, N.J.S.A. 18A:46-30. The State Board rules which govern county educational units are set forth at N.J.A.C. 6:28-8.1 et seq.

The Director of Special Services, then employed by the Ewing Board, was involved in the creation of the Mercer County Special Services District. In fact, he was subsequently employed by the new Mercer County unit in June 1978, as its Director of Student Personnel Services. In the meantime, however, he acted as an unpaid consultant to the new Board which began functioning during February or March 1978.

It is to be noticed here that during 1977-78, petitioner continued to perform her contractual duties for the Ewing Board at the Kisthardt Center of Project Child; that her immediate supervisor, the Director of Special Services, was performing unpaid consultant services to the newly created Board of the County Special Services Unit; and that during the spring of 1978, the Director of Special Services conducted a meeting of all Ewing's Project Child staff members. The Director explained at that meeting that the newly created Mercer County Special Services School District would assume the operation of Project Child as of the 1978-79 academic year and that the Ewing Board would no

longer be the local education agency for purposes of the Project's funding, organization, or operation.

Petitioner received, without making application or being interviewed for, a proffered contract of employment, dated April 25, 1978, from the Mercer County Special Services School District for 1978-79, which she accepted (P-5). The Ewing Board offered petitioner neither a contract of employment nor a written notice that her employment with it would not be continued for 1978-79, according to the provisions of N.J.S.A. 18A:27-3.2.

In the meantime, the Mercer County Board began to function in anticipation of school operation in September 1978. The Board met in private session on April 20, 1978, and considered, without adoption, a motion "to grant contracts to the Staff commencing September 1, to June 30, 1979" (P-9). The proffered contract of employment to petitioner followed, which contract required her to possess a certificate as a teacher of the handicapped (P-5). The Director (the unpaid consultant otherwise still employed by the Ewing Board) explained that "staff" as used here was intended, at least by him, to mean those Ewing staff members in Project Child because the program Project Child would be applied for by him, but under the auspices of the Mercer County Board.

Petitioner, now in the employ of the Mercer County Special Services School District, reported to the same Kisthardt Center to which she had reported while in the employ of the Ewing Board. She was assigned to work with preschoolers, or the nursery group, who suffered from communication skills handicaps, in both the morning and afternoon sessions.

Petitioner had approximately 13 pupils total in both sessions, and the pupils were essentially the same pupils with whom petitioner had worked while employed by Ewing. The curriculum that petitioner taught was essentially the same as that which she had taught while employed by the Ewing Board. The program, however, was now referred to as the Mercer County Special Services School District, Kisthardt Center, not Project Child, Kisthardt Center, as it was under the auspices of the Ewing Board. Furthermore, each child with whom petitioner now worked had had an Individualized Education Program (IEP) prepared, as required by N.J.A.C. 6:28-1.8. The IEP was now prepared by the teacher (here, petitioner), the child study team, and the parents of the child.

Petitioner was reemployed by the Mercer Board for 1979-80 as a teacher of the handicapped (P-4). During that year, the Superintendent, who had been employed by the Special Services School District during July 1978, advised petitioner by letter dated April 25, 1980, that her employment was not to be continued by the Board for 1980-81.

This concludes a recitation of the basic uncontroverted facts of the matter. It is stipulated by the parties that petitioner's employment service with the Mercer County Special Services School District for 1978-79 and 1979-80 is service as a teaching staff member for purposes of tenure acquisition, pursuant to N.J.S.A. 18A:28-5.

Further Findings of Fact are as follows:

1. The Ewing Board was the local education agency for Project Child for at least 1976-77 and 1977-78. The program was dependent upon annual applications for grant money for it to continue.

2. Petitioner was employed by the Ewing Board through a regular teacher's contract for 1976-77 and 1977-78 which required her to be in possession of an elementary school teacher's certificate. Petitioner's service in the employ of the Ewing Board is service as a regular teacher.

3. Petitioner, at all times while under contract to the Ewing Board, was assigned to teach in Project Child, and the last assignment was in the Kisthardt Center.

4. Project Child was funded through grant applications made by the then Director of Special Services on behalf of his employer, the Ewing Board.

5. The Director, upon the creation of the Mercer County Special Services School District, entered that Board's employ and applied for grants on its behalf to fund a similar, if not identical, program to Project Child as he had for the Ewing Board.

6. The Director, having knowledge that he would apply for grants for substantially the same kind of Project Child program in Ewing, but on behalf of Mercer County Special Services District, met with Ewing's

Project Child staff during the spring of 1978. The Director informed the staff that the newly created Mercer County Special Services School District would be operating Project Child.

7. The Ewing Board, upon the Director's departure, made no application for Project Child funds.

8. The Mercer County Special Services School District has been operating a program similar to, if not identical to, Project Child operated by Ewing by grant funds applied for by the Director.

It is upon these facts, petitioner contends, that her service of employment with the Ewing Board must be coupled with service with the Mercer County Board for purposes of tenure acquisition. Petitioner anchors this claim on her contention that there was, at least, an implied agreement between the Ewing Board and the newly created Mercer Board for the latter to assume the operation of the then-existing program, Project Child. Petitioner contends that because her service in the employ of the Ewing Board, together with service in the employ of the Mercer County Board, is more than sufficient to have acquired tenure of employment, N.J.S.A. 18A:28-5, the Board's determination not to reemploy her for 1980-81 violates that tenure protection. Petitioner argues that N.J.S.A. 18A:28-15 and 16 require her service in the employ of the Ewing Board to be recognized by the Mercer County Board because the Board ". . .was created to serve handicapped students that local districts could not reasonably serve. . ." (Petitioner's Reply Brief, letter dated June 10, 1981, at p. 1). Petitioner reasons that because the Mercer Board assumed the operation of Project Child from the Ewing Board, N.J.S.A. 18A:28-15 and 16 are applicable.

N.J.S.A. 18A:28-15 addresses the effect of a change in government of a local school district upon ". . .tenure of service or tenure of service rights, heretofore obtained or hereafter to be obtained, under this [N.J.S.A. 18A:1-1 et seq.] or any other law, because of any change in the method of government of the school district . . . by which [the teacher] was employed on the date of such change. . . ." Here, there was no change in the method of government of the Ewing Board by which petitioner's employment was affected. Nor is there a discontinuance of a major component of a local board's responsibility to afford a thorough and efficient program of education to its pupils, i.e., a high school, as there was in Franklin Ed. Assn. v. Bd. of Ed. of Wallkill Valley Reg. Sch.

Dist., 1981 S.L.D. _____ (decided February 6, 1981). Consequently, I **CONCLUDE** that N.J.S.A. 18A:28-15 provides no authority for petitioner to command a combination of employment with the Ewing Board with employment by the Mercer County Board for purposes of tenure in the latter's employ.

Next, N.J.S.A. 18A:28-16 states

> Whenever an Educational Services Commission, a Jointure Commission, the Commissioner of Education . . . shall undertake the operation of any school previously operated by a school district in this State . . . any periods of prior employment [of all teaching staff members] 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. . . .

Petitioner, in relying upon this statute to combine her employment with both boards for purposes of tenure, relies on the earlier ruling of the Commissioner in Susan Stuermer v. Board of Education of the Special Services School District of Bergen, 1978 S.L.D. 628. There, Stuermer had been employed by the Hackensack City Board of Education for a sufficient period of time to acquire tenure as a speech therapist. She was assigned to that Board's program for "deaf pupils," or, its program for pupils with communication skills handicaps. The Board thereafter notified the Commissioner of its intention to abolish the program because of economy and lack of suitable facilities. The Commissioner approved the Hackensack Board's stated intention (application) to discontinue the program. The Board of Education of Bergen County Special Services School District assumed responsibility for the communication skills handicap program, formerly operated by the Hackensack Board. Stuermer left the employ of the Hackensack Board, where she had acquired tenure, and entered employment with the Bergen County Board. Three years later, the Bergen County Board, on the theory that Stuermer had not acquired tenure in its employ, determined not to offer her reemployment for the fourth year. On appeal, the Commissioner ruled that N.J.S.A. 18A:28-6.1, which saves tenure rights upon the discontinuation of a high school, junior high school, elementary school, or any one or more of the grades kindergarten through 12 upon an agreement with another board that the pupils formerly enrolled shall be enrolled in the programs to be operated by the new board, together with N.J.S.A. 18A:28-16 and 17 and N.J.S.A. 18A:46-29 et seq., required that Stuermer, upon acquiring tenure with the Hackensack Board, had those tenure rights transferred to the Bergen County Special Services School District when it agreed to take over the program formerly operated by the Hackensack Board.

Here, the facts are distinguishable from those in Stuermer. Petitioner had not acquired tenure in the employ of the Ewing Board; the Ewing Board did not make a conscious, affirmative decision to abandon any required program; and there was no "agreement" between the Ewing Board and the Mercer County Board for the latter to take over any program otherwise required to be offered by and from the Ewing Board. The Director of Student Personnel Services (who was formerly employed by Ewing prior to his employment by the Board) must be seen to be the cause of Project Child's being discontinued at Ewing while a similar, if not identical, program was created at the Mercer County facility. It was he who created the grant applications at Ewing; it was he who created the nature of the program; and, it was he alone who made the determination to leave the employ of the Ewing Board and to enter the employ of the Mercer County Board. Finally, it was the Director, I **CONCLUDE,** who made the determination that he would no longer prepare his grant applications for Project Child on behalf of the Ewing Board; rather, he would henceforth prepare such applications on behalf of the Mercer County Board. The record is absent of any "agreement" by and between the Ewing Board and the Mercer County Board to take over "Project Child" - although Project Child has indeed continued at Mercer County Special Services School Districts.

Within the facts of the matter as viewed, I **CONCLUDE** that petitioner, while employed by the Ewing Board, was assigned to a distinct program; while she was employed by the Mercer County Special Services School District, she was assigned to a distinct program. Absent any evidence that both boards of education consciously and affirmatively agreed that the latter would "take over" the program of the former, I **FIND** no basis to combine petitioner's employment with both boards for purposes of tenure. Tenure of employment must be preceded by official actions of boards of education to employ teachers. The transfer of accrued rights from one board to another must similarly be conscious, affirmative decisions. A personal decision, as here made by the Director, to take to a new employing board a grant-supported program, is not a sufficient basis to claim transfer of rights, as contemplated at N.J.S.A. 18A:28-6.1, 16 or 17.

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.

July 27, 1981
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

July 28 1981
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

July 30, 1981
DATE

Ronald I. Parker TAZ
OFFICE OF ADMINISTRATIVE LAW

bm

LOIS SHELKO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MERCER COUNTY SPECIAL SERVICES SCHOOL DISTRICT, MERCER 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 conclusion by the Honorable Daniel B. McKeown, ALJ that she did not acquire tenure with respondent pursuant to N.J.S.A. 18A:28-15 and 16 and 18A:46-43. Petitioner argues that Judge McKeown's finding that Susan Stuermer, supra, is distinguishable from the present matter is erroneous. Petitioner contends that she fully satisfies the criteria set forth in N.J.S.A. 18A:28-15 and 16 and 18A:46-43. The Commissioner finds merit in petitioner's exceptions.

A thorough examination of the record herein convinces the Commissioner that the principles enunciated in Stuermer are dispositive of the present case. Further, N.J.S.A. 18A:28-16 was at all times in effect, as was N.J.S.A. 18A:46-43 which states in its entirety:

> "All teachers, principals, and other employees of the board of education of the county special services school district are hereby held to possess all rights and privileges of teachers, principals and other employees of boards of education of other school districts as provided in Title 18A of the New Jersey Statutes."

The Commissioner further notes that the decision of Judge McKeown in the matter herein controverted is predicated to a large degree upon what he perceives to be an absence of evidence that both Boards consciously and affirmatively agreed to a transfer of the program from the Ewing Board of Education to that of the Mercer County Special Services School District.

Judge McKeown further places considerable weight upon the fact that the transfer of the program in question rested upon the decision of the former Director of Special Services for the Ewing Board to take the Project Child program over to the new board (Mercer County Special Services District) employing his services.

The Commissioner cannot accept such determination. While it may be argued that the Ewing Board never made an affirmative determination to transfer its program to the management of the Mercer County Special Services District, it cannot be disputed that the Mercer County Special Services District did make an affirmative determination to accept the program. The Commissioner further observes that the statutory responsibility for such determination must of necessity rest with the Mercer County Special Services Board and not with the newly-appointed Director. It was the Mercer County Special Services District Board that proposed to petitioner herein a contract for the 1978-79 school year as well as taking such other steps as legally required for the operation of the program described herein. Therefore, in the Commissioner's view, such proffering of contract and such other steps taken by the Mercer County Special Services District Board did represent a conscious and affirmative action on its part to assume the responsibility for the conduct of the program formerly operated under the aegis of the Ewing Board of Education.

The Commissioner further finds that the Ewing Board's failure to provide petitioner herein with either a contract of employment or a written notice that her employment would not be continued for the 1978-79 school year pursuant to N.J.S.A. 18A:27-3.2 represented a tacit understanding and agreement on its part that the program in which petitioner herein was employed was being transferred with its cooperation to another jurisdiction. The fact that the Ewing Board took no formal action to transfer the program should not be permitted to operate to the detriment of petitioner's rights herein.

For the foregoing reasons, the decision of Judge McKeown herein is set aside. The Commissioner determines that Petitioner Lois Shelko acquired tenure with Respondent Mercer County Special Services School District.

The Commissioner so holds.

COMMISSIONER OF EDUCATION

September 11, 1981
Pending State Board

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1863-79
AGENCY DKT. NO. 60-3/79A

IN THE MATTER OF:

**THE TENURE HEARING OF ORAZIO TANELLI,
SCHOOL DISTRICT OF THE TOWN OF
MONTCLAIR, ESSEX COUNTY**

Record Closed: July 10, 1981 — Decided: July 31, 1981
Received by Agency: — Mailed to Parties:

APPEARANCES:

Lois M. Van Deusen, Esq., for the Board

Alan G. Kelley, Esq., for the Respondent

BEFORE **WARD R. YOUNG**, ALJ:

The Board of Education of the Town of Montclair certified a charge of conduct unbecoming a teacher at its March 8, 1979 meeting against a tenured teaching staff member, Orazio Tanelli, and filed it with the Commissioner of Education on March 15, 1979. The charge states the respondent engaged in a pattern of placing harassing telephone calls to the residence of the principal between September 12-20, 1978.

The respondent denied the charge in an answer filed with the Commissioner on April 9, 1979.

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. on June 22, 1979, and initially assigned to Administrative Law Judge Jack Berman. After holding a prehearing conference on September 14, 1979, Judge Berman granted a stay of the proceedings on motion by the respondent pending an appeal before the Superior Court of New Jersey, Appellate Division, of a new trial denial by the Honorable David Landau, J.S.C., Essex County Court, following a finding of guilt in the Montclair Municipal Court by the Honorable Robert A. Scanlon. The Office of Administrative Law was noticed on March 3, 1981 that the Appellate Division had denied respondent's appeal for a new trial. Because of the death of Judge Berman, the matter was assigned to the undersigned.

A prehearing conference was held on April 20, 1981. The issues were framed as follows:

1. Does the finding of guilt and judgment of a municipal court constitute ground for forfeiture of respondent's public employment pursuant to N.J.S.A. 2C:51-2?

2. In the event of a negative determination of Issue #1 and in light of the denial of a new trial by the Superior Court, Appellate Division, may the Office of Administrative Law hear the matter to determine the substantive aspects of the charges, or is the doctrine of collateral estoppel applicable?

3. If the Office of Administrative Law hears the matter as the result of its determination of Issue #2, shall said hearing be anew, or de novo, limited to the record below, or should the transcript below be incorporated and the parties permitted to present additional evidence (documentary as well as testimonial)?

4. In the event respondent is held to be or to have been guilty in violation of N.J.S.A. 2C:33-4 as alleged, is said finding sufficient to warrant dismissal or a reduction in salary?

Respondent excepted to Issues 1, 2 and 3. The Board agreed to those issues, which were incorporated on a determination by the undersigned.

Respondent filed a motion for partial summary disposition and other relief on May 7, 1981. He sought to strike the first three issues and an order compelling a hearing in the matter. An Order denying the relief sought was entered on May 15, 1981. The Commissioner determined not to review the decision on motion pursuant to N.J.A.C. 1:1-9.7(a),(b) and (c) on May 20, 1981.

The following stipulation of facts were incorporated in the prehearing order, and are adopted herein as FINDINGS OF FACT:

1. Respondent was charged with repeatedly telephoning his high school principal (Tonnes Stave) for the purpose of annoying him in violation of N.J.S. 2A:170-29.4 (now N.J.S.A. 2C:33-4).

2. A trial was held in Municipal Court of Montclair. The Honorable Robert A. Scanlon found respondent guilty and entered a judgment of a $500 fine plus costs.

The Board filed a Motion for Summary Decision declaring respondent's public employment forfeit on May 22, 1981. The record was closed upon receipt of petitioner's rebuttal brief on July 10, 1981.

ISSUE #1.

DOES THE FINDING OF GUILT AND JUDGMENT OF A MUNICIPAL COURT CONSTITUTE GROUND FOR FORFEITURE OF RESPONDENT'S PUBLIC EMPLOYMENT PURSUANT TO N.J.S.A. 2C:51-2?

Respondent argues inapplicability of N.J.S.A. 2C:51-2 since the offense here took place before September 1, 1979, effective date of the new Code of Criminal Justice for New Jersey. (It is noted here N.J.S.A. 2C:98-2 repealed N.J.S.A. 2A:135-9, which was enacted in substance as N.J.S.A. 2C:51-2.) In In the Matter of the Tenure Hearing of Novis W. Saunders, School District of the City of Elizabeth, 1981 S.L.D. _____ (decided April 21, 1981), the teacher there made the same argument. The teacher entered a plea of guilty to several charges in United States District Court. The Commissioner rejected the argument and cited In the Matter of the Tenure Hearing of David Earl Humphreys, School District of the Township of Pennsville, 1978 S.L.D. 691, remanded for other reasons by the State Board, which in turn involved a teacher found guilty of possessing a controlled substance. There both the Commissioner and the State Board found N.J.S.A. 2A:135-9 to be applicable. In Saunders, the Commissioner said he was "constrained to observe that such sophistry on the part of respondent exemplifies an unwarranted conclusion with which [he] cannot agree." (Slip opinion at p. 10.)

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.

N.J.S.A. 2C:33-4 [Harassment], formerly N.J.S. 2A:170-29.4, reads as follows:

A person commits a petty disorderly persons offense if, with purpose to harass another, he:

a. Makes, or causes to be made, a communication or communications anonymously or at extremely inconvenient hours, or in offensively coarse language, or any other manner likely to cause annoyance or alarm;

b. Subjects another to striking, kicking, shoving, or other offensive touching, or threatens to do so; or

c. Engages in any other course of alarming conduct or of repeatedly committed acts with purpose to alarm or seriously annoy such other person.

The question that must be addressed here is whether the Legislature intended N.J.S.A. 2C:51-2 a.(2) to be applicable to a violation of N.J.S.A. 2C:33-4, which is a petty disorderly persons offense.

N.J.S.A. 2C:51-2(b)(1) and (2) were part of Senate Bill 738 (1978) introduced on January 26, 1978. Later, sections (c) and (d) were added as part of the Assembly Committee amendments enacted on June 19, 1978. This version of N.J.S.A. 2C:51-2 then became part of the New Jersey Code of Criminal Justice, P.L. 1978, c. 95, approved on August 10, 1978.

The New Jersey Criminal Law Revision Commission, organized in 1969, issued three drafts of the criminal code. The Study Draft was issued in two parts, the Tentative Draft of January 1971 and the Final Report of October 1971. Although no forfeiture provision appears in the first draft, the Tentative Draft contains both a proposed statute and a commentary. Forfeiture would occur upon sentencing, but only if the crime involved malfeasance in office or dishonesty. New Jersey Criminal Law Revision Commission, Tentative Draft at 834 (1971). The Commentary at 836 suggested that:

> [C]onviction of lesser offenses, i.e., disorderly persons offenses, would result in forfeiture only if they involve malfeasance in office or dishonesty. The determination as to whether the misdemeanor or disorderly persons offense falls within this subsection is to be made by the trial court which is mandated to order forfeiture if the offense is so included.

The Final Draft version of N.J.S.A. 2C:51-2 provided for forfeiture upon conviction of a crime involving moral turpitude or an offense involving dishonesty. New Jersey Criminal Law Revision Commission, Final Report, Volume I: Report and Penal Code at 173 (1971). Forfeiture would also result where the official is convicted of an offense touching his office. Id., at 174. The commentary to this section reveals that a conviction of a disorderly persons offense touching the officer's position would result in forfeiture upon conviction. New Jersey Criminal Law Revision Committee, Final Report, Volume II: Commentary at 361 (1971).

The previous statute, N.J.S.A. 2A:135-9, had also been interpreted to provide for forfeiture upon conviction, Hayes v. Hudson County Board of Freeholders, 116 N.J. Super. 21, 27 (App. Div. 1971), or a plea of guilty, Andriola v. Hudson County Pension Fund, 140 N.J. Super. 103, 108 (Law Div. 1976).

The language and legislative history of the N.J.S.A. 2C:51-2 clearly specifies that forfeiture occurs automatically upon conviction or a plea of guilty. Satisfied the offense occurred, this forum must determine if the offense "touches" the position.

Respondent was convicted of making harassing telephone calls to his principal. An effective professional relationship between a teaching staff member and his principal is so essential to promote a thorough and efficient education for pupils that the offense here indisputably "touches" the position. See, In the Matter of the Tenure Hearing of Stephen Levitt, School District of the City of Newark, _____1977 S.L.D. 976, aff'd 1978 S.L.D. 1027 (State Board of Education), aff'd _____ N.J. Super. (decided April 9, 1979, App. Div.), Docket No. A2796-77.

I **CONCLUDE** that the finding of guilt and judgment of Montclair Municipal Court constitutes ground for forfeiture of respondent's public employment pursuant to N.J.S.A. 2C:51-2. The conviction was for a petty disorderly persons offense that involved or touched upon that public employment.

Levitt is a case directly on point. There, as here, the teacher was convicted in municipal court of making harassing phone calls to his principal in violation of N.J.S.A. 2A:170-29.4 (now N.J.S.A. 2C:33-4). The Commissioner determined that the teacher's conduct was highly unbecoming and said:

> As a teacher his responsibility is to demonstrate, through his behavior, proper conduct for his pupils to emulate. Surely, the type of conduct shown by respondent in regard to the early morning telephone calls which did abuse, threaten and harass the administrators and destroyed the tranquility of their respective homes, is not conduct desirable for emulation. (at 984).

The Commissioner concluded there that respondent's "unbecoming conduct warrants the termination of his employment and tenure status" (Id., at 984).

Since the determination of Issue #1 was affirmative, I find no compelling need to address Issues #2, 3 or 4.

SUMMARY.

I **FIND**, pursuant to N.J.S.A. 2C:51-2, respondent's tenured teaching position **IS FORFEITED**, and further, respondent's unbecoming conduct warrants the termination of his employment and tenure status. I **CONCLUDE**, therefore, that Summary Decision **IS GRANTED** to the Board, and the termination of respondent's employment **IS SO ORDERED**, 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.

31 July 1981
DATE

WARD R. YOUNG, ALJ

Receipt Acknowledged:

4 August 1981
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

Aug. 6, 1981
DATE

Ronald I. Parker IAZ
FOR OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE TENURE :

HEARING OF ORAZIO TANELLI, : COMMISSIONER OF EDUCATION

SCHOOL DISTRICT OF THE TOWN : DECISION

OF MONTCLAIR, ESSEX 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 conclusion by the Honorable Ward R. Young, ALJ that respondent be detenured through the application of N.J.S.A. 2C:51-2 and the principles set down in Saunders, supra. Respondent argues that the Saunders decision provides no authority for the conclusions of Judge Young herein. Further respondent contends that as in Humphreys, supra, he is entitled to a full due process hearing forthwith. The Board in reply exceptions refutes the arguments of respondent and affirms the initial decision. The Commissioner agrees with the Board.

An examination of the record before him convinces the Commissioner that the actions of respondent herein meet the criteria established by N.J.S.A. 2C:51-2a(2) wherein is said:

> ***
>
> "He is convicted of an offense involving or touching such office, position or employment***."

The Commissioner finds further that the action of respondent herein meets the determination of the State Board in Humphreys, supra, 1979 S.L.D. 839, 840 whether respondent's conduct herein "touched the administration of his position."

The Commissioner agrees with the applicability of Stephen Levitt, supra, to the present case.

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

Accordingly, the termination of respondent's employment and tenure status is ordered forthwith.

COMMISSIONER OF EDUCATION

September 18, 1981
Pending State Board

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 0265-81
AGENCY DKT. NO. 582-12/80A

IN THE MATTER OF:

EARMOND DE MARCO,
Petitioner
v.
BOARD OF EDUCATION OF THE BOROUGH OF GLASSBORO, GLOUCESTER COUNTY,
Respondent.

Record Closed: July 2, 1981
Received by Agency:

Decided: August 6, 1981
Mailed to Parties:

APPEARANCES:

Richard F. Berkey, Esq., of counsel, for the Petitioner

John W. Trimble, Esq., (Trimble & Master, attorneys) for the Respondent

BEFORE **AUGUST E. THOMAS,** ALJ:

The Board of Education of the Borough of Glassboro (Board) filed tenure charges against petitioner with the Commissioner of Education, who rendered a decision on March 10, 1980, reinstating petitioner to his former position at a salary less than he would normally have been entitled to receive. Petitioner seeks clarification of the last two sentences of that decision regarding his penalty.

The matter was thereafter 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 March 3, 1981, two issues were developed. The second has been abandoned by the litigants; therefore, the only issue to be decided is as follows:

ISSUE

What is petitioner's proper rate of compensation from 1976 through 1981?

The last two sentences of the Commissioner's decision read as follows:

> Accordingly, it is ordered that respondent be reinstated to his teaching position but at the same annual salary he was earning immediately prior to his suspension, without the benefit of adjustments of increments to which he might, in the ordinary course, have become entitled. In all other respects, the Commissioner accepts the findings of fact and conclusions of law contained in the hearing examiner's report and adopts them as his own.

For the school year 1976-77, petitioner was compensated in the amount of $13,055 at the BA+30 level on the tenth step of the teacher's salary schedule (Exhibit B-1). During the school year 1977-78, petitioner was compensated again at the rate provided by the tenth step of the schedule ($13,055); however, he had been suspended by the Board effective July 1, 1977, and, pursuant to N.J.S.A. 18A:6-14, his salary was withheld until November 1, 1977. It is noticed that the salary assigned for 1977-78, although petitioner's eleventh year, held him on the tenth step of the salary schedule because the Board withheld his increment. For the school year 1978-79, he was compensated at the BA+30 level on the twelfth step of the schedule at $15,280 (B-3), and on the thirteenth step at $15,730 beginning September 1979, until March 14, 1980, when the Board reduced his salary to $13,055 because of the Commissioner's decision previously referred to.

A chart of petitioner's compensation for these years follows:

Year	Step	Salary	Explanation
1976-77	10	$13,055	Pre-Litigation
1977-78	11	13,055	Increment withheld
1978-79	12	15,280	Resumption of salary, pursuant to N.J.S.A. 18A:6-14
1979-80	13	15,730	Reduction to $13,055 on 3/14/80— Commissioner's decision
1980-81	14	13,055	Commissioner's decision, according to Board

Petitioner contends that the imposition of his salary reduction to $13,055 for the 1980-81 school year is a second penalty not intended by the Commissioner's decision. He asserts also that he should have been compensated at the rate of $16,542 beginning 1979, and at $18,179 beginning 1980. These salaries represent the BA+30 level at the thirteenth and fourteenth steps on the appropriate schedules. The Board actually compensated petitioner at the thirteenth step of the 1978-79 guide for the 1979-80 school year, and at $13,055 for the 1980-81 school year in accordance, as it believed, with the Commissioner's decision (B-3, 4, 5).

The legislature enacted N.J.S.A. 18A:6-14 on February 10, 1972. That statute provides for the suspension of a teacher with or without pay for 120 days. Accordingly, upon the certification of the tenure charges to the Commissioner, petitioner was suspended without pay. The statute reads in full as follows:

> Upon certification of any charge to the Commissioner, the board may suspend the person against whom such charge is made, with or without pay, but, if the determination of the charge by the Commissioner of Education is not made within 120 calendar days after certification of the charges, excluding all delays which are granted at the request of such person, then the full salary (except for said 120 days) of such person shall be paid beginning on the one hundred twenty-first day until such determination is made. Should the charge be dismissed, the person shall be reinstated immediately with full pay from the first day of such suspension. Should the charge be dismissed and the suspension be continued during an appeal therefrom, then the full pay or salary of such person shall continue until the determination of the appeal. However, the board of education shall deduct from said full pay or salary any sums received by such employee or officers by way of pay or salary

> from any substituted employment assumed during such period of suspension. Should the charge be sustained on the original hearing or an appeal therefrom, and should such person appeal from the same, then the suspension may be continued unless and until such determination is reversed, in which event he shall be reinstated immediately with full pay as of the time of such suspension.

Thus it is apparent on its face that the legislature intended an expeditious disposition of tenure matters which would, at the very least, serve the salutory functions of, 1) permitting a board of education to suspend an employee without pay, and 2) providing the employee's salary after the expiration of 120 days so that a board's suspension would not become an automatic penalty.

However, the statute does not provide for automatic raises from year to year while the litigation is in progress. Such an interpretation is diametrically opposed to the purpose of suspension, which is the imposition of some penalty. The ultimate penalty can be determined by the Commissioner only, and an employee who prevails in the litigation can be made whole. The Board paid petitioner more than it should have, beginning in the 1978-79 school year when his salary should have continued at the $13,055 level until the Commissioner's decision was rendered.

For these reasons it seems reasonable to interpret the last two sentences of the Commissioner's decision as follows: beginning March 10, 1980, petitioner will forfeit, for one year, any advancement on the salary schedule, and that thereafter he will advance regularly on the salary schedule one step behind his regular step, absent other legal actions taken by the Board. To hold that petitioner should be returned to his regular place on the salary schedule beginning in the 1980-81 school year would mean that the penalty imposed by the Commissioner would amount to less than an ordinary increment. Stated another way, petitioner's salary would be held at the $13,055 rate only for the months of March, when he was reinstated, through June 1980.

Essentially, petitioner has lost two steps on the salary schedule: one because of the withholding of his increment by the Board, and the other by the Commissioner's decision as interpreted here.

The following table sets forth the compensation rate to which petitioner is entitled:

Year	Step	Salary Rate	Event
1976-77	10	$13,055	—
1977-78	10 (11)	13,055	Increment witheld
1978-79	10 (12)	13,055	Tenure litigation
1979-80	10 (13)	13,055	Tenure litigation
1980-81	10 (14)	13,055	Until March 10, 1981
1980-81	12 (14)	17,169	March 11 to June 30, 1981 (1980-81 schedule)
1981-82	13	According to the 1981-82 salary schedule	

The summary shows that during the 1976-77 school year, petitioner's salary was $13,055 and remained such for the 1977-78 school year because his increment was withheld. He was not entitled to automatic raises as shown on the several salary schedules while his tenure matter was in litigation (Exhibits B-1 through 5); consequently, his salary should have remained at $13,055 until the Commissioner decided the tenure matter. The Commissioner's decision placed petitioner at the $13,055 level, but for an unspecified period of time. That period is adjudged to be one year, so that on March 10, 1981, petitioner, now two steps behind on the salary schedule, was entitled to be placed on the twelfth step of the guide for the remainder of the school year on the BA+30 level of the 1980-81 salary schedule ($17,169). Thereafter, petitioner is entitled to advance on the salary guide annually in accordance with the salary schedule in effect. This advancement is subject, of course, to any future action against petitioner which might be taken by the Board.

The Board is directed to use the overpayments to petitioner during 1978-79 and 1979-80 to offset adjustments to his salary.

For all of these reasons, there is no other relief to which petitioner is entitled. Therefore, except for the relief offered, the Petition of Appeal is **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.

6 August 81
DATE

August E. Thomas
AUGUST E. THOMAS, ALJ

Receipt Acknowledged:

8/7/81
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

Aug 11, 1981
DATE

Ronald I. Parker TAZ
OFFICE OF ADMINISTRATIVE LAW

plb

DOCUMENTS IN EVIDENCE

Exhibit A Commissioner's Decision of March 10, 1980
Exhibit B Salary guides 1976-77, 1977-78, 1978-79, 1979-80, 1980-81
Exhibit C Salary Summation
Exhibit D Letter from Superintendent of November 25, 1980

EARMOND DE MARCO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF GLASSBORO, 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 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, with the noted salary adjustments, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

September 21, 1981

Pending State Board

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 973-81

AGENCY DKT. NO. 52-2/81A

IN THE MATTER OF:

BERNICE SCHNEIDERMAN EDELCREEK,
Petitioner
v.
BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,
Respondent.

Record Closed: June 19, 1981
Received by Agency:

Decided: August 7, 1981
Mailed to Parties:

APPEARANCES:

Seymour Margulies, Esq., for Petitioner,
Bernice Schneiderman Edelcreek
(Margulies & Margulies, attorneys)

Cecil J. Banks, Esq., for Respondent,
Board of Education of the City of Newark, Essex County

OAL DKT. NO. EDU 973-81

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

Bernice Schneiderman Edelcreek, a certificated physical education teacher first so employed by the Board of Education of the City of Newark, Essex County, in 1955, served in that employment category until she resigned in 1966. After a hiatus of 10 years, she was reemployed in that position on October 11, 1976 and served in it until February 20, 1979, when the Board terminated her employment for reasons of economy. Her second period of employment was less than the period of time specified in N.J.S.A. 18A:28-5(a), (b) and (c) for acquisition of tenured status.

Invoking the protections and preferences of N.J.S.A. 18A:28-5, 9, 10 and 12 and N.J.A.C. 6:3-1.10 and "seniority provisions" of a collective bargaining agreement between the Board and a teachers' union, petitioner sought reinstatement by the Board and back pay. The Board denied her claim and alleged compliance with N.J.S.A. 18A:28-9.

Petitioner's claim was not initially filed in the Division of Controversies and Disputes of the Department of Education. Instead, she filed it as a complaint in Superior Court of New Jersey, Law Division, Essex County, under Docket No. L-29814-78 on February 21, 1979. The Board's answer, filed March 27, 1979, alleged, among other things, that plaintiff had failed to exhaust her administrative remedies before the Commissioner of Education under N.J.S.A. 18A:6-9 and, in effect, that her suit was in an inappropriate judicial forum. On December 14, 1979, the Honorable John J. Dios, J.S.C., granted defendant Board's motion to dismiss the complaint for failure to exhaust administrative remedies. On appeal to the Appellate Division of Superior Court under Docket No. A-1518-79, the Court on January 19, 1981 affirmed the judgment below, substantially for the reasons stated in a written opinion filed by Judge Dios on October 26, 1979. The Appellate Division ordered the cause transferred to the Commissioner of Education to resolve the dispute arising under school laws, pursuant to transfer powers of R.1:13-4(b).

On February 27, 1981, the Commissioner transmitted the matter 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.

Thereafter, a prehearing conference was conducted in the Office of Administrative Law on March 17, 1981 and an order entered establishing a hearing date on May 19, 1981. It was established that the matters at issue would be addressed and decided as if on cross-motions for summary decision in accordance with N.J.A.C. 1:1-13.1, et seq, on pleadings, stipulations and memoranda of law to be filed by the parties. Subsequently, at the request of and/or with the consent of the parties, the hearing date of May 19, 1981 was extended in order to permit filing of such memoranda for 30 days until June 19, 1981, date for closing of the record. Petitioner's memorandum of law was filed on May 29, 1981. Respondent filed no memorandum of law.

STIPULATIONS AND FINDINGS OF FACT

1. Petitioner was employed by the Board as a long-time substitute teacher from February 1, 1950 to June 1955.

2. She was appointed as a physical education teacher in the Newark school district in or about June 1955.

3. She commenced work as a teacher of physical education on September 1, 1955 and remained in that position until a maternity leave was granted on or about March 3, 1962.

4. The maternity leave was extended for care of her child until her resignation was accepted by the Board on July 1, 1966.

5. She was reappointed to the position of physical education teacher in the Newark schools on or about October 11, 1976 and continued in that position until the present circumstances.

6. Upon reappointment, her pension rights were adjusted so that she would be given credit for her previous service upon proper contribution to the pension plan.

7. At all relevant times, she has been properly certified as a health, recreation and physical education instructor.

8. On January 20, 1979, she was given notice that her employment with the Board would be terminated on February 20, 1979 due to economic reasons.

9. Article V, Section 6, Subsection A of the collective bargaining agreement between the Board and the Newark Teachers' Union, Local 481, A.F.T., AFL/CIO, provided that, "seniority shall be defined as the length of time in the Newark public schools as a full-time paid employee including service as a regularly appointed teacher, a long-term substitute and/or an administrator." Though not a member of the union, petitioner is a member of the collective bargaining unit as a teacher in the Newark school system that is represented by the union and is, therefore, entitled to benefits of the collective bargaining agreement.

STATEMENT OF ISSUES

At issue are the following:

(A) At termination of employment in 1979, was petitioner tenured?

(B) If not, is she entitled to relief?

(C) Even if not, did her termination infringe "seniority rights" based on total service in the district since 1955 within the protections and preferences of N.J.S.A. 18A:28-9, 10 and 12; N.J.A.C. 6:3-1.10 (b) and (h); and Article V, Section 6 of the negotiated agreement?

(D) Even if not, was petitioner improperly replaced by others whose service in her certificated category was less?

(E) Is Article V, Section 6 of the negotiated agreement, assuming its scope is broader than tenure laws and seniority rules of

the State Board, infra vires the powers of the Board and a teachers' union to negotiate and conclude?

DISCUSSION

In Solomon v. Board of Education of Princeton Regional, 1977 S.L.D. 650, affirmed St. Bd., 1977 S.L.D. 657, it appeared that petitioner, a teaching staff member employed by Princeton Regional Board of Education, had been so employed from 1962 until 1971, when she resigned. She was reemployed by that Board on October 3, 1972, but was terminated at the end of the 1975-76 school year. She was properly certificated as a teacher. She alleged she had acquired tenure status as a teaching staff member under N.J.S.A. 18A:28-5(c) and was not, for that reason, subject to termination by the Board without certification of charges against her in accordance with N.J.S.A. 18A:6-10, et seq. She sought reinstatement. The Board denied she was tenured at the time of termination in 1975. The Commissioner held her resignation effectively terminated her previous tenure employment with the Board and barred all service prior to resignation from subsequently accruing to any new tenure entitlement. Petitioner's employment began anew on October 3, 1972 and continued until June 1975. That period fell short of the statutory prescription set forth in N.J.S.A. 18A:28-5(c) for the purpose of new tenure accrual. On motion, the Commissioner granted the Board summary judgment in its favor, dismissing her petition. Cf. also Riemann v. Board of Education of Township of Edison, 1980 S.L.D. ___ (slip opinion, pp. 12-13). In that case, petitioner, a tenured business education teacher alleged the Board should have counted her total years of teaching service in determining seniority status, even though her two periods of employment were separated by eight years. She alleged her assignment to a fourth-fifths position, rather than a remaining full-time position, was improper. The Commissioner held her voluntary resignation and subsequent long-term absence from teaching effectively broke the continuity of employment contemplated in determining seniority status. He dismissed her petition. Petitioner argued, unavailingly, that teaching service need not be continuous to be considered in determining seniority status and that provisions governing determination of seniority status do not compel the contrary result reached by the Commissioner under N.J.S.A. 18A:28-12, 13 and N.J.A.C. 6:3-1.10(b). The Commissioner noted, however, that petitioner by resigning had surrendered not only her tenure but as well, whatever seniority status that attended her tenure.

Applying such standards to the circumstances in this case, one has little difficulty in concluding, as I do, that this petitioner's prior tenure and seniority status were effectually foresworn at time of her resignation as physical education teacher in the Newark school district in 1966. On her reappointment by the Board to the position on October 11, 1976, she began that employment in the same manner as would any other beginning probationary teacher and was subject anew, therefore, to the conditions for establishment of tenure contained in N.J.S.A. 18A:28-5. By the time of her termination on February 20, 1979, she did not meet those conditions. Her petition for relief by way of reinstatement and restoration of all prior rights and benefits must fail for that reason alone.

Petitioner argues, however, that a plain reading of the language of Article V, Section 6 of the negotiated agreement requires that all her service in the district, despite any hiatus between resignation and reappointment, should be counted toward her "seniority" and should, therefore, be viewed as a bar to her termination in February 1979. She argues there is a necessarily implied difference between the definition of seniority as contained in Article V, Section 6, and the definition contained in N.J.A.C. 6:3-1.10(b). That difference, says petitioner, is that the contract definition must be read as including all terms of service regardless of continuity. I do not view a fair reading of the language of the contractual definition, however, as fairly implying any such thing. Instead, it appears only reasonable to conclude from the language within the four corners of the definitional paragraph to mean no more, nor any less than that which statutes, regulations of the State Board and decisional authority of the courts of this State have indicated, namely, that seniority follows tenure and does not exist in abstraction and that tenure, once lost, necessarily occasions loss of seniority.

Even if that were not the case, however, that is to say, even if the contractual definition of seniority explicitly or implicitly broadened statutory and regulatory definitions, one might well question whether such broadening was not ultra vires the powers of the Board and a teachers' union to negotiate and conclude. Like teacher transfers and reassignments, for example, the subject is not permissibly negotiable. Ridgefield Park Education Association v. Ridgefield Park Board of Education, 78 N.J. 144, 162-166 (1978), states:

Of the relevant actors at the local level, only school boards have a primary responsibility to the public at large, as they have been delegated the responsibility of

ensuring that all children receive a thorough and efficient education. These boards are responsible to the local electorate, as well as to the State, and may not make difficult educational policy decisions in a forum from which the public is excluded. Moreover, a multi-year contract covering policy matters would freeze the status quo and prevent a school board from making a flexible, creative response to changed circumstances, which might well preclude its acting in the best interests of the students.

The impermissibility of negotiation of such matters as tenure and seniority is not lifted, moreover, by powers granted local boards under N.J.S.A. 18A:28-5(a): any such action to modify tenure periods must be taken by adoption of a rule of general application to all classifiable employees. Cf. Rall v. Board of Education, Bayonne, 54 N.J. 373, 376 (1969). That is not to say, however, that modification may be done by the collective bargaining process. Cf. Board of Education of Bernards Township v. Bernards Education Association, 79 N.J. 311, 321 (1979) (teacher increment withholding under N.J.S.A. 18A:29-14 is an essential, non-delegable managerial prerogative); and Demarest Board of Education v. Demarest Education Association, 177 N.J. Super. 211, 216, 220 (App. Div. 1980) (defiance of denial of grant of leave of absence not arbitrable); and see Clifton Education Association v. Clifton Board of Education, 136 N.J. Super. 336, 339-40 (App. Div. 1975).

CONCLUSION

Based on the foregoing, therefore, I **CONCLUDE** the petition (complaint) herein should be, and it is hereby, **DISMISSED.** Judgment to that effect in favor of the Board is hereby entered accordingly.

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 973-81

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

August 7, 1981
DATE

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

Aug 13, 1981
DATE

Ronald I. Parker TAZ
FOR OFFICE OF ADMINISTRATIVE LAW

db

BERNICE SCHNEIDERMAN EDELCREEK,	:	
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 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

September 22, 1981

Pending State Board

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6403-80

(EDU 5249-80 - Remanded)

AGENCY DKT. NO. 352 -9/79A

IN THE MATTER OF:

DOROTHY REEVES,
Petitioner
v.
BOARD OF EDUCATION OF THE WESTWOOD REGIONAL SCHOOL DISTRICT, BERGEN COUNTY,
Respondent and
Third-Party Petitioner,
v.
MICHAEL CIPOLLETTI,
Third-Party Respondent.

Record Closed: July 20, 1981
Received by Agency:

Decided: August 7, 1981
Mailed to Parties:

APPEARANCES:

William F. Rupp, Esq., for Petitioner
(Lesemann & Rupp, attorneys)

OAL DKT. NO. EDU 6403-80

Mark G. Sullivan, Esq., for Respondent and
Third-Party Petitioner (Sullivan & Sullivan, attorneys)

Richard A. Friedman, Esq., for Third-Party Respondent
(Ruhlman and Butrym, attorneys)

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

This matter was heard on remand from the Commissioner of Education with instructions to determine the relative seniority rights of petitioner Dorothy Reeves and third-party Michael Cipolletti in the category of speech correctionist. Petitioner contends that her transfer by respondent Board of Education from her teaching assignment as a speech correctionist to teacher of the handicapped contravened the applicable seniority standards set forth in N.J.S.A. 18A:28-9 et seq. and N.J.A.C. 6:3-1.10. Determination of the seniority issue depends on the answer to two underlying questions. First, is Reeves entitled to credit for summer teaching conducted under the Title I program of the Elementary and Secondary Education Act, 20 U.S.C.A. 236 et seq.? Second, is Cipolletti entitled to credit for teaching services rendered to parochial school students at public expense in possible violation of the Establishment Clause of the First Amendment of the United States Constitution? For the reasons which follow, the first question must be answered in the negative and the second in the affirmative, resulting in the conclusion that Cipolletti has greater seniority than Reeves as a speech correctionist.

PROCEDURAL HISTORY

On September 6, 1979, Reeves filed a verified petition with the Commissioner of Education seeking a declaratory judgment that her transfer for the 1979-80 and succeeding school years was illegal. In turn, the Board of Education of the Westwood Regional School District denied the allegations and impleaded Cipolletti, who would lose his current job as speech correctionist if Reeves were to prevail. The matter was transmitted to the Office of Administrative Law on November 12, 1979 for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. Cipolletti then brought a motion to dismiss, which was originally granted on the theory that seniority protection may be invoked only by persons threatened with "dismissal" as distinguished from "transfer." Reeves v. Westwood Reg. Sch. Dist. Bd. of Ed., OAK DKT. NO. EDU 5249-79 (May 14, 1980). However, on appeal the Commissioner rejected this interpretation and instead held

that seniority regulations are applicable to transfers made because of a reduction in force. 1980 S.L.D. ___ (July 2, 1980). Subsequently, on October 9, 1980, the matter was remanded to the Office of Administrative Law for development of a record of the facts bearing on the seniority issue. Hearings were held on February 11 and 25, 1981. Witnesses who testified and documents considered in deciding this case are listed in the appendix. Upon receipt of legal briefs, the record was closed as of May 1, 1981. Thereafter, the record was reopened until July 20, 1981 to permit the parties to submit supplemental comments on two recent appellate opinions handed down only after the record had closed.

FINDINGS OF FACT

All of the basic facts are uncontroverted. Accordingly, based on the undisputed testimony, I **FIND** as follows:

1. General Background

In the summer of 1971 Reeves was employed by the Board as a speech correctionist under the Title I program. Her summer employment lasted from June 28, 1971 to August 18, 1971, and it is this service (along with all her subsequent service) which Reeves wants to count toward seniority in the category of speech correctionist. When first hired for the summer, Reeves possessed a certificate from the State Board of Examiners entitling her to work as a speech correctionist. Later in 1973, she also acquired certification as a teacher of the handicapped. Commencing in September 1971 and continuing to the present, Reeves had been employed by the Board during the regular school year. For five years until June 1976, she was assigned as a teacher of the handicapped or neurologically impaired. Then for the next three years until June 1979, Reeves was assigned as a speech correctionist. In September 1979 Reeves was reassigned to her former job as teacher of the handicapped. Shortly thereafter, she instituted this litigation challenging the validity of that transfer.

Cipolletti is Reeves's competitor for the speech correctionist position. In September 1972 he started working for the Board as a speech correctionist funded under the program popularly known as the "Parochiaid Act," N.J.S.A. 18A:58-59 et seq. Before the end of the school year, he was given notice of termination because the federal district court in Public Funds for Public Schools of N.J. v. Marburger, 358 F. Supp. 29 (D.N.J.

1973), aff'd 417 U.S. 961 (1974) declared portions of the Act to be unconstitutional. Neither Cipolletti nor the Board seek to credit any of Cipolletti's service during the 1972-73 school year toward seniority. After a break-in-service during the 1973-74 school year, Cipolletti resumed employment by the Board beginning in September 1974. Since that time, he has been assigned uninterruptedly as a speech correctionist. Thus, by September 1979, Cipolletti had accumulated five continuous years of service at the job. He holds a speech correctionist certificate issued in May 1971. Although Cipolletti was employed and paid by the Board, a large amount of his workday was spent teaching nonpublic school children within the physical confines of parochial schools. Reeves questions how much of Cipolletti's experience can be counted for seniority purposes.

During the 1978-79 school year, the Board had employed four speech correctionists. Due to budgetary considerations, it reduced that number to three for the 1979-80 school year. Originally in April 1979 the Superintendent of Schools, Dr. Reno Zinzarella, informed Reeves that she would continue to be assigned as a speech correctionist in the upcoming school year. As a result of complaints made on Cipolletti's behalf, however, the Board reversed its position and instead in June or July 1979 assigned Cipolletti to one of the remaining speech correctionist openings.

2. Reeves's Service Under the Title I Program During Summer 1971

Title I is a federal enrichment program designed to benefit so-called "culturally deprived" children whose families meet certain income limits and residence requirements. Not every child in the district was eligible to participate in the project, only those who qualified for Title I funding. Unlike the regular school program, the Title I summer program was open to a number of preschool children too young to attend Kindergarten. According to Thomas Olsen, an elementary school principal who was also the district's Title I Director in 1971, continuance of the summer classes was dependent on the availability of federal funds from year to year. Significantly, the 1971 summer grant application, which he helped to prepare, described the project as a "proving ground for the justification of such programs in the regular school terms." Olsen agreed that the summer project was "experimental" when he took over its leadership in 1967, but he added that by 1971 its success had been demonstrated. Reeves herself admitted that she understood the summer program was temporary. When Reeves began employment in June she had no assurance of continued employment in the fall, although as events unfolded she

was actually offered a regular 1971-72 contract in July before the summer program had finished.

Many striking similarities between Title I and regular teaching were brought out through Reeves's and Olsen's testimony. Comparing her duties as a speech correctionist under the Title I program with those during the regular school year, Reeves found them to be virtually identical. In both instances, her responsibilities included identifying and diagnosing children with communication disorders, planning programs for remediation, implementing those programs and consulting with parents. She used the same teaching materials and performed her services in the same speech room. Class size was substantially equal, with a maximum of five students per class. However, Reeves taught less than 50 students during the summer, as compared to a normal load of 75 or 80 students during the regular school year. Her summer schedule consisted of a full, five-day work week, just as during the regular school year. Likewise, the number of hours she devoted to teaching was comparable: in the summer, her eight-hour day began at 9:00 a.m. and ended at 4:00 p.m.; whereas, in the regular term, her eight-hour day began at 8:30 a.m. and ended at 3:30 p.m. With regard to extracurricular activities, in the summer Reeves was relieved of the usual homeroom and lunchroom duties which all teachers were required to perform during the regular school year.

There were also many crucial differences between Reeves's summer employment under the Title I program and employment during the regular school year. At the time of her summer employment, Reeves did not belong to the Westwood Education Association, the bargaining unit representing regular teachers in the district. Nor did she receive any written document embodying the terms of her summer employment. Zinzarella confirmed that the Board had not even taken any formal action to hire her for the summer. In contrast, regular teachers received either a written contract approved by the Board or, once they had attained tenure, a written teaching agreement for each school year. As a Title I teacher, Reeves was paid at an hourly rate for work performed. Her compensation was not calculated in accordance with the negotiated salary guide, which placed regular teachers at specified salary levels based on qualifications and prior experience. She was not permitted to enroll in the Teachers' Pension and Annuity Fund or receive standard health and life insurance coverage. Additionally, she was not entitled to any sick days, personal leave or paid holidays during the summer months. If she did not work, she simply did not get paid. While Olsen supervised her activities in the course of the summer, he did not prepare any written evaluation of her performance. Nontenured teachers during the regular school year received annual written evaluations.

3. Cipolletti's Service to Nonpublic School Children

On the other hand, from September 1974 onward the Board treated Cipolletti exactly like any other teacher in terms of compensation and benefits. He was a member of the Westwood Education Association, placed on the appropriate level of the negotiated salary scale, and given the same days off, pension rights and insurance protection which other teachers received. Like the other speech correctionists, he was required to attend in-service training sessions and back-to-school nights. For three academic years and at the commencement of the fourth, he received written contracts of employment from the Board. Thereafter the Board considered him tenured, and thenceforth he received a written teaching agreement of the type received by all teachers with tenure in the district.

Despite the fact that Cipolletti received his pay out of public funds, he was assigned to deliver speech correction services to nonpublic as well as public school children. In 1974-75 Cipolletti conducted all his speech classes in public school buildings. Nonetheless, a significant number of his students that year came from local parochial schools. A similar pattern emerged in following years. In 1975-76, roughly 65% of Cipolletti's time was spent teaching parochial school students; in 1976-77, roughly 60%; and in 1977-78 and 1978-79, roughly 70%.* Regardless of whether his students were from public or parochial school, Cipolletti performed the same kinds of remedial speech services which Reeves had earlier described. Over Cipolletti's protest, in 1975-76 through 1978-79, classes for nonpublic school children were held inside the particular school which the students were attending.

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*Note: These percentages are derived from the Board's daily schedules for the years in question. Although Cipolletti doubted the correctness of a 1-1/2 hour time segment on Fridays during 1977-78, generally he acknowledged that these figures properly reflect the distribution of his time between nonpublic and public school children. Moreover, he recalled that the ratio of time spent between nonpublic and public school children was about the same during the 1974-75 school year, for which corresponding figures were unavailable.

Arrangements to send Cipolletti into the parochial school buildings were made at the request of the various parochial school principals. Cipolletti's personal objections to this procedure were based not on philosophic or constitutional grounds, but merely because it was inconvenient for him to travel to outlying locations. Even though the parochial schools at which he was teaching had different calendars from the public schools, Cipolletti worked elsewhere on religious holidays and, insofar as possible, followed the same contract days as other public school teachers. He received his orders and supervision entirely from public school administrators, and was never assigned any duties by parochial school representatives.

Both Cipolletti and Zinzarella emphasized that teacher assignments were determined by the administration and not by the individual teacher involved. When in 1976 Cipolletti requested a transfer to a teaching assignment exclusively in the public schools, Zinzarella told him that it was the superintendent's prerogative to assign teachers wherever he pleased. In Zinzarella's own words, Cipolletti was given no choice about which students or at what location he would teach.

CONCLUSIONS OF LAW

Based on the factual findings and the applicable law, I **CONCLUDE** that Cipolletti is entitled to credit for five years of seniority (i.e., from September 1974 to September 1979) in the position of speech correctionist, whereas Reeves is entitled to only three years of seniority (i.e., from September 1976 to September 1979) in that position.

N.J.S.A. 18A:28-9 grants boards of education the power to terminate tenured "teaching staff members" for genuine reasons of economy, among other specified causes. Persons affected by such a "reduction in force" are accorded preference for the remaining job openings on the basis of seniority standards developed by the Commissioner of Education. N.J.S.A. 18A:28-10, 11. Seniority regulations adopted by the Commissioner must "classify insofar as practicable the fields or categories of administrative, supervisory, teaching or other educational services . . . ." N.J.S.A. 18A:28-13. Furthermore, the Commissioner,

> 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. Id.

In the exercise of his rule-making authority, the Commissioner has promulgated N.J.A.C. 6:3-1.10 which establishes standards for determining seniority. Subsection (h) of these regulations provides,

> 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. (Emphasis added.)

Momentarily putting aside the complications introduced by the Title I aspects of this case, the amount of Reeves's seniority in the category of speech correctionist depends on whether she may count employment during the summer months. It is well settled by prior Commissioner's rulings that a teacher may not gain credit for summer school teaching, either for purposes of seniority, Blitz v. Bridgeton Bd. of Ed., 1980 S.L.D. _____ (July 21, 1980), aff'd State Bd. of Ed., 1981 S.L.D. _____ (February 4, 1981), or for purposes of tenure. Kennedy v. Willingboro Bd. of Ed., 1972 S.L.D. 138; Braverman v. Franklin Bd. of Ed., 1971 S.L.D. 460. Blitz squarely holds that service for a single summer school session, being only "temporary" and "part-time," cannot be equated with regular teaching for calculation of seniority rights (slip opinion at 10). In arriving at the result, the Commissioner observed that summer teachers normally receive lower pay, are prohibited from contributing to any pension or enhanced life insurance plans, and do not accrue additional sick days or receive other customary benefits given regular teachers (slip opinion at 8). Here the same may be equally said about Reeves's summer employment by the Board.

Another way of approaching the problem is to examine whether a summer teacher satisfies the definition of persons who are entitled to acquire tenure and seniority, namely, "teaching staff members." Looking only at the statutory definition contained in N.J.S.A. 18A:1-1, Reeves would appear to comply with the fundamental requirement that she hold a valid certificate "appropriate to [her] office." Undoubtedly, Reeves was properly certified as a speech correctionist in Summer 1971. But Blitz goes further, and analogizes summer teachers to other part-time teachers who have been declared ineligible for tenure (and, by implication, seniority), even though they may possess the proper credentials, because of the nonpermanent nature of their employment and the need for flexibility on the part of the local board. See, for example, Capella v. Camden Cty. Voc. Tech. Bd. of Ed., 145 N.J. Super. 209 (App. Div. 1976) (guidance

counselors at adult evening school are ineligible for tenure); Biancardi v. Waldwick Bd. of Ed., 139 N.J. Super. 175 (App. Div. 1976), aff'd o.b., 73 N.J. 37 (1977) (time served as a substitute cannot be counted toward tenure as a regular teacher). Accord, Driscoll v. Clifton Bd. of Ed., 165 N.J. Super. 241 (App. Div. 1977), aff'd 79 N.J. 126 (1979). Under this analysis, Reeves did not engage in full-time employment as a "teaching staff member," and, consequently, cannot rightfully claim any seniority advantage.

This outcome is also suggested by a review of the leading cases dealing with the rights of Title I teachers, although the picture is somewhat clouded by a series of recent appellate opinions which are difficult to reconcile with each other. Compare Point Pleasant Beach Teachers Ass'n v. Callam, 173 N.J. Super. 11 (App. Div. 1980), certif. den., 84 N.J. 469 (1980) with Spiewak v. Rutherford Bd. of Ed. (N.J. App. Div., June 22, 1981, A-4853-70-T2) (unreported). See also, Hamilton Tp. Suppl. Teachers Ass'n v. Hamilton Tp. Bd. of Ed. (N.J. App. Div., July 10, 1981, A-667-80-T1) (unreported).

Point Pleasant involved several Title I teachers claiming tenure after having been employed as supplementary or reading teachers for more than three academic years. Eligibility for tenure was seen by the court as depending upon the "nature of the employment," which could only be determined after an "examination of the terms, conditions, and duties of the employment and a consideration of the conduct of the parties." 173 N.J. Super. at 17., After a recital of the peculiar characteristics of Title I employment (including payment on an hourly basis, absence of homeroom and playground duties, lack of any written contract and the need to reapply for employment every year, lack of fringe benefits, and nonenrollment in the pension system), the court focused on what it seemed to regard as the deciding factor: the temporary nature of petitioners' employment as demonstrated by the uncertainty in the source of funding. Concluding from the record before it that petitioners had understood and accepted their employment as temporary, the court found under such circumstances that tenure status was not conferred. Its ruling left open the distinct possibility of a different result if the intent of the parties had been different.

Along came the Spiewak case, which was also a tenure claim brought by Title I supplementary teachers who had served in that capacity more than three academic years. Most of the distinguishing factors noted in Point Pleasant (payment on an hourly basis, lack of fringe benefits, nonenrollment in the pension system, etc.) were also present in Spiewak. In addition, the court remarked that the original temporary character of the

Spiewak petitioners' employment had changed into a more permanent arrangement as the innovative educational program gradually became incorporated into the regular school curriculum. Although the court purported to accept the premise of Point Pleasant that temporary employment cannot become the basis of tenure, nevertheless it expressed reservations about the apparent breadth of the Point Pleasant holding. Specifically, the court in Spiewak rejected the notion that the source of funds by which Title I teachers were paid has any relevance to the issue of tenure status. Since remedial programs to assist handicapped or educationally disadvantaged children are mandated by state law, the court reasoned that the local board was obligated to find one way or another to pay for these indispensable services. Thus the appellate panel in Spiewak felt that the Point Pleasant ruling was not controlling, and that teachers employed to fulfill the mandate of a thorough and efficient education had attained tenure by virtue of their continued service for the requisite period.

To make matters more confusing, at nearly the same time a third appellate panel sitting on the Hamilton Tp. case was taking the opposite tack and limiting the Point Pleasant ruling to situations where the continuation of the program was "dependent on the largesse of federal funding" (slip opinion at 3). Exactly how much of the Point Pleasant holding survives Spiewak and Hamilton Tp. is yet unclear. A common thread running through all three opinions is that service is not creditable for tenure whenever the employment relationship is temporary, either because of an understanding reached between the parties, the experimental or provisional nature of the program, or the uncertainty of continued funding. Applying that common rationale to our seniority problem, the facts show that Reeves's Title I employment was temporary in all of these different senses. Reeves understood that her Title I employment would be temporary when she accepted the job. The summer program for pre-Kindergarten students was still experimental and not part of the regular curriculum. And the future of the program was obviously contingent on continued federal funding. Either viewed from the perspective of summer employment alone or from the perspective of Title I employment alone, Reeves cannot count her service toward seniority. Certainly the combination of both elements must be fatal to her claim.

Turning to a discussion of Cipolletti's seniority entitlement, objections to Reeves's standing to challenge the constitutional propriety of Cipolletti's assignment may be quickly put to rest. As a citizen and taxpayer, Reeves had a sufficient personal stake to fall within the zone of interest sought to be protected by the Establishment Clause of

the First Amendment. Flast v. Cohen, 392 U.S. 83 (1968).

It is unnecessary, however, to reach the constitutional issue in order to resolve fully the narrow seniority issue before the Commissioner. Boards of education have inherent managerial power to transfer or reassign teachers anywhere within the scope of their certifications. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978). A presumption of regularity attaches to a local board's determination of teaching assignment. Often the fine line between competing constitutional considerations is difficult to draw and may not be readily discernible in advance even to trained attorneys. Cf. Wolman v. Walter, 433 U.S. 229, 433 (1977) (dissenting opinion of Powell, J.) Teachers who in good faith rely on the board's presumed expertise must not be penalized if it later turns out that the board guessed wrongly. If a board acts illegally, then it is the board itself rather than the innocent teacher that ought to suffer any adverse consequences. Otherwise, it will become necessary for teachers to disobey their supervisors or institute a lawsuit every time they receive a questionable change of assignment. Here the record firmly established that Cipolletti had absolutely no choice about the assignment he received. Indeed, Cipolletti would have personally preferred a different assignment. It could just have easily been Reeves who had been assigned to provide speech services to parochial school children. Reasonable expectations regarding accrual of seniority must not depend on such fortuitous and irrelevant events. Irrespective of the constitutionality of the program, Cipolletti is entitled to seniority credit for the service he faithfully performed at the direction of his employer.

Cases cited by Reeves for the proposition that illegal employment cannot be credited for seniority are clearly distinguishable. Freitag v. Glen Rock Bd. of Ed., 1978 S.L.D. 792 and Gelsomino v. Belleville Bd. of Ed., 1980 S.L.D. ____ (June 5, 1980), both concern teachers who were uncertified for the jobs they were performing. Those cases simply illustrate the unavoidable application of N.J.S.A. 18A:28-5, which expressly prohibits acquisition of tenure or seniority rights by persons "who are not the holders of proper certificates in full force and effect." In passing, it should be noted that some doubt exists as to whether Reeves can legitimately claim seniority credit during the period she apparently worked as a teacher of the handicapped without proper certification in that field. Because that particular point was not raised or argued by the parties, it shall not be considered in rendering this decision.

Finally, Reeves argues that, assuming she cannot obtain credit for her Title I teaching during Summer 1971, nonetheless she should receive eight years credit in the category of speech correctionist dating back to the time she joined the Board's staff as a regular teacher in September 1971. In support of her argument, she refers to subsection (g) of the seniority regulations which provides,

> Whenever a person shall move from or revert to a category, all periods of employment shall be credited toward his seniority in any or all categories in which he previously held employment. (Emphasis added.)

Between September 1976 and June 1979, Reeves was employed as a speech correctionist, thus that category clearly constitutes "previous held employment." According to her literal reading of the regulatory language, Reeves is therefore entitled to credit all periods of employment toward seniority in that category.

Such a strained construction of the seniority rules defies common sense and past agency practice. When a teacher takes a position in a district, he begins to accrue seniority in that position. In the event of transfer to a different position, he begins to accrue seniority in the new position and continues to accrue seniority in the old one. But the converse is not also true. As the Commissioner has plainly indicated, subsection (g) "allows an individual to count years of employment as years of seniority in all previously held job categories, but it does not permit one to count years of previous employment toward seniority in a subsequent job category." Fitzpatrick v. Weehawken Bd. of Ed., 1980 S.L.D. _____ (June 13, 1980), aff'd State Bd. of Ed., 1981 S.L.D. _____ (March 4, 1981) (slip opinion at 18). Succinctly stated, a teacher with an educational services certificate cannot begin to acquire seniority in a category until he had actually served in that category. Teachers Union Local 481 v. Newark Bd. of Ed., 1978 S.L.D. _____ 908; Berkhout v. Roseland Bd. of Ed., 1978 S.L.D. 534. Apart from the summer, Reeves did not have actual experience as a speech correctionist until September 1976. Applying the regulation correctly, she did not start to accrue seniority in the category of speech correctionist until September 1976.

For the foregoing reasons, it is **ORDERED** that petitioner's request for relief is **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.

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

August 7, 1981
DATE

Ken R. Springer
KEN R. SPRINGER, A.J

Receipt Acknowledged:

August 13, 1981
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

DATE

FOR OFFICE OF ADMINISTRATIVE LAW

db

APPENDIX
LIST OF WITNESSES

1. Dorothy Reeves
2. Thomas Olsen
3. Reno M. Zinzarella
4. Michael Cipolletti

LIST OF EXHIBITS

Number	Description
J-1	Copy of the Minutes of the Board for the Meeting of April 9, 1979
J-2	Copy of Speech Correctionist Certificate issued to Reeves in April 1971
J-3	Copy of Teacher of the Handicapped Certificate issued to Reeves in March 1973
J-4	Copy of the Board's Employment Records pertaining to Reeves
J-5	Copy of Teacher of the Deaf Certificate issued to Cipolletti in December 1978
J-6	Copy of Speech Correctionist Certificate issued to Cipolletti in May 1971
J-7	Copy of the Board's Employment Records pertaining to Cipolletti
P-1	Copy of Letter dated July 30, 1971 to Reeves from Zinzarella
P-2	Copy of Employment Contract of Reeves dated July 19, 1971
P-3	Copy of Application of Employment of Reeves dated February 9, 1971

Number	Description
P-4	Copy of the Minutes of the Board for the Meeting of July 16, 1979
P-5	Assignment of Reeves for 1979-80 School Year
P-6	Teaching Agreement of Reeves dated April 9, 1979
R-1	Copy of the Minutes of the Board for the Meeting of April 21, 1980
R-2	Copy of the Board's Revised Daily Schedule of Special Teachers (a) 1974-75 (b) 1975-76 (c) 1976-77 (d) 1977-78 (e) 1978-79 (f) 1979-80 (g) 1980-81
R-3	Copies of Employment Contracts of Cipolletti (a) 1972-73 (b) 1974-75 (dated July 1, 1974) (c) 1974-75 (dated October 16, 1974) (d) 1975-76 (dated June 19, 1975) (e) 1975-76 (dated October 15, 1975) (f) 1976-77 (dated June 15, 1976) (g) 1976-77 (dated April 19, 1977) (h) 1977-78 (dated April 19, 1977) (i) 1977-78 (dated October 3, 1977) (j) 1978-79 (dated April 25, 1978) (k) 1978-79 (dated September 25, 1978) (l) 1978-79 (dated October 17, 1978) (m) 1979-80 (n) 1980-81

Number	Description
R-4	Copy of Letter dated October 3, 1977 to Cipolletti from Zinzarella
R-5	Copy of Letter dated September 25, 1978 to Cipolletti from Zinzarella
R-6	Copy of Letter dated April 29, 1973 to Cipolletti from Zinzarella
R-7	Copy of Letter dated April 29, 1975 to Cipolletti from Zinzarella
R-8	Copy of Certification of Payroll Deduction of Cipolletti dated October 1, 1979
R-9	Copy of Statement of Cipolletti's Account with the Teachers' Pension and Annuity Fund for 1972, 1974 and 1976
R-10	Copy of Statement of Cipolletti's Account with the Teachers' Pension and Annuity Fund for 1977, 1978 and 1979
R-11	Speech Correctionist Job Description
R-12	Copy of Board's Application for Title I Funds during Summer 1971
R-13	Copy of Board Program Description Accompanying Board's Application for Title I Funds

DOROTHY REEVES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE WESTWOOD REGIONAL SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION ON REMAND
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 conclusion by the Honorable Ken R. Springer, ALJ that her 1971 summer employment was not creditable for tenure and seniority purposes. Petitioner relies on Spiewak, supra, in support of her argument. The reply exceptions of third-party Respondent Cipolletti refute petitioner's contentions and affirm the initial decision by Judge Springer. The Commissioner views with favor the exceptions of third-party respondent.

An examination of the record herein, including the testimony and manifold exhibits in evidence, convinces the Commissioner that the summer employment of petitioner was temporary and was so understood by her. As temporary employment, it is not creditable to either tenure or seniority. Blitz, supra The Commissioner so holds.

The Commissioner does not find Spiewak, supra, dispositive of petitioner's claim. As was said therein:

> "***As we read Point Pleasant Beach, which addressed only the status of Title I teachers, its result was based primarily on the premise that where employment is offered and accepted on a temporary basis and where its temporary nature is understood by both employer and employee to be one of its essential predicates, such employment cannot then be relied on by the employee as the basis of tenure***. We do not disagree with these basic premises of Point Pleasant Beach and we do not suggest that they were not applicable to the facts then before the Court.***" (Slip Opinion, at p. 6)

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

September 25, 1981

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 3524-80

AGENCY DKT. NO. 258-5/80A

IN THE MATTER OF:

BERNARDS TOWNSHIP EDUCATION ASSOCIATION, PATRICIA WOHLLEB, ELSIE DRAGONETTI, MARYANN MC ELVOGUE, IRIS WATTS, AND CECILIA VALERI,

Petitioners

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF BERNARDS, SOMERSET COUNTY,

Respondent.

Record Closed: June 16, 1981 Decided: July 31, 1981

Received by Agency: Mailed to Parties:

APPEARANCES:

Richard A. Friedman, Esq., (Ruhlman & Butrym, attorneys) for Petitioner

Michael E. Rodgers, Esq., (Lucid, Jabbour, Pinto & Rodgers, attorneys) for Respondent

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

Patricia Wohlleb, a certified school nurse, hereinafter "petitioner," is joined in this action by party petitioners Bernards Township Education Association, three (3) other

certified school nurses and one (1) parent of pupils enrolled in the schools operated by the respondent, Bernards Township Board of Education (Board). Petitioners allege that the Board acted in violation of the statutes and rules of the State Board of Education by determining not to reemploy petitioner or a replacement certified school nurse for the 1980-81 school year and by assigning school nurse duties to uncertified personnel.

The Board, conversely, contends that its reduction from four (4) to three (3) certified school nurses in September 1980 was legal in all respects and proportionate to the reduction in pupil enrollment in recent years.

When the pleadings were joined in June 1980, the Commissioner of Education transferred the matter as a contested case to the Office of Administrative Law, pursuant to N.J.S.A. 52:14F-1 et seq. A plenary hearing was held at Somerville, New Jersey, on November 17-18, 1981. After a number of approved requests for extension of time for both parties to submit briefs, post-hearing briefing was completed on June 16, 1981. One issue raised in the pleadings regarding compliance with the Open Public Meetings Act was amicably settled by the parties and is not addressed further herein.

UNCONTROVERTED FACTS:

I **FIND** the following to be uncontested facts which reveal the contextual setting of the dispute:

The Board, during all times relevant to this action, operated schools with steadily declining enrollment. Enrollment in the three (3) elementary schools of the district declined 38% from 1975-76 through 1980-81. Actual enrollment during that period and projected enrollment for 1981-82 is as follows:

	3 Elem. Sch. K-6	1 Jr. H. Sch. 7-9	1 H. Sch. 10-12	Totals
1975-76	1454	858	977	3289
1976-77	1330	830	975	3135
1977-78	1276	780	948	3004
1978-79	1184	764	874	2822
1979-80	1121	738	845	2704
1980-81	931	696	880	2507
1981-82 (Projected)	840	643	776	2259

During these years, the Board has employed certified school nurses whose certificates are issued by the New Jersey State Board of Examiners. Beginning in the middle of the 1976-77 school year and thereafter, the Board also employed "Medical Assistants" in each of the health offices of its elementary schools. These medical assistants were and are full-time hourly paid, registered nurses who do not possess school nurse certificates issued by the State Board of Examiners. They are, however, approved as paraprofessional aides by the Somerset County Superintendent of Schools, pursuant to N.J.A.C. 6:11-4.9. The numbers of certified school nurses and medical assistants employed by the Board from September 1975 through June 1981 are here set forth:

	Cert. Sch. Nurses	Med. Assist.	Total
1975-76	5	0	5
1976-77	4	3	7
1977-78	4	3	7
1978-79	4	3	7
1979-80	4	3	7
1980-81	3	3	6

The Board, on September 13, 1976, authorized its Superintendent to apply for approval of the positions of medical assistants. The Superintendent's October 22, 1976 application (J-8), which was approved by the County Superintendent, specified that the minimum training required would be either that of an emergency medical technician or the highest levels of first aid training provided by the Red Cross. The application further specified that the medical assistants would be responsible to the principal and the school nurse, both of whom would provide orientation, supervision, and in-service training. The application further specified that the hiring of medical assistants would permit school nurses to teach health on a scheduled basis for one-half day and to be in school health offices one-half day. Specific duties of medical assistants were detailed as follows:

1. Assist school nurse in maintaining medical office files, supplies, correspondence, reports, and records.
2. Screen telephone calls and student contacts.
3. Supervise students waiting to go to doctor or home.
4. Have a knowledge of the school nurse's daily schedule.
5. Assist school nurse in conducting specific programs, e.g., vision testing, hearing testing, etc.
6. Provide necessary first aid.

7. Dispense medication according to Board Policy under direction of the School Nurse when approved by the School Physician according to his written instruction.

8. Perform such other duties as assigned by the school nurse and approved by the building administrator. [J-8]

Petitioner Wohlleb, who had been employed elsewhere as a certified school nurse since 1973, was employed by the Board in its junior high school during the 1979-80 school year. On April 21, 1980, however, she was notified that her contract would not be renewed for the ensuing school year (J-1). When petitioner requested reasons for nonrenewal of her contract (J-2), she was advised that the "action was taken because of the Board of Education's decision to reduce the number of school nurse positions. . ." and that the "decision resulted because of the district's declining enrollment and other economic considerations. . . ." (J-3). Petitioner requested and was granted an opportunity to appear before the Board. When the Board did not alter its position, petitioner, together with the other named party petitioners, filed this action on May 28, 1980.

TESTIMONY OF WITNESSES:

Petitioner Wohlleb testified that when she was interviewed for a school nurse position by a principal and the head of the Board's child study team, she inquired and was told inter alia, that the position for which she was being interviewed was not a temporary position.

One of the Board's certified school nurses, Iris Watts, who was assigned to the Board's three (3) elementary schools during 1980-81, testified that during 1980-81 she worked two (2) days per week at the health office of one elementary school and one and one-half days at each of the other two (2) elementary school health offices. She testified that in 1979-80, she spent her time until January exclusively on scoliosis, hearing, and vision testing, the results of which she personally charted on pupils' health records. She stated that in the screening procedure, she has been assisted by the medical assistants, who schedule pupils for testing and take and record heights and weights. She testified that although she taught classes of pupils after January in past years, she could not foresee that she would have time to do so in 1980-81, since she is now the only school nurse serving at the Board's three (3) elementary schools. She testified, however, that she expected to be assigned to teach nine (9) sixth grade health classes after January 1981. She testified that medical assistants perform filing and other clerical duties, answer the

telephone, issue gym excuses, decide whether to send pupils home or to the hospital when they are ill or injured, render first aid care in keeping with standing orders (J-12), prepare accident reports, make entries in the daily health office logs (J-10A, B, C), issue medicine and/or food supplements to children who have serious ailments such as asthma, diabetes and epilepsy, and to others for whom standing orders have been individually prepared by a doctor or the school nurse.

Ms. Watts testified, however, that, unlike herself, medical assistants do not carry out the aforementioned screening tests or interpret their results to parents. She testified that they do not participate in or prepare reports for child study team staffings, do not set up standing orders for individual pupils, and do not prepare lists of pupils with special problems for use by teaching staff members. She testified that, although she does not conduct in-service training for or formally supervise medical assistants, she has authority over them and is in charge of each of the elementary school health offices.

Corroborative testimony was elicited from another of the Board's school nurses who, prior to her present assignment during 1980-81 at the junior high school, had been assigned for seven (7) years to the Board's Liberty Corner Elementary School. She testified that, although she had not been directed to supervise her medical assistant, she did so anyway. Both testified that, when medical assistants were first hired during the 1976-77 school year, the school nurses oriented them by acquainting them with health office routines, standing orders and first aid and serious injury procedures (J-11,12).

The two (2) medical assistants who testified corroborated in all essential points the testimony of the school nurses summarized above. That testimony need not be repeated here. They testified also that they regularly notified the school nurse when a pupil injury or illness of major proportions occurred, and that they consider themselves under the authority and supervision of the school nurses and their principals. In this regard, they testified that they had been told when they were employed that they would be oriented by and continue to work under the supervision and authority of their respective school nurses and principals. They also testified that they spend approximately 40% of their time working with pupils and 60% of their time doing clerical duties. They testified that in no instances do they interpret to parents or pupils the results of the screening tests performed by the school nurse. One testified, in regard to her relationship with her school nurse, as follows:

> I feel very comfortable working with Mrs. Watts. I feel she's a certified nurse. I work under her jurisdiction. I work under her directives; and she's also very competent and very forthright with directives; and I feel I work under her direct supervision. . . . [Tr. 11/18/80, p. 163]

The present principal at the Board's Oak Street Elementary School testified that when he and the Board's other elementary principals had been directed by their Superintendent during the 1976-77 school year to orient newly employed medical assistants, he had done so. He testified that, together with the school nurse, he had conducted orientation covering such areas as health office procedures, clerical duties, first aid and serious injury procedures and standing orders. He testified that, as part of that orientation, his medical assistants had been allowed for a period of time to observe the school nurse in the health office, prior to assuming their own responsibilities. He testified that he had advised the medical assistant in his school that she would be responsible to and supervised by the school nurse.

The principal testified further that, since inception of the use of medical assistants, their duties have not changed in any substantive way prior to or during the 1980-81 school year, when the school nurse staff was reduced by one. Finally, the principal testified that the Board has plans to reduce the number of schools it maintains by closing one (1) elementary school and adopting the following reorganization plan:

Grades K-5	Two (2) Elementary Schools
Grades 6-8	One (1) Middle School
Grades 9-12	One (1) High School

FINDINGS OF FACT:

On the basis of a preponderance of credible evidence within the record, I **FIND** the following additional facts to be considered, together with the uncontested facts previously set forth, when reaching a determination:

1. The Board effected a reduction in force of one (1) certified school nurse in the 1980-81 school year. By doing so, it reduced the amount budgeted for nurses salaries from $66,000 in 1979-80 to $52,341 in 1980-81. For the same years, it increased the budgeted amount for medical assistants

from $13,500 to $18,638 (J-9). The combined result was that the Board budgeted $8,521 less for health salaries in these two categories for 1980-81.

2. As the result of that reduction in force, the Board has reduced its coverage by certified school nurses in its three (3) elementary schools from two (2) to one (1). Medical assistant coverage remains constant with one (1) assigned to each elementary school. School nurse coverage at the junior high school and high school has not been altered by the reduction in force. No medical assistants work in those schools.

3. The reduction in force has not altered the duties of the medical assistants, whose responsibility it is to perform clerical duties such as: file; take and record height and weight information for pupils; schedule pupils for testing by the school nurse; administer first aid; issue gym excuses and send pupils who become ill or injured home or for medical treatment; speak with parents in person and on the telephone; take charge of the health office when the school nurse is away; make entries in the daily log; care for and keep a record of supplies and equipment; and issue only those medications or food supplements as authorized by doctors, parents and the school nurse.

4. The reduction in force has not altered those duties exclusively reserved to the certified school nurses, among which are: teaching health classes; conducting testing and interpreting test results for scoliosis, hearing, and vision; setting up standing orders for pupils with such afflictions as epilepsy and diabetes; altering health office routines; participating in child study team staffings; issuing lists of pupil disabilities for use of teaching staff members; making decisions regarding any serious pupil injury or illness reported by the medical assistants.

5. The medical assistants were oriented by their respective principals and certified school nurses when they were first hired in 1976-77. Since then, they have received no formal orientations or in-service training.

6. Medical assistants are subject to and recognize the authority of their certified school nurse.

7. While the certified school nurses have recognized and exerted their authority over the medical assistants, the school nurses have not fully accepted as their responsibility the supervision of the medical assistants. The principals, however, look on the certified school nurses as co-equals in the responsibility of supervising the medical assistants.

8. The duties performed by medical assistants in 1980-81 are essentially those approved by the County Superintendent in 1976-77 (J-8). The goal of improving instructional services by releasing certified school nurses to teach has been attained, in that they have been scheduled on a part-time basis to teach health in recent years. It is apparent, however, that the reduction in force by one (1) school nurse in 1980-81 left the remaining elementary school nurse with undiminished responsibility for 931 pupils in grades K-6, as contrasted to the average pupil responsiblity in 1976-77 of 615 for the two (2) elementary school nurses. The stated goal in the application to the County Superintendent to free the certified elementary school nurses to teach half-time was not met, since they had been teaching for one semester only for one-third of their scheduled time prior to 1980-81. With responsibility for yet greater numbers of pupils, it is further apparent that the goal could not have been met by the certified elementary school nurse for 1980-81.

DISCUSSION AND CONCLUSIONS:

The Board, during the 1976-77 school year, submitted a job description for medical assistants. That job description accurately reflects the work since performed by medical assistants. Essentially, they have performed clerical duties, covered the elementary school health offices, taken and recorded routine height and weight data, assisted the certified school nurse in scheduling pupils for testing, provided first aid in accordance with established standing orders and procedures, selected and supervised pupils who needed to go home or obtain medical care, and dispensed medication in accordance

with standing orders. The County Superintendent approved the use of the medical assistants as school aides, pursuant to his authority under the following State Board of Education rule:

N.J.A.C. 6:11-4.9 Paraprofessional approval

(a) School aides and/or classroom aides, assisting in the supervision of pupil activities under the direction of a principal, teacher or other designated certified professional personnel, shall be approved in accordance with regulations and procedures adopted by the State Board of Education in February, 1968. Copies of these procedures are available from the Bureau of Teacher Education and Academic Credentials or the offices of county superintendent of schools.

(b) Current regulations require school districts employing aides to develop job descriptions and standards for appointment. These descriptions and standards should be based on study of local needs. The nature of the job descriptions will dictate the qualifications to be met, the proficiency standards needed, and the pay to be received.

(c) The locally developed descriptions and standards adopted by the board of education shall be submitted by the superintendent of schools or chief administrative officer to the county superintendent for approval, in accordance with the regulations outlined below:

1. Any board of education employing school aides or classroom aides shall submit to the county superintendent of schools a job description for each type of aide to be employed, setting forth the duties to be performed, the types of proficiency needed, the qualifications to be required, and the arrangement for supervision of the aides. The qualifications shall include proof of good moral character.

2. The county superintendent of schools shall review the job descriptions and the qualifications proposed for positions for the various types of supervisory or classroom aides. If he finds that the descriptions and qualifications are in accord with the policies of the State Board of Education, and conform to sound educational practice, he shall approve them, and notify the school board of his approval in writing.

The Board's use of medical assistants was not challenged until the instant action was filed in June 1980. Essentially, petitioners charge that the medical assistants perform duties which may only be performed legally by a certified school nurse and that,

for this reason, the County Superintendent's approval was improper. In this assertion, petitioners rely on the Commissioner's holding in Joan Scrupski, et al. v. Bd. of Ed. of the Twp. of Warren, 1977 S.L.D. 1051. Therein, the Commissioner held that the Warren Township Board had improperly reduced its certified nurse staff by one and one-half nurses and assigned their duties to five (5) school health aides.

Scrupski, supra, is factually distinguishable from that which is shown to prevail herein. In Scrupski, the hearing examiner found "no significant difference between the assigned duties of the school health aide positions and the duties assigned school nurses. . ." (1977 S.L.D. 1053). Herein, by contrast, the medical assistants do not perform the following important and specialized duties reserved to school nurses: testing of pupils, interpreting those test results to parents and teachers, teaching health classes, setting up standing orders for individual pupils, issuing lists of pupil disabilities to teachers, making major decisions on items referred by the medical assistants, participating in child study team staffing, and establishing and altering health office routines.

The instant matter is also importantly distinguishable from Scrupski, supra, for the reason that the Board's recent reduction in force of one (1) school nurse did not result in the reassignment of nurses' duties to the medical assistants. The effect of that reduction in force was to increase the duties of the remaining elementary school nurse, who then had to shoulder the full duties which she and one (1) other nurse had carried in prior years. No other duties devolved on the medical assistants, who had at all times been required to cover the respective elementary school health offices. In sharp contrast, the Commissioner determined in Scrupski that, "the Board relegated the one and one-half school nurse teaching staff positions to five teaching aide positions contrary to the provisions of N.J.A.C. 6:11-4.9(a). The Board effectively replaced teaching staff members with aides . . . ." (1977 S.L.D. 1055).

I **CONCLUDE** that in the instant matter, the Board's reduction in force did not result in any such wholesale transfer to the three (3) medical assistants of duties which had previously been those of school nurses.

That the Board is not under obligation to have a full-time certified school nurse present in every school is well settled. In Margot Outslay v. Midland Park Bd. of Ed., 1977 S.L.D. 1033, the Commissioner, referring to the employment of a less than full-time nurse, stated at page 1038:

While it is true that N.J.S.A. 18A:40-3.1 does not specifically make reference to the employment of a part-time nurse, the legality of such employment has been rendered stare decisis by decisional law in Bruce W. Roe et al. v. Board of Education of the Township of Mine Hill, Morris County, 1976 S.L.D. 673, aff'd State Board of Education 677, as follows:

> "...The Commissioner also holds that there is no requirement that each school district of the State employ a full-time nurse or that a nurse be present at all times in each school building. (See Leona Smith et al. v. Board of Education of the Borough of Caldwell-West Caldwell, Essex County, 1972 S.L.D. 232.) A nurse is a teaching staff member whose position is mandated by specific statutory authority. N.J.S.A. 18A:40-1 The same authority also states, however, that the '... board shall fix their salaries and terms of office.' Thus, the conditions pertinent to the position of school nurse are left to the discretion of local boards charged with the general government and management of the public schools. N.J.S.A. 18A:11-1 The statutes nowhere provide that nurses or any teaching staff member must be employed on a full-time basis...." (Emphasis supplied.) (at 677)

A similar conclusion was reached by the Commissioner in Veronica Smith, et al. v. Sayreville Bd. of Ed., 1974 S.L.D. 1095. Therein, the Commissioner, in determining that the assignment of temporary health office coverage to a registered nurse who was not a certified school nurse was reasonable, stated:

> Petitioner was never appointed by the Board to a part-time school nurse position. Nor was it encumbent upon the Board that she be so appointed nor that she be certified as a school nurse. The Commissioner, in a similar situation involving the assignment of temporary school health office coverage to guidance counselors, in Leona Smith, Mort Robin and Jan Campbell v. Board of Education of the Borough of Caldwell-West Caldwell, Essex County, 1972 S.L.D. 232, said:
>
> > "... N.J.S.A. 18A:40-1 simply provides, inter alia, that each local board of education '... shall employ ... one or more school nurses ...' and '... adopt rules, subject to the approval of the state board, for the government of such employees.' There is no provision in this statute that mandates the coverage that a nurse must give, but the clear implication, by the limited nature of the mandate, is that some schools will share nursing services, and ... at some times will be without the physical presence of a nurse in the building. ... (Emphasis supplied.) (at p. 238)

And,

> ". . . Therefore, it must be accepted as fact that there is a recognition in the statutes that nurses are not always present in school buildings, and that at such times, some of the responsibilities for the implementation of the rules of the State Board, and the local board, must be borne by other employees of the school system. . . ." (at p. 239)

And,

> ". . . Neither is it 'unreasonable,' in the Commissioner's view, that the Board decided to assign staff members . . . to perform some of the nurse's referral chores, when the nurse was absent from the building. . ."
>
> "The Commissioner opines that the only ultimate, eminently satisfactory provision, to properly provide for each and every emergency health situation . . . would be a licensed doctor of medicine in each of the buildings at all times they are in session. However, common sense dictates that such provision mandated by law would be one totally distorted and out of proportion to need. Even a mandated provision of a nurse for every school building on all occasions would seem to be illogical and to exceed the requirements of the statutes. . ." (at pp. 239-240)
>
> The Commissioner determines that precisely the same reasonable assignment was made for temporary health office coverage in the instant matter. He further determines that, while the Board could have required that petitioner apply for and possess a school nurse certificate, it was not derelict in duty in not making this requirement. Such assignment was reasonable in that petitioner, being trained as a registered nurse, was eminently qualified to perform such limited duties. [at p. 1101]

The Board herein, effective September 1980, reduced by 25% its staff of certified school nurses. This decrease must be viewed in the light of a corresponding 30% decrease in its pupil enrollment in the elementary schools since 1976-77. In view of that decrease in pupil enrollment, I **CONCLUDE** that the Board's action was a reasonable attempt to effect fiscal economy. The Board's plan to close one (1) elementary school by the fall of 1982 presents further evidence of the reasonableness of the Board's action. In view of the above, I further **CONCLUDE** that the reasons given to petitioner Wohlleb were based in fact.

As the Commissioner stated in Kenny v. Board of Education of Montclair, 1938 S.L.D. 647, affirmed State Board of Education 649, 653:

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

Similarly, it was stated by the Court in Schinck v. Bd. of Ed. of Westwood Consol. School Dist., 60 N.J. Super. 448 at 476 that:

> We are mindful of the general principle that on appellate review we should not substitute our judgment for the specialized and expert judgment of the Commissioner and the Board, and also of the local school board, all of whom have been entrusted with the fulfillment of the legislative policy. To do so would constitute a judicial exercise of the administrative function.

I **CONCLUDE** that neither the County Superintendent of Schools nor the Board acted in contravention of prevailing educational law when, respectively, they approved and employed medical assistants to perform the limited duties they have been assigned to perform. I further **CONCLUDE** that, absent such a wholesale transfer of school nurse duties to the medical assistants as proved fatal in Scrupski, supra, the Board's action is entitled to a presumption of correctness.

I further **CONCLUDE,** on the basis of the testimony of the school nurses, the principal and the medical assistants, that, although the nurses and the principals initially provided in-service training and supervision of medical assistants, they have not continued to do so on the continuing basis contemplated by the State Board of Education when it issued its February 1968 guidelines.

DETERMINATION:

Having considered, in the light of prevailing education law, all of the respective arguments set forth in Briefs of Counsel, the Findings of Fact and the conclusions set forth above, it is **DETERMINED** that the relief sought by petitioners is contraindicated. Accordingly, it is **ORDERED** that petitioners' request for an order directing the reinstatement of petitioner Wohlleb to a school nurse position, together with back pay, is **DENIED.** It is further **ORDERED** that petitioners' request for an order restraining the Board from continuing to employ medical assistants is also **DENIED.** In view of the aforementioned apparent but less-than-fatal inconsistency, it is also

ORDERED that the Board establish, forthwith, a continuing program of supervision and in-service training of medical assistants, in keeping with the State Board of Education's February 1968 guidelines.

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.

July 31, 1981
DATE

Eric G. Errickson
ERIC G. ERRICKSON, ALJ

Receipt Acknowledged:

July 31 1981
DATE

Seymour Weiss.
DEPARTMENT OF EDUCATION

Mailed To Parties:

Aug 3, 1981
DATE

Ronald I Parker IOZ
OFFICE OF ADMINISTRATIVE LAW

plb

EXHIBITS IN EVIDENCE:

J-1	Evans to Wohlleb, April 10, 1980
J-2	Wohlleb to Evans, April 28, 1980
J-3	Evans to Wohlleb, May 5, 1980
J-4	Evans to Wohlleb, April 3, 1980
J-5	Wohlleb to Evans, April 8, 1980
J-6	Tieman to Board, August 30, 1976
J-7	School Nurse Job Description
J-8	Application to County Superintendent for Medical Assistant Approval
J-9	1980-81 School Budget, March 1980
J-10A,B,C	Nurse's Logs for Elementary Schools, January 1980 and September 1980
J-11	Serious Injury Procedure, November 20, 1979
J-12	Standing Orders for First Aid
J-13	Head Nurse Job Description

BERNARDS TOWNSHIP EDUCATION ASSOCIATION, PATRICIA WOHLLEB, ELSIE DRAGONETTI, MARYANN MC ELVOGUE, IRIS WATTS, AND CECILIA VALERI,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BERNARDS, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the record in the instant matter including the initial decision rendered by the Office of Administrative Law, Eric G. Errickson, ALJ.

The Commissioner observes that timely exceptions and reply exceptions have been filed to the initial decision by petitioners and the Board, respectively, pursuant to N.J.A.C. 1:1-16.4a, b and c.

The parties also rely on their post-hearing briefs in support of their exceptions which are incorporated by reference herein.

Petitioners make the following points in their exceptions to the initial decision:

1. Contrary to the conclusion reached by Judge Errickson in his initial decision at page 2, which states that the issue with respect to the Board's alleged violation of the Open Public Meetings Act, has been "amicably settled by the parties," petitioners maintain that no settlement of this issue has been achieved between the parties. Failure to reach such settlement is attributed to the Board by petitioners inasmuch as the Board has not forwarded a written copy of the settlement to petitioners for their concurrence to be subsequently filed with the Commissioner for his review.

2. Petitioners except to the findings in the initial decision which state that forty percent of the aides' time was spent working with pupils, while sixty percent of their time was spent on clerical matters. In this regard petitioners maintain that Judge Errickson erred by ignoring the testimony of the aides which states that the majority of their time is spent in rendering first aid to pupils during the school year except for

the months of September and June. Moreover, petitioners maintain that the aides perform many other duties without consultation or supervision of the school nurse omitted in the initial decision.

Petitioners argue that it is physically impossible for one certified school nurse, now employed by the Board in its three elementary schools, to perform her required duties; many of these functions are now being assumed by aides without supervision.

3. Contrary to the findings and conclusions rendered in the initial decision of this matter, petitioners argue that the Commissioner's prior ruling in Scrupski, supra, are indistinguishable from the facts adduced herein. In Scrupski, the Commissioner held that the Board's action in hiring uncertified personnel to perform duties properly assignable to certified school nurses was a violation of school law and the applicable regulations promulgated to that effect by the State Board of Education.

4. Petitioners reject the findings and conclusions reached in the initial decision in this matter which hold that the aides' duties are not in conflict with those of a certified school nurse and that such duties as constituted are more than clerical in practice.

Petitioners urge the Commissioner to set aside these findings rendered by Judge Errickson for the specific reasons enuciated in Scrupski.

The Board rejects the position taken by petitioners in their exceptions with respect to the duties which it has assigned to its aides since the inception of the medical assistant program.

The Board avers that its action in this regard has always been legally correct for those reasons expressed in the initial decision of this matter by Judge Errickson.

In regard to the issue excepted to by petitioners pertaining to its alleged violation of the Open Public Meetings Act, the Board maintains that it will submit a copy of the agreement of settlement to petitioners forthwith and urges that this issue be dismissed by the Commissioner.

The Commissioner has reviewed the respective positions of the parties as set forth in the exceptions of petitioners and the Board's reply exceptions filed herein.

In the Commissioner's judgment, the matter is, in fact, distinguishable from Scrupski, supra, for the reasons set forth in the initial decision by Judge Errickson.

The Commissioner is constrained to observe, however, that one of the duties contained in the job description for medical assistants (J-8) has been improperly authorized as a function for that position. More specifically, the Commissioner's attention is focused upon line 4, item 7 of the Application for Position Approval for School Aides or Classroom Aides which reads:

> "7. Dispense medication according to Board Policy under direction of the School Nurse when approved by the School Physician according to his written instruction." (J-8)

It is observed that, while the three persons who are currently employed as aides to one certified school nurse are, in fact, registered nurses, the nature of such employment does not require them to hold an appropriate school nurse's certificate issued by the State Board of Examiners. These persons are not by definition "teaching staff members" (N.J.S.A. 18A:1-1) and, according to the approved job description for medical assistants, it is possible for persons to be employed who are licensed as emergency medical technicians or who are certified in first aid by the Red Cross.

As a matter of further clarification with respect to the administration of medications, the Commissioner has requested and received a policy statement issued by the New Jersey State Board of Nursing, dated April 23, 1974. It reads as follows:

> "Under the Nurse Practice Act, N.J.S.A. 45:11-23 et seq., only the following nursing personnel are permitted to administer medications in the State of New Jersey under the direction of a licensed or otherwise legally authorized physician or dentist:
>
> 1. Licensed Registered Professional Nurses;
>
> 2. Licensed Practical Nurses;
>
> 3. Nurses with valid 'permission to work' letters issued by this Board (N.J.A.C. 13:37-3.5; 13:37-4.6; 13:37-10.4; and 13:37-11.5);
>
> 4. Graduate nurses from any domestically accredited nursing school pending the results of the first two consecutive licensing examinations immediately following the completion of their nursing program (N.J.A.C. 13:37-2.7 and 13:37-9.5); and

5. Student nurses in an approved school of nursing under the direct supervision of a registered nurse.

"Exclusive of these categories, the New Jersey Board of Nursing is unalterably opposed to unqualified or unlicensed individuals including teachers, nurses aids, attendants, orderlies, ward helpers, etc., to administer any kind of medications to patients in any health care facility or treatment center in the State." (C-1)

In the Commissioner's judgment, it is clear that a certified school nurse is the only teaching staff member in the employ of a local board of education who has the appropriate credentials to satisfy the requirements of the New Jersey Board of Nursing and the regulations of the State Board of Education to administer medications when authorized by the school medical inspector. The Commissioner so holds.

Accordingly, the Commissioner finds and determines that this function listed under the job description of medical assistant (J-8) is not a duty to be performed by an aide but rather the certified school nurse(s) employed by the Board herein. The Commissioner directs the Board to resubmit the job description to the Somerset County Superintendent of Schools for his approval with the aforementioned function deleted.

The remaining issue in regard to the Board's alleged violation of the Open Public Meetings Act remains viable until such time as the parties file a joint stipulation of settlement with the Commissioner or, in the alternative, request that further proceedings be conducted on this issue through the Office of Administrative Law. In any event, the Commissioner directs that he be so informed by the parties not later than October 15, 1981. The Commissioner retains jurisdiction with respect to a final determination of this remaining issue.

In all other respects, except as determined by the Commissioner above, the initial decision of Judge Errickson is affirmed and the findings and conclusions set forth therein are hereby adopted by the Commissioner as his own.

COMMISSIONER OF EDUCATION

September 29, 1981
Pending State Board

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 2629-81

AGENCY DKT. NO. 117-4/81A

IN THE MATTER OF:

CARL COHEN et als.,
Petitioners
v.
PISCATAWAY BOARD OF EDUCATION,
MIDDLESEX COUNTY,
Respondent.

Record Closed: July 16, 1981
Received by Agency:

Decided: August 27, 1981
Mailed to Parties:

APPEARANCES:

Robert M. Schwartz, Esq., (General Counsel, Principal and Supervisor Associations) for Petitioner

David B. Rubin, Esq., (Rubin, Lerner & Rubin, attorneys) for Respondent

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

This is an action for an order placing petitioners in certain middle school administrative positions in the Piscataway School District. Petitioners have been the subject of a reduction in force, pursuant to N.J.S.A. 18A:28-9 et seq.

The matter was opened before the Commissioner of Education and transmitted to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. Oral argument on a request by petitioners for a stay of Board action was heard on July 2, 1981, at the Office of Administrative Law, Trenton. The request was denied and an order to that effect issued on July 17.

A prehearing conference was held on July 2, at which the issues were defined and it was agreed that the matter proceed to summary judgment on cross-motions, joint stipulation of facts, briefs and affidavits.

I.

Carl Cohen, Ernest Frino and Theodore Choplick (petitioners) are tenured employees of the Piscataway Board of Education (Board). Cohen is an elementary school principal, Frino is an elementary school vice principal and Choplick is a secondary school assistant principal. On February 23, 1981, the Board adopted resolutions abolishing two elementary principalships and all elementary vice principalships. These resolutions affected the employment of Cohen and Frino, respectively. On the same date, the Board adopted an administrative personnel seniority list prepared by a consultant firm. That list sets forth the position of middle school vice principal as a separate category. On March 9, the Board voted to abolish the secondary school assistant principalship, thereby affecting Choplick's employment.

Cohen's administrative service history in the district is 3.8 years as elementary vice principal plus 8.9 years as elementary principal, giving a total of 12.7 years. Frino's administrative service history is 13.8 years as elementary vice principal. Choplick's administrative service history is 6.7 years as elementary vice principal plus 3.0 years as secondary assistant principal, giving a total of 9.7 years.

The foregoing facts are undisputed and I adopt them as FINDINGS OF FACT.

II.

Petitioners contend the Board's designation of middle school vice principal as a separate category for seniority purposes is improper. The authority of a board of education to effect a reduction in force is not argued. N.J.S.A. 18A:28-9. However, when a reduction in force is effected, the Board must be guided by N.J.A.C. 6:3-1.10 in determining seniority.

The Board's adoption of the consultant's report constitutes error in that the Board, by doing so, creates a category not recognized by the State Board of Education and artificially draws a distinction between elementary and middle school administrators. This error affects petitioners in that they have not been permitted to assert their seniority rights against those of present middle school administrators.

Under rules of the State Board, N.J.A.C. 6:3-1.10 et seq., seniority is to be determined according to the number of academic or calendar years in the school district in specific categories. If an employee's position is abolished, he shall be given that employment in the same category to which he is entitled by seniority. If his seniority is insufficient for employment in the same category, he is reverted to the category in which he held employment immediately prior to his employment in the same category. He is placed upon a preferred eligible list for the category from which he was reverted. This process continues should he have insufficient seniority in the category to which he is reverted. It is, therefore, important for a board of education, when preparing a seniority list, to include for each person the number of years of employment and also to determine the categories or positions to which the number of years applies.

Here, the Board properly credited petitioners with the correct numbers of years of service, but failed to include the category of middle school vice principal as one of the categories to which the number of years of seniority might apply. Under N.J.A.C. 6:1-10(k), there is no separate category for the middle school position. Subparagraph 28 of the cited rule states, "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." The middle school structure in the Piscataway School District does not go beyond the eighth grade and, thus, the appropriate category for the vice principal of such a school would be elementary school vice principal.

Petitioners also assert that the plain meaning of N.J.A.C. 6:1-10.3(k)21, which states "Each vice-principalship, assistant principalship or assistant to the principalship in paragraphs 14 through 21 of this subsection shall be a separate category," is that each subprincipalship, as distinguished among high school, junior high school, elementary school and vocational school, has separate seniority entitlements. A secondary vice principal may not assert a seniority entitlement to an elementary vice principalship without first having served in an elementary vice principalship in the district.

Where a middle school contains a ninth grade, petitioners admit that, based on their argument, it would fall into the junior high school category.

As to the Board's reliance (see below) on paragraphs 27 and 28 of N.J.A.C. 6:3- 1.10(k), defining secondary and elementary, petitioners state the paragraphs have no applicability to vice principalships, since these are dealt with specifically in paragraphs 14-21, cited above.

Petitioners assert the seniority list adopted by the Board is void and must be corrected before any reductions in force are put into effect. They ask that the Board be ordered to prepare a revised seniority list in which elementary school and middle school vice principalships are considered one category and, further, that the Board be directed to rescind any reductions in force, based upon the present seniority list.

III.

The Board argues that the definitions of secondary and elementary set forth at N.J.A.C. 6:3-1.10(k)27 and 28 give to secondary school personnel as much claim to middle school positions as they give to elementary school personnel. Subparagraph 27 is set forth, above. Subparagraph 28 states, "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 departmentalized instructions." The instruction offered at the middle school level in the Piscataway District is departmentalized. Middle school, therefore, is as readily classified secondary as it is elementary.

The drafters of the rules acknowledged the educational validity of schools designed for pupils in transition from childhood to adolescence and foresaw the competing

claims elementary and secondary administrators might assert over them. Recognition was given in the separately enumerated categories, paragraphs 14-21, above, to the junior high school administrative level. Perhaps when the rules were drafted, the term middle school was less current than the term junior high school. The Board contends, however, that the two were and are conceptually one.

In the Board's view, petitioner's argument presupposes that seniority accumulated in a particular vice principalship may be counted toward entitlement to another vice principalship in the district. The premise is unfounded. N.J.A.C. 6:1-10(k)21, upon which petitioners rely, provides that each subprincipalship set out in subparagraphs 14-21 shall be a separate category.

The underlying purpose of this rule was announced by the Commissioner of Education in Esther Boyle Eyler, et als v. Board of Education of the City of Paterson, in the County of Passaic, et als, 1959-60 S.L.D. 68:

> In preparing [seniority] standards, the Commissioner discovered that both the titles and the duties of the vice-principalship vary in the school systems of the State. The titles used are vice-principal, assistant principal and assistant to the principal. In some cases, the vice-principal, assistant principal or assistant to the principal, as the case might be, is a supervisor of instruction or director of guidance and, in other cases, an administrative assistant, an attendance officer, a disciplinarian or the person who takes the principal's place in his absence.
>
> The purpose of seniority standards is two-fold: one, to give a reasonable protection to the professional staff member, and, two, to protect the school system by preventing seniority from operating in such a manner as to displace a qualified person with an unqualified one. It is obvious that a vice-principal, whose experience has been that of a disciplinarian, should not be permitted to displace a vice-principal with lesser service who is an experienced supervisor.
>
> It was finally decided that, in the best interests of the pupils, the only seniority which it was practicable to give a vice-principal was in the particular vice-principalship he had held. Accordingly, this note was included in the standards:
>
> > "Each vice-principalship, or assistant to the principalship in categories 14-21 inclusive shall be a separate category."

> Thus, the only vice-principalship which a vice-principal could claim by seniority would be the particular one he once held. (Id. at 72).

The Board asks summary judgment in its favor, dismissing the petition of appeal.

IV.

There is no middle school designation in N.J.A.C. 6:3-1.10(k). That rule, in pertinent part, reads

> The following shall be deemed to be specific categories but not necessarily numbered in order of preference:
> . . .
>
> 14. High School Vice-Principal or Assistant Principal;
>
> 15. Junior High School Vice-Principal or Assistant Principal;
>
> 16. Elementary School Vice-Principal or Assistant Principal;
>
> 17. Vocational School Vice-Principal or Assistant Principal;
>
> 18. Assistant to the High School Principal;
>
> 19. Assistant to the Junior High School Principal;
>
> 20. Assistant to the Elementary School Principal;
>
> 21. Assistant to the Vocational School Principal;
>
> (Each vice-principalship, assistant principalship, or assistant to the principalship in paragraphs 14 through 21 of this subsection shall be a separate category.)
> . . . .

The source of N.J.A.C. 6:3-1.10 is Section 26, Rules of the State Board of Education, adopted June 24, 1955, filed with the Secretary of State January 16, 1967. Upon enactment of the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. in 1969, the rule was refiled and codified in accordance with the provisions of the act.

The term middle school is defined as a school administrative unit, typically between the primary elementary unit and the last or secondary unit in the school system.

Dictionary of Education 366 (1973). The concept was developed in the United States in the 1950's. International Dictionary of Education 221 (1977). A 1968 study indicated that something more than 10% of the middle schools in the U.S. were established before 1960. 6 Encyc. of Ed. at 353.

It appears that the middle school is not a concept so new as to have likely escaped the notice of the Commissioner and State Board. There has been periodic review of all administrative rules and regulations under Executive Order 66 (April 14, 1978). It must be assumed, therefore, that the omission of reference to middle schools as a designation in the code is not inadvertent.

This, then, leaves the categories of high school, junior high school, elementary school and vocational school. It must be decided into which of these categories the middle school fits. I **CONCLUDE** that the middle school as constituted in the Piscataway District is an elementary school.

Both parties have looked to the definitions of secondary and elementary in N.J.A.C. 6:3-1.10(k), above. The Board argues that a middle school is as readily classified secondary as elementary, since the rule defines secondary to 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."

Petitioners, on the other hand, assert that elementary, being defined as "Kindergarten, grades 1-6 and grades 7-8 with or without departmental instruction, including grades 7-8 in junior high schools," properly covers the present circumstances.

In its submission dated July 10, 1981, the Board states, "The present structure of all three [middle] schools is grades 6, 7 and 8. Grade 6 in self-contained classes and grades 7 and 8 in departmentalized programs." The definition of elementary reaches all of these grades and arrangements. The definition of secondary reaches grades 7 and 8 in departmentalized programs, but cannot reach the self-contained sixth grade.

Cutting each school into two pieces, one containing grade 6 and the other containing grades 7 and 8, might give the impression of Solomonic wisdom, but would hardly resolve the present question. Taken as an entity, each middle school in the Piscataway District plainly is an elementary school and is properly classified as such.

The Board also states all three schools were called junior high schools through the 1972-73 school year. In the period 1961-62 through 1963-64, Quibbletown Junior High School included grades 5-8, with grades 5 and 6 in self-contained classes and grades 7 and 8 in departmentalized programs. Again, the definition of elementary reaches all of these grades and arrangements, the definition of secondary does not.

From 1964-65 through 1969-70, each of the then junior high schools housed sixth grades in self-contained classes and grades 7, 8 and 9 in departmentalized programs. Whether this arrangement was based on educational philosophy or on enrollment pressures is not of record. Nevertheless, service in those schools during those years is properly classified as junior high school service in whatever designated category. Service in those schools since that time is properly classified as elementary school service.

V.

On the basis of the foregoing, I **CONCLUDE** the seniority lists for elementary vice principal and for middle school vice principal must be merged. Assuming their accuracy as adopted by the Board, the lists, when merged, yield the following seniority entitlements:

Name	Years of Seniority
Palushock, Edward	20.0
Rankin, Lon	16.7
Wilkos, Walter	16.1
Yonowitz, Harvey	15.0
Frino, Ernest	13.8
Cohen, Carl	12.7
Zissis, George	11.0
Cerasa, Carmine	10.0
Gardner, John	9.8
Choplick, Theodore	9.7
Leef, Dorothy	9.5
Fisher, James	7.0
Castoral, Jean	6.0

Under the provisions of N.J.S.A. 18A:28-9 et seq., the Board may eliminate such elementary school, including middle school, vice principalships as its judgment fairly dictates. However, it must do so in accordance with the seniority list set forth above or show how its own figures are in error, thereby justifying some other result.

It is so **ORDERED.**

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 August 81
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

28 August 1981
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

Sept 2, 1981
DATE

Ronald I. Parker
OFFICE OF ADMINISTRATIVE LAW

ij

CARL COHEN ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, 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.

Respondent excepts to the determination by the Honorable Bruce R. Campbell, ALJ that the middle school as constituted in the Piscataway District is an elementary school. Respondent contends that the middle schools have traditionally been viewed as junior high schools and that vice principals therein be considered under N.J.A.C. 6:3-1.10(k)15. Respondent contends that each vice principal, as listed in paragraphs 14 through 21 of N.J.A.C. 6:3-1.10(k), is deemed a separate category and relies on Eyler, supra.

Petitioners' reply exceptions refute those of respondent and affirm the decision by Judge Campbell. The Commissioner views with favor the arguments of petitioners and notes with approval their arguments of law wherein in answer to respondent's reliance on Eyler, supra, is said in part:

> "***[A]t the time of this decision the Tenure Laws, R.S. 18:13-16, did not provide the position of vice principal with the security of tenure. It is on this basis on which the Commissioner made his decision in the Esther Boyle Eyler case. Obviously, as a result of the revision of the Tenure Laws in 1962, wherein N.J.S.A. 18A:28-5 was written so as to provide a tenure status for vice principals, the decision could not rest on the same basis today.***"
> (Petitioners' Letter Memorandum, at p. 2)

The Commissioner likewise notes that respondent's arguments relative to the middle school in Piscataway having been traditionally viewed as a junior high school are without merit.

The Commissioner notes with approval the analysis provided by Judge Campbell relative to the absence of a category designated middle school principal within N.J.A.C. 6:3-1.10(k) and incorporates same herein by reference. The Commissioner is further constrained to observe that N.J.A.C. 6:27-1.2(a) classifies secondary schools as follows:

> "(a)***
>
> Grades 7 to 9 inclusive, junior high school;
>
> Grades 10 to 12 inclusive, senior high school;
>
> Grades 7 to 12 inclusive, six-year high school;
>
> Grades 9 to 12 inclusive, four-year high school;
>
> "(b) Partial high schools shall not be eligible for approval." (Emphasis supplied.)

The Commissioner notes that to serve as a vice principal an individual must be properly certified. N.J.S.A. 18A:26-2 As such, the vice-principal is authorized to function as an administrator whether in discipline, supervision or any other field expected of administration.

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

Assuming the correctness of the figures set down in the seniority list, the entitlements therein are adopted by the Commissioner.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

October 2, 1981

Pending State Board

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 134-81

AGENCY DKT. NO. 579-12/80A

IN THE MATTER OF:

MINNA KAPELL FRIEDMAN,
Petitioner,
v.
BOARD OF EDUCATION OF THE
BOROUGH OF LEONIA, BERGEN CO.,
Respondent.

Record Closed: July 7, 1981
Received by Agency: 8-18-81

Decided:
Mailed to Parties: 8-25-81

APPEARANCES:

Louis Bucceri, Esq., for Petitioner
(Goldberg & Simon, attorneys)

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

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

The request of Minna Kapell Friedman, a tenured teacher employed by the Board of Education of the Borough of Leonia, Bergen County, for a disability leave of absence was denied by the Board, which instead construed her absence from work beginning September 1980 as a resignation by abandonment. She alleged violation of her tenure rights and seeks restoration of employment in an uncompensated disability leave status. The Board denied the allegations and contended it acted properly to terminate petitioner's employment.

The petition for relief was filed in the Division of Controversies and Disputes of the Department of Education on December 22, 1980. The Board filed its answer on January 2, 1981. Thereafter, the Commissioner of the Department of Education transmitted the matter to the Office of Administrative Law on January 9, 1981 for hearing and determination as a contested case in accordance with N.J.S.A. 52:14F-1 et seq. A prehearing conference was conducted in the Office of Administrative Law on April 3, 1981 establishing a hearing date for June 8, 1981 at which time, the parties agreed, the matter should be addressed and disposed of on cross motions for summary disposition in accordance with N.J.A.C. 1:11-3.1 et seq, on pleadings, stipulations, exhibits and memoranda of law. At the request and/or with the consent of the parties, the hearing date was continued to July 7, 1981, at which time the record was closed.

STIPULATIONS AND FINDINGS OF FACT

1. On August 27, 1980, petitioner wrote the president of the Board of Education asking for a leave of absence for one year "due to an emergency family problem." The letter expressed her regret she would be unable to return to school on September 2, 1980.

2. On September 2, 1980, petitioner wrote to the Superintendent of Schools making the same request. She said her babysitter informed her on August 27, 1980 she was moving out of the state. Petitioner said she was therefore left with no one to care for her children. Her husband was ill and she was filled with worry and concern. She felt she was unable to do a good job at the present time.

3. On September 4, 1980, petitioner's school principal wrote to her advising her it was upsetting that she had not notified the school or its answering service that she would not be present on September 2. The principal said the superintendent had tried to reach petitioner the previous week, but was unable to do so. He specifically requested that she call the school collect to advise when she would be returning.

4. On September 4, 1980, the superintendent wrote petitioner advising her that her request for a leave of absence would be discussed by the Board at a meeting to be held on September 9, 1980. He pointed out that Board policy required such leave requests to be made two months in advance. He noted she had said she was not home ill and that she had, therefore, taken three personal days although the negotiated agreement in force in the district only allowed three personal days during the entire year.

5. On September 5, 1980, the superintendent wrote petitioner to say her leave request had been forwarded to the Board and cautioning that if it were rejected by the Board she should be prepared to resume her duties on September 15,1980.

6. On September 9, 1980 at an emergency meeting of the Board, it voted to deny her request for a leave of absence. No reason was assigned by the Board to its denial.

7. On September 10, 1980, the superintendent informed her her request for a leave of absence had been denied by the Board. He directed her to return to school on September 15, 1980.

8. On September 12, 1980, Dr. Lawrence S. Jackmann, M.D., certified by letter "To Whom It May Concern" that petitioner was under his care and was suffering significant anxiety and depression as a result of a situational reaction ofadult life. He strongly recommended a leave of absence from work responsibility as a first step toward improving her situation.

9. On September 17, 1980, the superintendent wrote petitioner that the Board had again discussed her request for leave of absence based on her illness. He said the Board considered her request and the letter from her obstetrician. After

discussion, said the superintendent, the Board again determined to deny the leave request. He was instructed to tell petitioner to honor her employment contract and return to work immediately. He cautioned that if she refused, the Board would have to consider she had vacated her position and had in effect resigned.

10. On October 15, 1980, the superintendent wrote petitioner the Board felt she had abandoned her position. She was directed to return to work by October 21, 1980. Failing that, said the superintendent, the Board would have no recourse but to accept her resignation by abandonment.

11. On October 18, 1980, petitioner wrote the Board asking for a disability leave of absence based on advice of her psychiatrist, Leonard Kane, M.D., F.A.P.A., who certified on October 3, 1980 that she was under his care in psychotherapy and was suffering from marked anxiety reaction with a concomitant depression. He felt she was unable to work. He recommended she be given a leave of absence from work until such time as there was improvement in her condition.

12. On October 20, 1980, petitioner's attorneys wrote the superintendent enclosing a copy of her letter of October 18, 1980. Counsel asked the superintendent to regard its letter as a supplement to petitioner's previous request for a leave of absence dated August 27, 1980. Counsel cautioned that petitioner's position was that she was discriminatorily denied a leave of absence based on an analysis of "analogous" requests for leaves of absence made by other teachers in prior years, requests that were, counsel said, granted by the Board. Counsel denied petitioner was abandoning her position and alleged the Board could not consider her posture to be one of abandonment.

13. On November 12, 1980, the superintendent again directed petitioner to report for work and cautioned that if she did not return the Board would have no choice but to accept her resignation by abandonment.

14. On November 18, 1980, petitioner's attorneys again advised the superintendent petitioner was not abandoning her position, but was in fact disabled and was otherwise entitled to a leave of absence.

15. At its meeting of November 18, 1980, the Board formally acted to "accept the resignation of petitioner by abandonment."

16. The written policy of the Board of Education of the Borough of Leonia concerning uncompensated leaves of absence (Board Policy No. 331, J-17 in evidence) provides as follows:

UNCOMPENSATED LEAVE

The Board recognizes that in certain instances an employee may wish extended leave for personal reasons and that the district could benefit from the return of said employee. For that purpose the Board will promulgate policy for the award of uncompensated leaves of absence for reasons other than those specified by statute.

The Board reserves the right to specify the conditions when not otherwise covered by the terms of the negotiated agreement under which uncompensated leave may be taken.

A. Purpose:

Uncompensated leave may be taken for the following purposes: study, travel, special work assignment, restoration of health or such other good cause as may be approved by the Board.

B. Eligibility:

Uncompensated leave may be granted to tenured teaching staff members.

C. Application:

Request for uncompensated leave and the reason therefor shall be made to the Superintendent at least two months in advance of the desired start date. Special consideration will be given to emergencies; leave should start at the start of the school year. All applications are subject to final approval by the Board.

D. Period of Leave:

An uncompensated leave may be granted for a maximum of one school year.

E. Commitment of Employee:

The employee shall observe the reason given for the leave; should the leave be used for other than the stated reason the Board may terminate the leave. The employee shall inform the Board within 60 school days of the scheduled return date as to his/her intentions. If said notification is not received, action shall be taken to terminate employment.

F. Commitment of Employer:

At the expiration of the uncompensated leave, the employee shall be offered a position for which she/he is certified. Time on uncompensated leaves shall not count as time on the job.

Course credit obtained during uncompensated leave may be applied toward credit on the salary schedule. While on uncompensated leave, an employee may be entitled to three months insurance benefits at the discretion of the Board.

STATEMENT OF ISSUES

At issue are the following:

A. Whether the Board properly construed petitioner's conduct and actions as an abandonment of position. Should it have certified tenure charges instead?

B. Was the Board obligated to honor petitioner's requests for emergency or disability leaves?

C. May a Board arbitrarily refuse a request for disability leave?

D. If not, was the Board's refusal here arbitrary?

DISCUSSION

Resignation, it is said (77 CJS 311), is a term of legal art, having legal connotations that describe certain legal results. It is characteristically the voluntary surrender of a position by the one resigning made freely and not under duress, and the word is defined generally as meaning the act of resigning, or giving up, as a claim, possession or position. And it is said further, generally (78 CJS 206, Schools and School Districts), that a contract of employment may be terminated by the employee's abandonment. But it seems clear under New Jersey School Law historically that not every abandonment can be unilaterally viewed as a resignation. In Smith v. Carty, 102 NJL 335 (E & A 1938), it appeared that a teacher was suspended by the Board of Education of her district on charges that the Board after a hearing credited. The teacher was dismissed and on appeal to the Commissioner of Education the dismissal was affirmed. The Supreme Court granted a writ of certiorari to review the judgement to the State Board of Education. The Board moved to dismiss the writ on the ground the teacher had applied for

and received the full proceeds of monies accredited and available to her in the teachers' retirement fund and that, therefore, by her withdrawal of these funds, she acquiesced in the action of the school board in dismissing her, and thus had abandoned her status as teacher. The court of Errors & Appeals rejected the argument, saying that the teacher's withdrawal of contributions to the pension fund was not the equivalent of abandoning her status as teacher. Such a view, said the Court, was a harsh one, one that would tend to support forfeiture, never favored at law, and potentially lead to serious injustice. Ibid, pps. 337-39 of 120 NJL. See also Walker v. Board of Education of Wild Wood, 120 NJL 408, 409 (Supreme Court 1938); and Driscoll v. Board of Education of Clifton, 165 N.J. Super. 241, 247 (App. Div. 1977), aff'd, 79 NJ 126 (1979) (a tenured teacher may only be involuntarily dismissed pursuant to N.J.S.A. 18A:6-10 et seq, the tenure employees' hearing law).

In Winters v. Board of Education of Freehold Regional High School District, 1971 SLD 403, the son of a deceased teacher brought an action against the Board alleging it had made an improper determination that decedent had abandoned his tenured employment. It appeared that the Board had unsuccessfully attempted to communicate with decedent about school opening through the mails. All its notifications were undelivered and returned to the Board. It developed that decedent had been seriously ill before his death and, in the opinion of his doctor, was so weakened he was unable to make an informed decision with respect to abandonment or continuance of his employment. Though the Board had intimated to the Commissioner the possibility of its preferring charges against decedent before his death, it never had done so. Instead, the Board merely and unilaterally notified the Commissioner that the Board viewed all evidence to date as indicative of an abandonment of job. The Commissioner held that the statutory tenure status under N.J.S.A. 18A:28-5 was undisturbed at the time of his death, no charges had been brought against him by the Board, nor had he been suspended from duty. In such an instance, said the Commissioner, the Board had a heavy duty to prove conclusively that an employee had abandoned his duties. He found the evidence in the case did not support such a conclusion. Ibid. at p. 408.

Applying such criteria to the facts of this case, I have little difficulty in concluding that the Leonia Board's unilateral declaration that petitioner here had resigned by abandonment was entirely misplaced and, therefore, erroneous as a matter of law. The record stipulated here shows clearly and consistently that petitioner repeatedly disavowed any intention to resign her position. Justification in her defiance of orders to return to

work aside, it seems clear, furthermore, that the Board was in no sense bereft of remedy against petitioner for such defiance. It could have but did not, for example, seek to have petitioner examined by a physician under powers given the Board in N.J.S.A. 18:16-2, 4 or N.J.S.A. 18A:30-4. Principally, however, the Board could have but did not invoke its powers and remedies under N.J.S.A. 18A:6-10 et seq the tenure employees hearing law, involuntarily to dismiss petitioner for inefficiency, incapacity, unbecoming conduct, or other just cause. The Board's action in unilaterally construing petitioner's defiance as ostensible or tacit resignation seems especially egregious in the face of opinions from two doctors that petitioner was emotionally disabled and incapable of a return to work. There is no suggestion in this record that the Board did more than reject such opinions out of hand. Whether those opinions were valid or invalid, they at least should have served the purpose of putting the Board on notice that petitioner in no way intended to abandon her position. The Board's action, therefore, constituted an abridgment of petitioner's tenure rights and cannot stand.

The Board's persistent rejection of petitioner's numerous requests for uncompensated leave of absence on grounds of disability, moreover, seems especially harsh in view not only of the medical opinions supporting the requests but as well in view of the Board's own written policy, no. 331. No reason whatever was assigned by the Board for rejection, yet the Board expressly recognizes that in certain instances employees may wish extended leave for personal reasons. Uncompensated leave may be taken, said the Board, for purposes of, among other things, restoration of health or such other good cause as may be approved by the Board. The Board reserved to itself the right to specify the conditions under which such uncompensated leave of absences might be taken. On a return from leave, employees are required to inform the Board within 60 school days of their scheduled return and as to their intention to return. The policy specifies that should such notification not be received, the Board shall take action to terminate the employment. The implication seems clear that such action may only be taken by institution of tenure charges in the usual way but not, perhaps, by the mode of a unilateral declaration of abandonment.

In Seamans v. Bd. of Ed. Twp of Woodbridge, 1968 SLD 1, a local civic organization appealed denial of its application to the Board for permission to use a school auditorium for a public debate. Though statute law (R.S. 18:5-22, now N.J.S.A. 18A:20-34) enabled and the Board's own written policy permitted use of such school facilities when

not otherwise required for school purposes, the Board refused the request but did so without assignment of reasons except to say denial was "in the best interest of the Community." The Commissioner found the refusal arbitrary for that reason, set it aside and ordered the Board to grant the use, saying (at p.6):

> ... a statement (that denial is in the best interest of the Community) is not a reason at all; rather it is a conclusion that must be founded on reasons. In this case, the reasons are unstated and may not be speculated. The question of the validity of reasons in cases mentioned by petitioners cannot be examined here, for there are no reasons to be examined. While it might be argued the matter should therefore be remanded to the Board for a clear statement of its reasons, if such there be, the Commissioner finds that under the circumstances no purpose would be served thereby...

Seamans was followed shortly afterward by an apposite holding on similar facts in Mears v. Bd. of Ed. Town of Boonton, 1968 SLD 108, 111:

> In the instant matter it is as impossible for the Commissioner to examine respondent's reasons for its denial of petitioners' application as it was in Seamans, for no reasons are, or ever have been, effectively given. While the testimony of one Board member as to his reason for changing his position at the time of the second vote is enlightening as to him, the absence of a record of the roll call on either vote gives no warrant for a conclusion that his reason became the sole determinant of the outcome of the second vote, when granting the application was clearly defeated. The Commissioner must therefore find, as he did in Seamans, supra, that respondent has acted arbitrarily and that its action must therefore be set aside.
>
> The determination herein, in Seamans, suggests the need for a word of caution to boards of education. 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 decision, 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. Neither in Seamans nor in the present matter could the Commissioner find such reasonable basis, and he therefore was impelled to the conclusion that the Board's action was unreasonable and arbitrary.
>
> The Commissioner finds and determines that because of the absence of any indication that there is a reasonable basis for the exercise of its discretion, respondent's denial of its facilities to petitioners, as requested, will be set aside. He directs respondent to grant to petitioners the use of the Boonton High School auditorium in accord with petitioners' application therefore, and in accord with respondent's rules and regulations governing such use.

And so here, the Board's action in rejecting this petitioner's request for uncompensated disability leave of absence, standing as it does without assignment of reasons, is arbitrary and cannot stand. And, as in Seamans (ibid p.6), under the circumstances that the Board here at least twice formally rejected plaintiff's request without reason almost a year ago, that the record here in litigation is likewise barren of justification for the Board's action and that petitioner's supporting medical opinions on diagnosis and prognois for restoration of health remain presumptively uncontradicted, there appears no purpose to be served in a remand to the Board by the Commissioner now for assignment of reasons.

CONCLUSION

Accordingly, I **CONCLUDE** the action of the Board of Education of the Borough of Leonia in unilaterally declaring its resolution to accept petitioner's resignation by abandonment should be, and it is hereby **INVALIDATED** and **REVERSED.** Correspondingly, I hereby **ORDER** petitioner's status as a tenured teaching member be, and it is hereby **RESTORED** and **AFFIRMED.**

I hereby further **ORDER** the action heretofore taken by the Board of Education of the Borough of Leonia in rejecting without assignment of reasons petitioner's request for uncompensated disability leave of absence be, and it is hereby **INVALIDATED**

and **REVERSED.** Petitioner's request therefore, under the circumstances, is hereby **GRANTED** nunc pro tunc as of date of rejection, **SUBJECT,** nevertheless, to policy no. 331, Uncompensated Leave, of respondent Board of Education of the Borough of Leonia and the procedures, standards and limitations contained therein.

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.

August 14, 1981
DATE

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

August 18, 1981
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

Aug 25, 1981
DATE

Ronald I. Parker
FOR OFFICE OF ADMINISTRATIVE LAW

db

EXHIBITS MARKED IN EVIDENCE

EXHIBIT NO.	DESCRIPTION
J-1	Letter from M. K. Friedman to Dr. Johanna Meskill, August 27, 1980
J-2	Letter from M. K. Friedman to Dr. Charles Murphy, September 2, 1981
J-3	Letter from R. Anagnostis to Mr. K. Friedman, September 4, 1980
J-4	Letter from C. J. Murphy to M. K. Friedman, September 4, 1980
J-5	Letter from C. J. Murphy to M. D. Friedman, September 5, 1980
J-6	Letter from C. J. Murphy to M. K. Friedman, September 10, 1980
J-7	Letter from Dr. H. S. Jackman to "To Whom it May Concern", September 12, 1980
J-8	Letter from C. J. Murphy to M. K. Friedman, September 17, 1980
J-9	Letter from C. J. Murphy to M. K. Friedman, October 15, 1980
J-10	Letter from M. K. Friedman to C. J. Murphy, October 18, 1980, with enclosed letter from Dr. L. Kane to "To Whom It May Concern", October 3, 1980
J-11	Letter from Theodore M. Simon, Esq., to C. J. Murphy, October 20, 1980, with enclosures set forth in J-10
J-12	Letter from C. J. Murphy to M. K. Friedman, November 12, 1980
J-13	Letter from Theodore M. Simon, Esq., to C. J. Murphy, November 18, 1980
J-14	Letter from C. J. Murphy to M. K. Friedman, November 19, 1980
J-15	Board of Education Minutes, September 9, 1980
J-16	Extract of Board Minutes, November 18, 1980
J-17	Board Policy No. 331 entitled " Uncompensated Leave"

MINNA KAPELL FRIEDMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF LEONIA, 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 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 action of the Leonia Board of Education in rejecting without reason petitioner's request for an uncompensated disability leave of absence is set aside. Petitioner's status as a tenured teaching staff member is affirmed. Petitioner's request for uncompensated leave pursuant to Board policy shall be considered by the Board.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

October 2, 1981

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5626-80
AGENCY DKT. NO. 365-7/80A

IN THE MATTER OF:

JOAN JARRETT,
Petitioner
v.
BOARD OF EDUCATION OF THE BOROUGH OF WATCHUNG, SOMERSET COUNTY,
Respondent.

Record Closed: July 6, 1981
Received by Agency: 8-20-81

Decided: August 20, 1981
Mailed to Parties: 8-26-81

APPEARANCES:

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

Daniel C. Soriano, Jr., Esq., (Soriano & Gross, attorneys) for Respondent

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

Petitioner, a tenured science teacher employed by the Watchung Borough Board of Education (Board), appeals from an action of the Board during April 1980, eliminating her employment for the ensuing 1980-81 school year. Specifically, petitioner alleges that the Board's action was violative of her seniority rights, her right to engage in associational activity, the provisions of the Open Public Meetings Act, and the Board's own stated policy.

The Board, conversely, asserts that its action was in all points, legal, taken in good faith, and in no way violative of the rights of petitioner, who has been placed on a preferred eligibility list for reemployment as a science teacher.

PROCEDURAL RECITATION:

The Petition of Appeal and the Answer were filed respectively on July 24 and August 27, 1980, before the Commissioner of Education. Thereafter, the Commissioner transferred the matter for determination as a contested case to the Office of Administrative Law, pursuant to N.J.S.A. 52:14F-1 et seq.

Pursuant to a prehearing order dated December 15, 1980, the parties, on April 7, 1981, submitted a complete Stipulation of Facts with appended Exhibits A through D, thus obviating the need for a plenary hearing. Petitioner moved for summary decision. Briefing on the Motion was completed with receipt of Petitioner's Reply Brief on July 6, 1981.

RELEVANT FACTS:

The following are the relevant facts as stipulated by the parties:

During consideration of the budget for the 1980-81 school year, a recommendation was made to the Board to eliminate one full-time science teaching position at the Valley View School where petitioner was then teaching. At the public hearing on the budget on March 6, 1980, the Board adopted a resolution by a vote of 5-2 to staff the Valley View science position for the ensuing 1980-81 school year (Exhibit A). That resolution related to the position then held by Petitioner Jarrett. Nevertheless, on April 17, 1980, the Board, after hearing a recitation by its personnel committee, resolved, in open public session, to eliminate one science teaching position at its Valley View School (Exhibit B). The Superintendent then notified petitioner on or about April 21, by letter dated April 18, 1980, as follows:

> You are hereby notified that because of a reduction in force, one less science classroom teacher shall be required for the 1980-81 school year.
>
> Pursuant to N.J.S.A. 18A:28-11, it has been determined that you possess the least seniority within the category of science teacher;

> consequently, it becomes necessary to dismiss you as a tenured teaching staff member at the conclusion of this school year.
>
> Pursuant to N.J.S.A. 18A:28-12 and N.J.A.C. 6:3-1.10, your name has been placed upon a preferred eligible list for reemployment as a science teacher, and whenever a vacancy occurs in this position, you shall be reemployed by the Board of Education.
>
> Upon reemployment, full recognition shall be given to your previous years of service in the District.
>
> Please be assured that every possible effort shall be made by the Board to find you employment for the 1980-81 school year. In the meantime, should you require any further clarification or should you have any questions, please contact me. [Exhibit C]

The Board's meeting on April 17 was its regularly scheduled monthly meeting for which notice had been given to the public, pursuant to the requirements of the Open Public Meetings Act, N.J.S.A. 10:4-9. Neither petitioner nor the public had been furnished advanced notice that the issue of abolishment of a full-time science teaching position was to be considered by the Board at that meeting.

The respective years of service with the Board and the certification held by petitioner and two other properly certified science teachers who have taught science at the Board's Valley View School are as follows:

Petitioner Jarrett:

Standard N.J. Teacher of Science - issued December 1972

1972-1974	7&8 grades Science	(2 years)
1974-1977	7th grade Science	(3 ")
1977-1980	7&8 grades Science	(3 ")

Sylvio Marquis:

Standard N.J. Teacher of Biological Science - issued December 1971

1971-1974	7&8 grades Science	(3 years)
1974-1977	8th grade Science	(3 ")
1977-1981	7&8 grades Science	(4 ")

Elaine Hochheiser

Standard Elementary - issued September 1967
Standard N.J. Secondary School Teacher of Science - issued July 1968

1968-1978	6th grade	(10 years)
1978-1979	7&8 Language Arts	(1 year)
1979-1980	7&8 Language Arts and Social Studies	(1 ")
1980-1981	7&8 Language Arts and Science	(1 ")

[Exhibit D]

During the 1979-80 academic year, both petitioner and Sylvio Marquis taught four periods of science, including one period of N.F.L. Science, a course designed to give extra help to non-foreign-language pupils. N.F.L. Science was eliminated from the curriculum at Valley View School during the 1980-81 school year. Elaine Hochheiser taught two periods of science and four periods of language arts during the 1980-81 academic year at Valley View School.

Article X(A)(5) of the 1979-80 negotiated agreement between the Board and the Watchung Education Association provides as follows:

> All teachers shall be given notification of renewal or non-renewal of contract for the following school year no later than March 30th of each year, except that teachers employed after January 1st shall be given such notification no later than April 30th, and the teachers shall thereafter notify the Board of intention to accept or reject such contract, if offered, within two weeks after receipt of such notice.
>
> [Stipulation of Facts at p. 4]

DISCUSSION AND CONCLUSIONS:

OPEN PUBLIC MEETINGS ISSUE

Petitioner argues that failure on the part of the Board to notify her in advance of the April 17, 1980 meeting at which it voted to abolish one science position at Valley View School violated the provisions of N.J.S.A. 10:4-6 et seq.

Nothing in the stipulated facts states or implies that the Board, at any time, contemplated holding or did hold a closed meeting to discuss petitioner's employment. N.J.S.A. 10:4-12b(8), cited at length by petitioner, provides that a public body may

exclude the public from a closed meeting at which termination of employment of individuals is discussed "unless all the individual employees or appointees whose rights could be adversely affected request in writing that such matter or matters be discussed at a public meeting." However, neither petitioner's employment nor the abolishment of a science position was ever discussed in a private session of the Board. Accordingly, the cited statutory provision is inapplicable.

Petitioner also cites numerous cases, including Rice v. Union Cty. Reg. High School Bd. of Ed., 155 N.J. Super. 64 and Dudek v. Willingboro Board of Education, L-56650-78 (Law Div., November 13, 1979), aff'd, o.b. A-1596-79 (App. Div., November 13, 1979). Those cases, however, are factually distinguishable, since in both instances, in sharp contrast to the instant matter, the respective Boards of Education had held closed session meetings which gave rise to points in litigation.

In the instant matter, the Board's meetings of March 6 and April 17 were open public meetings, properly advertised for the conduct of business. No Board discussions which affected petitioner's employment were held in private. The opinion of the State Board of Education in Alan Schwartz v. Board of Education of Ridgefield, 1980 S.L.D. _____ (decided State Board, October 1, 1981) addressed the requirements in such circumstances. Therein, the State Board, in reversing the Commissioner's holding that Schwartz had been entitled to prior written notice of action on his employment contemplated at an open public session, stated:

> The meeting of February 8, 1979, had been regularly scheduled and was one of the meetings of which notice was given to the public in the initial annual notice of its schedule of regular meetings. The key question, therefore, is whether any further notice of that meeting or of action to be taken thereat was required to be given to Petitioner or anyone else who might be affected by the Board's reorganization of its administrative structure. The answer is clearly in the negative. N.J.S.A. 10:4-8(d) specifically provides that:
>
> > "where annual notice or revisions thereof in compliance with section 13 (N.J.S.A. 10:4-18) of this act sets forth the location of any meetings, no further notice shall be required for such meeting."
>
> Construing that section, several decisions have held that nothing in the Open Public Meetings Act requires an individual notice to any particular individual who may be affected by a contemplated Board action, nor need an agenda be published prior to a regularly scheduled meeting. Crisfasi v. Governing Body of Oakland,

156 N.J. Super. 182 (App. Div. 1978); LaFranz v. Weehawken Board of Education, 164 N.J. Super. 5 (App. Div. 1979); Cole v. Woodcliff Lake Board of Education, 155 N.J. Super. 398 (Law Div. 1978).

Schwartz, supra, is controlling in this area of case law. Accordingly, I **CONCLUDE** that in the instant matter, the Board did not act, as petitioner alleges, in violation of the Open Public Meetings Act in actions taken at the March 6 and April 17 meetings.

ISSUE OF RECISION OF THE BOARD'S MARCH 6 ACTION

Petitioner, asserting that the Board, having passed a resolution on March 6 not to eliminate a science teaching position at Valley View for the ensuing school year, established for petitioner an inviolable right to continue teaching in that position for 1980-81, cites, inter alia, the following cases: Carol Oxford v. Pohatcong Bd. of Ed., 1981 S.L.D. ___ (decided January 16, 1981); Agnes D. Galop v. Hanover Twp. Bd. of Ed., 1975 S.L.D. 358; Paul J. McCormick v. Hunterdon Central Reg. Bd. of Ed., 1978 S.L.D. 160; Robert Anson, et al. v. Bridgeton Bd. of Ed., 1972 S.L.D. 638.

In Anson, supra, and Galop, supra, the boards had voted at one meeting to fix salaries for ensuing years. At subsequent meetings, those same boards attempted to rescind those previously established salaries and set lower salaries for Anson and Galop. The Commissioner determined that the Boards were powerless to do so, since their prior action had created a contractual right to the higher salaries. Similarly, in McCormick, supra, where the Hunterdon Central Board had taken formal action to require that supervisory certificates be held by its department chairmen, the Commissioner held that that requirement was an important factor in determining that McCormick was tenured as a department chairman. In Oxford, supra, the Commissioner held that, after the Pohatcong Board had granted Oxford a maternity leave for the specified time she had requested, the Board could not unilaterally lengthen the time of the sick leave it had already approved.

Each of the cited cases, however, is factually distinguishable from the facts in the instant matter. Herein, the Board, after discussion at the annual public hearing on the budget on March 6, voted not to eliminate a science position at the Valley View School. The action taken at that meeting indirectly involved petitioner only to the extent that she

was one of two teachers of science at that school. She was not mentioned in the Board's March 6 resolution. Nor was she then noticed by the Board that she would or would not be employed in the ensuing year. Nor was the Board required by education law to give such notice to her at that time, since she, as a tenured employee, had entitlement to continued employment as long as her seniority and continued satisfactory service entitled her to any existing position on the Board's teaching staff. Accordingly, I **CONCLUDE** that the Board's action on March 6 created neither more nor less entitlement to continued employment than she previously had enjoyed.

The Board, as a quasi-municipal body, is empowered to do only those things which it is mandated to do or permitted by law to do. In the area of permissive authority, it is specifically empowered to reduce its staff by 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 or for other good cause upon compliance with the provisions of this article. [Emphasis supplied.]

In Mildred Wexler v. Hawthorne Bd. of Ed., 1966 S.L.D. 309, aff'd. State Board of Education 314, the Commissioner held that N.J.S.A. 18A:28-9:

> . . . places no limitation on the time when a board of education may effectuate a reduction in teaching staff for reasons of economy or other good cause. . . .

The Commissioner in Arthur L. Page v. Trenton Bd. of Ed., 1973 S.L.D. 704, holding that good reason was not shown for the Trenton Board's action on August 14, 1973, eliminating Page's administrative position, ordered Page restored to an administrative position. By contrast, in Marianne H. Polaski v. Burlington County Voc. Bd. of Ed., 1977 S.L.D. 346, the Commissioner, noting no showing of bad faith, but finding compelling reasons for reduction of Board expenditures, approved a Board's action removing Polaski on August 12 from her librarian's position less than one month prior to the opening of school.

The facts in the instant matter are similar to those in Polaski, supra. The Board's personnel committee, after several meetings with administrators in April,

concluded and reported to the Board on April 17 that not only would an additional teacher be needed at its Bayberry School, but that there was a strong possibility that a second additional teacher could be needed for the ensuing year. Accordingly, the committee recommended and the Board voted to eliminate the ten periods a week which seventh and eighth grade science teachers were assigned to science program development at the sixth grade level, and to eliminate its N.F.L. science offering. The resulting change was one well within the ambit of the Board's management prerogative. It was arrived at only after careful and prolonged study, as attested to by that portion of the personnel committee's report which states: "We have spent many hours, and personally, I can say, many sleepless nights examining the many facets of the problem. . ." (Exhibit B). The Board's decision, made in April, was timely by contrast to the Trenton Board's decision in Page, supra. There was rational basis for the Watchung Board's action, as contrasted to the Verona Board's capricious action in June dismissing a teacher with whom it had executed a contract in March for the ensuing school year. David Payne v. Verona Bd. of Ed., 1976 S.L.D. 543, aff'd State Board 1976 S.L.D. 554, aff'd N.J. Super. (App. Div.) 1977 S.L.D. 1304, cert. den. 75 N.J. 602 (1978). That rational basis lay in the Board's managerial right to revise its curriculum and to respond to financial pressures necessitating additional teachers in the lower grades. The Commissioner, in Mary Ann Popovich v. Wharton Bd. of Ed., 1977 S.L.D. 440, similarly upheld the Wharton Board's right in April to respond to a financial crisis by revising its curriculum and eliminating a teaching position which had been provided for in its budget adopted in March.

I **CONCLUDE** that in the instant matter, the Board's action on April 17, rescinding its prior action of March 6 and noticing petitioner that she would not be reemployed in the ensuing year, were not, as she charges, arbitrary, capricious, in bad faith, or taken in complete disregard of her rights. I further **CONCLUDE** that the Board's negotiated agreement requiring that all teachers be given notification of their employment status for the ensuing year by March 30 did not, and could not, supersede the Board's statutory right under N.J.S.A. 18A:28-9 and N.J.S.A. 18A:11-1 to manage its schools by revising its curriculum and effecting economy by eliminating a teaching position.

THE SENIORITY ISSUE

It remains to determine whether petitioner had more or less seniority than the two teachers who taught science during the 1980-81 school year.

Petitioner was certified only in science, so she could not and does not lay claim to a teaching position requiring an elementary teacher certificate. Her services to the board as a science teacher as of June 30, 1980 totaled eight years. Petitioner recognizes that this was less than the ten years of seniority of Sylvio Marquis who had taught seventh and eighth grade science for nine years as of June 30, 1980. Accordingly, she lays claim to continued employment during 1980-81 only by reason of the facts pertaining to the employment of Elaine Hochheiser, who was assigned to teach a schedule including seventh and eighth grade language arts and science during 1980-81. Hochheiser, who had not taught science for the Board prior to September 1980, is certified as both an elementary teacher and a teacher of science. Her seniority in the district, by reason of her teaching self-contained sixth grade classrooms for ten years and departmentalized seventh and eighth grade language arts for two years, totaled 12 years as of June 30, 1980.

The applicable State Board Rules on seniority, promulgated pursuant to N.J.S.A. 18A:28-10, are as follows:

> 6:3-1.10 Standards for determining seniority
>
> . . . (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. . . .
>
> . . . (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 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;
>
> 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.

N.J.A.C. 6:3-1.10(k) provides that persons teaching in grades seven and eight, whether the classes are self contained or departmentalized, gain seniority for each year of teaching service. Petitioner accrued, under her secondary teacher certification, eight years of seniority in the category of secondary teacher. Hochheiser gained ten years of seniority in the category of elementary teacher in self-contained sixth grade classrooms from 1968-1978. Thereafter, she taught two years in the Board's departmentalized seventh and eighth grades. Since she taught those two years in the areas of language arts and social studies, without secondary certification in those subjects, she did so in the category of elementary teacher, thus gaining a total seniority of twelve years in the category of elementary teacher.

Hochheiser was subject to reassignment by the Board at all times during her twelve years of employment to teach science or any other departmentalized subject in grades K-8. When the Board was faced with adjusting its staffing for September 1980, it determined that Hochheiser was entitled by reason of twelve years of seniority as an elementary school teacher, to continued employment. Petitioner disagreed, claiming that her eight years seniority under her secondary certificate as a specialist in science superseded that of Hochheiser who had not previously taught for the Board under her own secondary teacher of science certification. This claim is unfounded, since the seniority rules give no precedence to the category of secondary teacher over the category of elementary teacher.

Those who teach in the category of elementary teacher, N.J.A.C. 6:3-1.10(k)28, at any elementary grade level, may be and commonly are required to teach science. It must be assumed that, in this scientifically oriented age, Hochheiser was

required to do so for ten years while she taught self-contained sixth grade classes. Given her twelve years of teaching experience and her certification in secondary science, I **FIND** no valid logic in petitioner's assertion that Hochheiser's assignment by the Board in September 1980 to teach two sections of seventh and eighth grade science threatened the thoroughness and efficiency of the Board's elementary school educational program.

The numerous cases cited in petitioner's Briefs are not controlling and do not support her assertion that her seniority is greater than that of Hochheiser. Petitioner, as of June 30, 1980, had accrued only eight years of seniority in the Board's elementary school and could have been assigned only in the field of her certification which was science. Hochheiser, by contrast, accrued twelve years of seniority in the category of elementary teacher and could be assigned to any subject matter area, including science, for which she was certified.

Any seniority gained by a teacher in the seventh and eigth grades, whether in the elementary category or the secondary category must be evaluated and compared on the basis of total length of service. That a Board may assign teachers with elementary certification to teach subjects for which special certificates are issued is amply illustrated by the Commissioner's decision in Mary Ann Popovich v. Wharton Bd. of Ed., 1977 S.L.D. 440. Therein, the Commissioner, approving the Wharton Board's abolishment of its program of music instruction by certified music teachers to meet a financial crisis, stated:

> . . . [T]he Commissioner finds it lamentable that circumstances have so conspired that the Board deemed it necessary to abolish both positions of its professional music instructors thus depriving pupils of their ministrations. The record is clear that the Board is actively moving to establish an alternative program of vocal music instruction utilizing its elementary classroom teachers. Similarly, it is expending limited funds and making its facilities available for instrumental instruction and a band activity during the summer and extracurricular hours. The effectiveness of such programs will routinely come under the scrutiny of the monitoring procedures mandated by the State Board and the Commissioner in the rules for a Thorough and Efficient System of Free Public Schools, N.J.A.C. 6:8-1.1 et seq.
>
> The Commissioner finds no violation of either the statutes or rules of the State Board. Absent a finding that the Board acted in bad faith, punitively in reprisal, arbitrarily, capriciously or in subter-

> fuge, the Board's determination must stand, however regrettable may be the diminution of its instructional program. The Commissioner so holds.

I **CONCLUDE,** on the basis of a careful review of the statutes, State Board Rules and existing case law, that petitioner's seniority entitlement (eight years) on June 30, 1980, to continue to teach science in the Board's seventh and eighth grades was less than the seniority entitlement of Elaine Hochheiser (twelve years) to teach science in the Board's seventh and eighth grades.

DETERMINATION:

Having concluded that petitioner had less seniority than both Sylvio Marquis and Elaine Hochheiser, that the statutory right of the Board to revise its curriculum and eliminate a teaching position supersedes any negotiated agreement, that the Board's actions were neither arbitrary, capricious nor taken in bad faith, and that there was no violation of the Open Public Meetings Act, it is **DETERMINED** that petitioner has failed in her burden of proving that the Board's action was illegal or violative of her rights. Accordingly, it is **ORDERED** that the relief she seeks in the form of reinstatement to her teaching position with benefits retroactive to September 1980 be and is **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 5626-80

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

August 20, 1981
DATE

Eric G. Errickson
ERIC G. ERRICKSON, ALJ

Receipt Acknowledged:

August 20, 1981
DATE

Stephen Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

Aug 26, 1981
DATE

Ronald I Parker T3
OFFICE OF ADMINISTRATIVE LAW

plb

JOAN JARRETT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WATCHUNG, 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.

Petitioner excepts to the conclusion by the Honorable Eric G. Errickson, ALJ that the action of the Board at its meeting of April 17, 1980, wherein it voted to abolish one science position at Valley View School, did not violate the provisions of N.J.S.A. 10:4-6 et seq. Petitioner further excepts to the determination by Judge Errickson that her seniority entitlement was less than that of either of two other properly certified science teachers at Valley View School. Respondent's reply exceptions refute those of petitioner and affirm the initial decision. The Commissioner agrees with respondent.

An examination of the relevant facts herein convinces the Commissioner that the Board did not at any time hold closed session meetings to discuss petitioner's employment. Its actions were taken at open public meetings, properly advertised for the conduct of business. The cases cited by petitioner are inapposite to the matter at hand.

The Commissioner finds no merit in petitioner's claims of seniority entitlement over Hochheiser. Petitioner on June 30, 1980 had seniority of only eight years, or less than the twelve years' seniority of Hochheiser, to teach science in the Board's seventh and eighth grades. The Commissioner so holds.

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

October 5, 1981

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5174-80

AGENCY DKT. NO. 321-7/80A

IN THE MATTER OF:

WYCKOFF EDUCATION ASSOCIATION,
Petitioner
v.
WYCKOFF BOARD OF EDUCATION,
AND THE BERGEN COUNTY
SUPERINTENDENT OF SCHOOLS,
Respondents.

Record Closed: July 7, 1981
Received by Agency: 8-21-81

Decided: August 21, 1981
Mailed to Parties: 8-26-81

APPEARANCES:

Sheldon H. Pincus, Esq., (Goldberg & Simon, attorneys) on behalf of the Petitioner

Mark G. Sullivan, Esq., (Sullivan & Sullivan, attorneys) on behalf of the Respondent

Kathleen Duncan, Deputy Attorney General, (James R. Zazzali, Attorney General of New Jersey) for the Bergen County Superintendent of Schools

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

The Wyckoff Education Association (Association) challenges the action of the Wyckoff Board of Education (Board) and, by amended petition, the action of the Bergen County Superintendent of Schools (County Superintendent) which permits persons

employed by the Board as "clerical aides" to perform certain duties the Association alleges may only be performed by certificated school nurses. The Board asserts the Association lacks standing to bring the action and that, regardless of standing, the claim presented is barred through the application of res judicata. The County Superintendent seeks summary decision on the merits by way of dismissal of the complaint as to him. The County Superintendent also joins in the Board's assertion that the issues presented are barred from litigation through the application of res judicata and, he adds, collateral estoppel.

The Commissioner transferred the matter to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14 F-1 et seq. The parties filed briefs in support of their respective positions on the issues of standing, res judicata and related claims, and application for summary decision.

The uncontroverted and essential facts of the matter necessary for disposition of the legal defenses and summary decision motion are these:

The Association and the Board were involved in a similar matter on an earlier occasion. [See, Wyckoff Education Association v. Wyckoff Board of Education, OAL Dkt. EDU 901-79 (January 30, 1980), adopted, Commissioner of Education (March 17, 1980).] There, the Association alleged that the Board, contrary to N.J.S.A. 18A, Education Law, and the rules of the State Board of Education codified at N.J.A.C. 6:1-1 et seq., "... assigned and continues to assign personnel [clerical aides] not properly certificated ... to perform school nurse duties contrary to [law] ..." (Wyckoff Education Association, supra, p. _____)

For at least five years prior to September 1978, the Board had employed four certified school nurses in its schools. There are five schools in the district. In the spring of 1978, one of the school nurses died and was not replaced. The Board began utilizing four clerical aides, in lieu of replacing the nurse. During the time that a nurse is not present, the clerical aide is in charge of the nursing office. These aides are not certified as school nurses.

Following a plenary hearing, it was found that the clerical aides employed by the Board did, in fact, perform the following duties:

*taking temperatures of pupils

*sending children who are ill home

*contacting parents of children who report to the school nurse's office they are ill

*applying band-aids to minor cuts

*applying ice packs

*washing minor cuts

*removal of splinters

*soothing bee stings

*treating nose bleeds

*applying ointment and/or cream (Ibid., p. 3)

It was further found that:

1. The clerical aides were performing duties which were not set forth in a job description or required by N.J.A.C. 6:11-4.9;

2. The Board had not adopted such a job description, which it must, pursuant to N.J.A.C. 6:11-4.9(c);

3. The Board failed to secure the approval of the Superintendent of Schools of the duties to be performed by its clerical aides.

This litigation concluded with a directive to the Board, adopted by the Commissioner, to

> immediately cease the practice of using clerical aides to perform duties in the school nurse's stead while the school nurse is away from that school. Should the Board determine to assign clerical aides to assist school nurses, it shall approve a job description specifying the duties to be assigned such aides. (OAL Dkt. EDU 901-79, at p. ____)

During February 1980, the Board adopted a job description for the clerical aides and included the heretofore mentioned duties therein. On or about March 24, 1980,

the Bergen County Superintendent of Schools approved the job descriptions, which permit the aides to be employed by the Board and to perform the duties of the job description.

This concludes a recitation of the uncontroverted basic facts of the matter. The legal claims of the Board as to standing and res judicata shall be addressed first, while the County Superintendent's motion for summary decision shall be considered last.

STANDING

The Board contends the Association does not qualify as an "interested person" under N.J.A.C. 6:24-1.1 because it does not have a direct and substantial interest in the subject matter of the controversy, which purportedly deals with health services for the children of the district. The Board argues the Association's rights, status and legal relations will not be affected by a determination of such controversy and cites Ricciardelli v. Board of Education of the City of Newark, 1979 S.L.D. (November 16, 1979) and Delaney v. Board of Ed. of the Twp. of Woodbridge, Middlesex County, 1980 S.L.D. _____ (January 31, 1980). In Delaney, a resident and taxpayer sought to challenge the appointment of individuals to positions of employment in the district. It was found that the petitioner was neither a candidate for such employment nor did he represent the two individuals involved. (Slip Opinion, at 5)

In Ricciardelli, a resident sought to challenge the transfer of school personnel. Standing was not found because the petitioner did not have any personal interest in the outcome of the dispute. That is not the case in the present matter. The Association has a direct, personal interest in protecting its members, the certificated school nurses in the Board's employ, because it has an interest in questioning the propriety of the Board's actions as those actions intimately and directly affect the Association's members.

In Winston v. Bd. of Ed. of So. Plainfield, 125 N.J. Super. 131 (App. Div. 1973), aff'd 64 N.J. 582 (1974), an association of teachers was found to have standing in a matter before the Commissioner of Education involving the nonrenewal of a nontenured teacher. That court stated:

> The concern of an exclusive representative of public employees with respect to matters touching their employment is tangible and genuine; it is an interest sufficient to enable such an entity to participate as a party in proceedings before the Commissioner and State Board of Education. N.J.A.C. 6:24-1.6; cf. Cresent Park Tenants Ass'n v. Realty Equities Corp. of N.Y., 58 N.J. 98 (1971). In consequence, it was error for the Commissioner of Education, . . . to have ruled that South Plainfield Education Association be dismissed as a party to the proceedings. [125 N.J. Super. at 142.]

This language and conclusion was specifically affirmed by the Supreme Court. 64 N.J. at 586.

The standing of the Association to pursue the claims in this case is based upon the possible impact that the decision may have on its members. Its status as a representative goes beyond the confines of the present dispute. "A final disposition of such claims might have an impact which transcends the personal interest of the individual claimant and have repercussions affecting other employees." Winston, 125 N.J. Super. at 142. The present case alleges the use of uncertified personnel to perform the duties of school nurses. It further challenges the validity of the approval of certain job descriptions by the County Superintendent of Schools. These issues go to the employment of, and delegation of duties to, individuals in the district. These are clearly matters within the scope of the Association's status as a representative of employees. Since the matter intimately affects the employment of certain of its members, the Association has standing.

The Commissioner has consistently permitted employee organizations to represent the claims of individual teachers in education law matters. See, Elmwood Park, supra; Newark Teachers Union, Local 481 v. Board of Education of the City of Newark, 1978 S.L.D. 908; North Bergen Federation of Teachers, Local 1060, et al., 1978 S.L.D. 218; Alfonsetti and Lakewood Education Association v. Board of Education of the Township of Lakewood, 1975 S.L.D. 297. Indeed, teacher associations have pressed claims for individual teachers relative to the withholding of increments. De Old and Verona Education Association v. Board of Education of the Borough of Verona, 1977 S.L.D. 1096; rev'd State Board of Education, 1978 S.L.D. 1006; Quay and Haddon Township Education Association, 1976 S.L.D. 118.

In Freehold Regional High School Education Association et al. v. Board of Education of the Freehold Regional High School District, 1978 S.L.D. 960, the

Commissioner held that the "petitioner has standing to bring the action as the president of the Association on behalf of the membership . . ." 1978 S.L.D. at 961. [Emphasis supplied.] The petitioner in the present case is raising a similar claim on behalf of its members. On this basis, standing exists.

In Board of Education of the Sussex County Vocational School District v. Board of Chosen Freeholders, Sussex County, 1979 S.L.D. _____ (May 30, 1979), aff'd State Board of Education 1979 S.L.D. _____ (November 8, 1979), "The Sussex County Vocational-Technical Teachers Association was granted leave to participate at the hearing as an intervening party whose members would be vitally affected should the Board close its school effective June 1, 1979." (Slip Opinion, at p. 2). The Association is protecting similar vital interests in this case. The Board, it is alleged, is utilizing clerical aides in an improper manner. The Association has the responsibility to guard against such Board action, as it impinges upon the employment of school nurses.

In Wyckoff Education Association v. Board of Education of the Township of Wyckoff, 1980 S.L.D. _____ (March 17, 1980), the Commissioner of Education approved the initial determination in which the Association was found to have standing to press claims as to the illegal use of clerical aides. The same reasoning applies in the present case. The Association is, in fact, found to have standing to press the action.

RES JUDICATA AND COLLATERAL ESTOPPEL

The Board, joined by the County Superintendent of Schools, anchors its argument that res judicata applies by virtue of the former case between the parties on the ruling of our Appellate Division in City of Hackensack v. Winner, 162 N.J. Super. 1, 27 (App. Div. 1978), modified 82 N.J. 1 (1980). The fact is, however, that no final judgment was made on the merits of the Association's allegation in the former case. The Board was merely directed to adopt a job description for its clerical aides and submit that description for approval to the Bergen County Superintendent of Schools. The Board complied with that directive. That the County Superintendent approved that description upon the advice of the Board's medical inspector gives rise to the allegation that he, the County Superintendent, abused his discretion by subdelegating authority delegated to him by State Board Rule N.J.A.C. 6:11-4.9(c) 2.

Res judicata may only be applied if each of its component elements has been met. There must be: (1) a final judgment by a tribunal of competent jurisdiction; (2) an identity of parties; (3) an identity of issues; and (4) an identity of causes of action.

As noted earlier, there has not in the first instance been a final judgment of the issues raised here by a court of competent jurisdiction. Consequently, I **FIND** the doctrine of res judicata does not apply. Finding that res judicata does not apply, I also must **FIND** that the Association is not collaterally estopped in regard to the complaint raised against the County Superintendent.

SUMMARY DECISION

Administrative agency procedures for the disposition of motions for summary judgment are now set forth in N.J.A.C. 1:1-13.1 et seq. The substantive law surrounding the grant or denial of the motion is that which has been articulated by the courts and administrative tribunals on many occasions. In the landmark case of Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67 (1954), it was held:

> The role of the judge . . . is to determine whether there is a genuine issue as to a material fact, but not to decide the issue if he finds it to exist. . . .
>
> The standards of decision governing the grant or denial of a summary judgment emphasize that a party opposing a motion is not to be denied a trial unless the moving party sustains the burden of showing clearly the absence of a genuine issue of material fact. . . .
>
> All inferences of doubt are drawn against the movant in favor of the opponent of the motion. [17 N.J. at 73-75.]

Petitioner asserts that the duties set forth in the job description for Clerical Aide II are duties which may only be assigned to properly certificated nurses. This, petitioner contends, is mandated by the provisions of N.J.S.A. 18A:40-1 and N.J.S.A. 18A:40-3.1, and/or N.J.A.C. 6:11-12.8 and N.J.A.C. 6:11-12.9. Those statutes and regulations provide as follows:

> N.J.S.A. 18A:40-1
>
> Every board of education shall employ one or more physicians, licensed to practice medicine and surgery within the state, to be known as the medical inspector or medical inspectors, and any

board, not furnishing nursing services under a contract pursuant to section 18A:40-3.1 shall employ one or more school nurses, and it may also employ one or more optometrists, licensed to practice optometry within the state, to be known as the school vision examiner or school vision examiners, and the board shall fix their salaries and terms of office.

Every board of education shall adopt rules, subject to the approval of the state board, for the government of such employees.

N.J.S.A. 18A:40-3.1

Every person employed as a school nurse, school nurse supervisor, head school nurse, chief school nurse or school nurse coordinator, or performing any school nursing service, in the public schools of this state shall be appointed by the board of education having charge of the school or schools in which the services are to be rendered and shall be under the direction of said board or an officer or employee of the board designated by it and the salary of such person shall be fixed by, and paid from the funds of said board according to law, except that the performance of school nursing services in any public school in this state may be continued, under any original contract or agreement entered into, prior to February 27, 1957, or under any renewal or modification thereof, during the term of such contract or agreement or renewal or modification thereof.

N.J.A.C. 6:11-12.8

(a) This certificate authorizes service as a school nurse in elementary and secondary schools, and the teaching of first aid, home nursing and areas related to health.

(b) Effective for new applicants to July 1, 1975, the requirements are:

1. Current license as a registered professional nurse in New Jersey;

2. One year of experience as a registered nurse, or graduation from an accredited college;

3. Evidence of completion of one of the following:

i. A college curriculum approved by the New Jersey State Department of Education as the basis for issuing this certificate; or

ii. A minimum of 30 semester-hour credits chosen from among the following areas including some study in each starred area and a total of at least 18 semester-hour credits in the starred areas:

(1) *School nursing including such areas as organization and administration of school nurse services and school health problems (minimum of four semester-hour credits);

(2) *Child and/or adolescent growth and development;

(3) *Mental health;

(4) *Foundations of education. This group includes such courses as history of education, principles of education, philosophy of education, comparative education and contemporary issues in education;

(5) *The public school program curriculum, methods, practices;

(6) *Public health including such areas as public health nursing, community health problems and communicable disease control;

(7) Sociology including such areas as applied sociology, family case work, education for family living, delinquency;

(8) Guidance and counseling;

(9) Psychology of the exceptional child;

(10) Supervised field experience in school nursing.

N.J.A.C. 6:11-12.9

(a) This certificate authorizes service as a school nurse in elementary, secondary and vocational schools, and teaching in areas related to health.

(b) Effective for new applicants after July 1, 1975, the requirements are:

1. Current license as a registered professional nurse in New Jersey;

2. A bachelor's degree based upon a four-year curriculum in an accredited college;

3. Successful completion of one of the following:

i. A college curriculum approved by the New Jersey State Department of Education as the basis for issuing this certificate; or

ii. A program of college studies, including:

(1) A minimum of forty-five semester-hour credits in general background courses including at least four of the following fields: English, social studies, science, fine arts, foreign language, mathematics, philosophy and psychology.

(2) A minimum of thirty semester-hour credits chosen from the following areas, including some study in each starred area and a total of at least twenty semester-hour credits in the starred areas:

(A) *School Nursing, including school health services and organization and administration of the school health program. (Minimum of six semester-hour credits.);

(B) *Child and/or adolescent growth and development;

(C) *Mental health;

(D) *Foundations of education. This group includes such areas as history of education, principles of education, philosphy of education, comparative education, and contemporary issues in education;

(E) *The public school program, including areas in curriculum, methods and practices;

(F) *Public health including such areas as public health nursing, community health problems and communicable disease control;

(G) *Human and Intercultural Relations. Studies designed to develop understanding of social interaction and culture change,

including courses such as the following: urban sociology, history of minority groups, intergroup relations, and suburban and inner-city problems;

(H) Guidance and counseling;

(I) Psychology of the exceptional child.

4. Student teaching;

5. Provisional Certificate: A provisional certificate to serve as a school nurse may be issued to an applicant who meets the following requirements:

i. Meets requirement I;

ii. Meets requirement II;

iii. Is within twelve semester hours of meeting requirements III and IV.

School districts are not required to hire a school nurse for every building. N.J.S.A. 18A:40-1 requires that a district employ at least one school nurse. N.J.S.A. 18A:40-3.1 provides for appointment and determination of salary by the local board of education of persons employed as school nurses or performing any school nursing service. The regulatory provisions describe the types of school nurse certificates available together with the requirements for acquiring them. The fact that the statute requires the employment of only one school nurse implicitly recognizes that, except in systems which have only one building, there will be times when the school nurse will not be in the building when the need for first aid care arises. It cannot be assumed that the Legislature and the State Board intended that at such times the nurse would be called to travel from whichever building she was in at the time in order to apply a band-aid or an ice pack or to perform any of the other routine first aid procedures set forth in the job description for Clerical Aide II.

Here, I find no material facts in dispute. The clerical aides perform the duties set forth above. The Association argues such duties may only be performed by school nurses.

There is no clear, definitive listing of duties which are to be performed solely by certificated school nurses set forth in State Board rules. Still, as teaching staff

members, N.J.S.A. 18A:1-1, it seems reasonable to presume that a school nurse should teach health classes or related classes. It also seems proper that a school nurse would conduct and interpret physical examinations of pupils, including hearing and vision tests; establish standing orders, on advice of the school medical inspector, for pupils with continuing afflictions, such as epilepsy and diabetes; participate actively in child study team meetings; and make decisions in regard to serious pupil injury or sudden illness.

The duties ascribed to the clerical aides here are not the kinds of substantive obligations as may be expected to be performed uniquely by certificated school nurses. Surely the stringent requirements for certification established by State Board rules, ante, are not intended to qualify one to take temperatures, send ill pupils home, apply band-aids, and so on. These latter kinds of duties, that is, those assigned clerical aides here, may not be seen as reserved for performance only by a fully certificated school nurse.

I **FIND** the duties performed by the aides are not in contravention of either the statutes or of State Board rules. I find such duties may not be seen as reserved for performance by school nurses. The clerical aides here are not replacements for certificated school nurses as was the case in Scrupski v. Warren Twp. Bd. of Ed., 1977 S.L.D. 1051.

Next, N.J.S.A. 18A:40-1 requires each board to employ a medical inspector. Pursuant to N.J.S.A. 18A:40-4, that physician is responsible for providing direction for the school nurse. With respect to the authority of the medical inspector, N.J.A.C. 6:29-3.1(a) specifically states:

> The medical inspector shall direct the professional duties or activities of the school nurse and shall compile and issue regulations governing professional techniques, the conduct of inspections or tests and the administration of treatment.

Under this authority, the Board's medical inspector advised the County Superintendent that the duties set forth in the clerical aide description could be performed by persons who successfully complete a first aid course provided by the district.

The County Superintendent, in accordance with his responsibility to approve position titles (N.J.A.C. 6:11-4.9), after having consulted with the Board's medical inspector, approved the job description in question.

The Association's complaint that the County Superintendent delegated his authority is, on its face, wholly without merit. The County Superintendent looked to the Board's medical inspector for advice, but it was he, the County Superintendent, who exercised his discretion to approve the job description.

Having found no material issue of fact in dispute and having found that (1) the duties of the Board's clerical aides are not duties which may be performed solely by certificated school nurses, (2) the Board is not in violation of the statutes or of State Board rules in regard to the duties assigned its clerical aides, and (3) the allegation that the County Superintendent abused his discretion in approving the job description is deficient, on its face, I **CONCLUDE** summary decision on the merits must be **GRANTED** the Board and the County Superintendent.

The Petition of Appeal is **DISMISSED.** The hearing dates of September 1, 2 and 3, 1981 are hereby cancelled.

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 5174-80

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

August 21, 1981
DATE

David B. McKeown
DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

August 21, 1981
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

Aug 26, 1981
DATE

Ronald I. Parker Jr.
OFFICE OF ADMINISTRATIVE LAW

plb

WYCKOFF EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
WYCKOFF BOARD OF EDUCATION AND THE BERGEN COUNTY SUPERINTENDENT OF SCHOOLS,	:	DECISION
RESPONDENTS.	:	

The Commissioner has reviewed the entire record of this matter including the initial decision rendered by the Office of Administrative Law, Daniel B. McKeown, ALJ.

The Commissioner observes that timely exceptions to the initial decision were filed by petitioner and the Respondent Board. He further observes that reply exceptions were filed by the Office of the State Attorney General, M. Kathleen Duncan, Deputy Attorney General, on behalf of the Bergen County Superintendent of Schools. N.J.A.C. 1:1-16.4a, b and c

The parties also rely on their post-hearing briefs, incorporated by reference herein, in support of their exceptions.

Petitioner excepts to the initial decision on the following grounds:

1. While it agrees with Judge McKeown's determination which holds that the instant matter is not barred by the doctrines of res judicata or collateral estoppel by virtue of an earlier decision rendered by the Commissioner in re: Wyckoff Education Association v. Board of Education of the Township of Wyckoff, decided March 17, 1980, the Association, however, argues that the ALJ erred in applying those facts in a binding manner in granting Summary Judgment herein. In reaching this determination petitioner complains that Judge McKeown effectively precluded its right to proceed to a plenary hearing on those issues of material fact disputed by the parties pertaining to the duties and functions of the Clerical Aides II approved by the Bergen County Superintendent of Schools as a result of the Commissioner's ruling in Wyckoff, supra.

More specifically, petitioner asserts that its allegations with respect to the propriety and legality of the duties of the Clerical Aides II, which are challenged in paragraph 6 of its Amended Petition, are issues of material fact controverted herein which may not be determined without a plenary hearing.

2. Petitioner maintains the granting of Summary Judgment in this matter is improper because of its allegation that the Bergen County Superintendent of Schools abdicated his authority under the applicable provisions of State Board regulations when he approved the job description of the Clerical Aide II position solely upon the advice he received in consultation with the Board's medical inspector who was the author of said job description.

Petitioner charges that Judge McKeown's determination to grant Summary Judgment deprives it of the legal right to challenge the administrative decision of the Bergen County Superintendent of Schools without the benefit of being afforded an adversarial hearing on the merits of this issue. Petitioner maintains that its right to cross-examine witnesses and challenge their credibility with respect to these material issues of fact should not be terminated through a grant of Summary Judgment. Judson et al. v. Peoples Bank and Trust Co. of Westfield et al., 17 N.J. 67 (1954); Bouley v. Borough of Bradley Beach, 42 N.J. Super. 159 (App. Div. 1956)

The Board in its exceptions also concurs with the initial decision of Judge McKeown on the merits of the instant matter. The Board does take exception, however, to the determinations reached by the ALJ with respect to the issues it raised pertaining to the Association's standing in this matter and the bar to petitioner by the application of the doctrine of res judicata. The Board maintains that the determinations made in regard to these issues are in error and misapplied by Judge McKeown in interpreting Wykoff, supra, and Winston v. Board of Education of South Plainfield, 125 N.J. Super. 131 (App. Div. 1973).

In reply to petitioner's exceptions, the Deputy Attorney General, on behalf of the Bergen County Superintendent of Schools, takes the following position:

1. Contrary to the conclusions reached by the ALJ herein, the doctrines of res judicata and collateral estoppel do operate to bar both the Association and the Board from relitigating the factual issues previously determined by the Commissioner.

The issues between the Association and Respondent Board raised in the first petition are substantially those raised herein. Consequently, even if the Commissioner's earlier decision were narrowly construed to leave unresolved the ultimate issue, whether clerical aides may assist school nurses by performing those duties specifically enumerated in the approved job description, the Association is barred by the doctrine of collateral estoppel from rejecting those facts established in the earlier decision. Those duties remain essentially the same. The Commissioner held that such duties may not be performed, absent an approved job description by the Bergen County Superintendent of Schools. (County Superintendent's Brief, at pp. 12-13)

Furthermore, the County Superintendent argues that if there were other duties which the Association alleges may have been performed outside the approved job description, the Association failed to file affidavits to that effect in opposing Summary Judgment in this matter, nor did it seek to raise this as an issue in the pre-hearing order wherein the Association was limited to "Issue B."

2. The doctrines of collateral estoppel and res judicata do not bar the Association's claims against the County Superintendent since he was not a named party to the earlier litigation. However, no additional issues of material fact were subsequently raised by the Association in the pre-hearing order.

3. In conclusion, the ALJ correctly found and determined to be without merit the Association's allegation that the County Superintendent's approval of the job description after consultation with the Board's medical inspector was an abuse of his discretionary authority.

The Commissioner has carefully reviewed the respective positions of the parties as set forth in their exceptions. In the Commissioner's judgment the exceptions taken by the parties herein do not warrant a conclusion other than that reached by Judge McKeown in his initial decision. The Commissioner so holds.

The Commissioner observes, in arriving at this determination, that the allegation, raised by the Association in its amended Petition, pertaining to those additional duties performed outside the job description was not framed as an issue in this matter and need not be considered.

Accordingly, the initial decision is hereby affirmed and Summary Judgment is granted in favor of respondents. The instant Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

October 5, 1981

Pending State Board

BOARD OF EDUCATION OF THE BOROUGH OF CARTERET, MIDDLESEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
W.P.H. AND A.L.H., on behalf of their son, W.H.,	:	DECISION
RESPONDENTS.	:	

For the Petitioner, O'Dwyer, Malone & Conover
(John F. Malone, Esq., of Counsel)

For the Respondents, W.P.H. and A.L.H., Pro Se

This matter has been opened before the Commissioner by Petition of Appeal introduced by counsel for the Carteret Board of Education (Board) seeking reversal of a decision of the Chief Classification Officer rendered on March 9, 1981 which accorded respondents tuition reimbursement for the 1980-81 school year in which W.H. attended the Avatar School.

The Board argues that the Chief Classification Officer's decision requires the expenditure of public funds as reimbursement to respondents herein for attendance at a private school not eligible to receive public school funds.

The Board further argues that the placement of W.H. at the private school facility was made in contravention of N.J.A.C. 6:28-1.9(e) which requires that there be no change of a pupil's status during the pendency of a request for a hearing without the expressed permission of the Office of the County Superintendent of Schools and the Bureau of Special Education and Pupil Personnel Services.

The Board further asserts that W.H. no longer attends the Avatar School, having been expelled from that facility on or about March 6, 1981.

Respondents herein assert that their decision to remove their son from the Holy Trinity School's program in Westfield where he had been placed by the Board's CST was an involuntary act growing out of the failure of the Board to discuss, consider or provide an alternate placement.

Respondents further contend that their representations before the Chief Classification Officer as to W.H.'s progress at the Avatar School were at all times accurate and truthful and

that those problems that led to W.H.'s suspension and ultimate expulsion from Avatar did not commence until December 1980, said problems being attributed by respondents to the onset of puberty.

Respondents contend finally that the appropriateness of Avatar as a placement is not the central issue, claiming instead that the central question remains the inappropriateness of Holy Trinity School as a placement for W.H.

In reviewing the record of the matter herein controverted, the Commissioner takes notice of the numerous procedural errors made by the Board's CST as recounted by the Chief Classification Officer and incorporated herein by reference. Notwithstanding such procedural errors, the Commissioner finds the classification officer's determination, that such error provided justification for respondents to unilaterally withdraw W.H. from placement in a state approved facility and place him in a private school not approved for the receipt of handicapped pupils, to be without authority in either statute or regulation. To the contrary, the Commissioner notes that N.J.A.C. 6:28-1.2 provides, inter alia, that:

> ***
>
> "'Free appropriate education' means special education and related services which conform to the following criteria:
>
> 1. The services are provided at public expense, under public supervision and direction***;
>
> 2. The services meet standards established by the State Department of Education***." (Emphasis supplied.)

Such criteria cannot obviously be met by a facility not authorized by the State Department of Education to provide services to classified pupils. The Commissioner further observes that N.J.A.C. 6:28-4.8 provides:

> "If an educationally handicapped pupil has available a free appropriate public education offered by a local school district and the parent chooses to place the pupil in a private school, neither the state nor the local public school district is responsible for the cost of the private school placement."

The Commissioner notes that he has previously ordered tuition reimbursement where he held that the failure of a local school district to meet its obligation to provide a "free appropriate public education" created circumstances so dire to the educational well-being of a handicapped pupil that the parental action of removal and placement in a private school setting could not be considered voluntary. See Board of Education of the Township of Ridgewood, Bergen County v. Arthur and Elyse Hecht, decided October 27, 1980. The Commissioner does not, however, perceive such circumstances to prevail in the instant matter. At the time of the initiation of the hearing process, W.H. was enrolled in an approved private school program for handicapped students at Holy Trinity School, provided at the expense of the Board, notwithstanding respondents' claim that such program was inappropriate for meeting his needs. Respondents' decision to remove W.H. from such program during the pendency of the very hearing process designed to determine its appropriateness represents a voluntary action on their part and thus nonreimbursable pursuant to N.J.A.C. 6:28-4.8 and certainly not reimbursable for attendance at a school which was not state approved or even a facility established for providing services to handicapped pupils.

Accordingly, the Chief Classification Officer's determination that respondents be accorded tuition reimbursement for the 1980-81 school year is hereby set aside. All other aspects of the classification officer's decision relating to classification and placement are affirmed and the Board is directed to comply with such procedures without further delay.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

October 13, 1981

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5998-80

AGENCY DKT. NO. 371-7/80A

IN THE MATTER OF:

MELVIN SANDERS

v.

EAST ORANGE BOARD OF EDUCATION

Record Closed: August 17, 1981 Decided: August 25, 1981

Received by Agency: Mailed to Parties:

APPEARANCES:

Robert M. Schwartz, Esq., for Petitioner

Melvin Randall, Esq., for Respondent

(Love & Randall, attorneys)

BEFORE **ELINOR R. REINER,** ALJ:

Petitioner, Melvin Sanders, filed a petition of appeal with the Commissioner of Education alleging that the Board of Education of the City of East Orange (respondent) violated his tenure rights pursuant to N.J.S.A. 18:28-5 as a result of a reduction in his salary.

After respondent filed an answer, 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.

Approximately two months after the petition of appeal was filed in the instant case, petitioner filed an unfair labor practice charge before the Public Employment Relations Commission (PERC). As a result of this action, the matter before the Commissioner of Education was held in abeyance until resolution was reached on the matter pending before PERC. Subsequently, petitioner withdrew the charge filed before PERC, asking that complete jurisdiction be given to the Commissioner of Education. Petitioner contended that inasmuch as the dominant issues in this matter pertain to his tenure rights, all the issues relating to this controversy are appropriately before the Commissioner of Education.

A prehearing conference was held in this matter on May 22, 1981, at which time the following issues were isolated:

1. Did respondent's action to reorganize the Hart Middle School constitute an abolishment of petitioner's position pursuant to N.J.S.A. 18A:28-9?

2. If so, could respondent reduce petitioner's salary if he still remained in the same category, elementary principal, pursuant to N.J.A.C. 6:3-1.10?

3. When respondent assigned petitioner to a ten-month position as principal from a 12-month principalship, and reduced his salary, did such a reduction violate N.J.S.A. 18A:28-5 et seq.? If so, to what remedy is he entitled?

The facts necessary to resolve this matter are not in dispute. The parties have stipulated to the following facts which this court adopts as its findings of fact.

On April 15, 1980, the East Orange Board of Education adopted a resolution that the William S. Hart Senior Middle School complex be separated into three (3) individual schools, each housing sixth-,seventh- and eighth-grade students.

The recommendation included that in the first year, Building C would house approximately 500 sixth-grade students; Building A and B would house seventh- and eighth-grade students, totalling approximately 600 students in each building. This process was to be implemented in phases beginning in the 1980-81 school year with said buildings converted into self-contained, structurally sound classrooms, starting with Building C. Each building was staffed for the 1980-81 school term administratively to include one principal, one assistant principal and one maintenance manager on a ten-month basis.

The petitioner, Melvin Sanders, was not reappointed to the position of principal of the Hart Middle School Complex, which was a 12-month principalship. However, Melvin Sanders was reappointed on April 15, 1980 as an unassigned principal at a salary of $33,159 per annum. On May 20, 1980, per resolution of the East Orange Board of Education, Melvin Sanders was assigned to the position of Principal of the Vernon L. Davey Junior High School, a ten-month principalship.

Petitioner's salary for the 1979-1980 school year was $37,312; his salary for the 1980-1981 school year was $33,159.

Clearly, pursuant to N.J.S.A. 18A:28-5, a tenured teaching staff member "shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member, or other just cause...." However, it is respondent's contention that inasmuch as its action falls within N.J.S.A. 18A:28-9, the reduction in petitioner's salary is justified. Petitioner asserts that respondent's action of April 15, 1980, wherein it reduced petitioner's work year from 12 months to ten months, and reduced his annual salary from $37,312 to $33,159, was not an action sanctioned by N.J.S.A. 18A:28-9. That statute provides as follows:

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

It is this court's opinion that In re Piscataway Tp. Bd. of Ed., 164 N.J. Super. 98 (App. Div. 1978), wherein the court construed the meaning of the above-quoted statute, is dispositive of the case at hand. There, the Piscataway Township Board of Education

adopted a resolution reducing the yearly term of employment of a number of members of the Association from 12 months to ten months, entailing a proportionate reduction in salary of such persons. The Association protested the action and filed an unfair practice charge with the Public Employment Relations Committee. The board asserted that its action was properly to be regarded as a reduction in work force, and that the Education Act expressly authorized it. In support of this position, the board cited N.J.S.A. 18A:28-9. The court in Piscataway disagreed and held that N.J.S.A. 18A:28-9 "recognizes only the right of a board of education 'to reduce the number of teaching staff members employed in the district', which may be done for reasons of economy or other good cause." When the board argued that economy motivated the action complained of and that there was no material difference between the board's right to cut staff and the right to cut months of service of staff personnel where the economy motive is common to both exercises, the court disagreed. The court determined that "while cutting staff pursuant to N.J.S.A. 18A:28-9 would be permissable unilaterally without prior negotiations..., there cannot be the slightest doubt that cutting the work year, with the consequence of reducing annual compensation of retained personnel who customarily, and under the existing contract, work the full year (subject to normal vacations), and without prior negotiation with the employees affected, is in violation of both the text and the spirit of the Employer-Employee Relations Act." Id. at 101.

The clear meaning of the Piscataway decision is that it is not a reduction in force to reduce the employment of an individual from a 12-month basis to a ten-month basis. In the instant case, petitioner, a principal, employed on a 12-month basis, was reassigned to similar duties as principal on a ten-month basis. While there is no doubt that the board of education had the right to reassign petitioner, it cannot escape the requirement of N.J.S.A. 18A:28-5 by calling the reduction in work year a reduction in force pursuant to N.J.S.A. 18A:28-9.

Respondent would have this court ignore the clear holding of Piscataway on the theory that petitioner's Middle School Principalship was, in fact, abolished. This court finds that argument, even if true, to exalt form over substance. The only difference in the two principalships, aside from the fact that the Middle School Principalship was on a 12-month basis and the Junior High School Principalship was on a ten-month basis, was that the former was denominated a Middle School Principalship while the latter a Junior High School Principalship. This difference in position did not carry with it a difference in salary. Thus, the relevant focus is the difference between a 12-month employment and a

ten-month employment, a difference which the court in Piscataway clearly held could not be justified as a reduction in force.[1]

It should also be noted that there were no facts presented which would substantiate the notion that the board's reorganization otherwise resulted in a reduction in force.

Based upon the above discussion and findings of fact, it is, therefore, **CONCLUDED** that respondent violated petitioner's tenure rights pursuant to N.J.S.A. 18A:28-5 by reducing his salary from $37,312 to $33,159.

Based upon the foregoing, it is, therefore, **ORDERED** that respondent reinstate petitioner to his former salary of $37,312.

It is further **ORDERED** that petitioner be compensated for any salary, benefits, or emoluments lost as a result of respondent's action in reducing his salary.

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[1] This is to be contrasted with cases such as Deily v. Bd. of Ed. of Jersey City, 1950-51 S.L.D. 44; Potter v. Bd. of Ed. of the Tp. of Berkeley, 1960-61 S.L.D. 167; Page v. Bd. of Ed. of Trenton, 1973 S.L.D. 704; Metzger v. Bd. of Ed. of Willingboro, 1979 S.L.D. ____ (Oct. 23, 1979), in which the reduction in force resulted in a transfer to another category, which transfer carried with it an attendant reduction in salary. Such cases are inapposite in that they deal with a situation in which an individual is paid less salary for performing duties in a different classification as a result of the abolition of his position in another classification.

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.

August 25, 1981
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

8/27/81
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

Aug 31, 1981
DATE

Ronald I. Parker
FOR OFFICE OF ADMINISTRATIVE LAW

db

MELVIN SANDERS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST 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 respondent's exceptions were filed in a procedurally incorrect manner, copies not having been filed with petitioner and, accordingly, not considered by the Commissioner.

An examination of the record herein and the conclusions by the Honorable Elinor R. Reiner, ALJ convinces the Commissioner that she erred in determining that petitioner's tenure status was violated with a resultant entitlement to restoration to his former salary.

The Commissioner finds Piscataway Township, supra, on which the Court relies, to be inapposite to the present matter. In that decision the board unilaterally reduced the work year of a class of professional employees and their resulting remuneration under the guise of a reduction in work force. In the matter presently controverted, the Board by resolution of April 15, 1980 restructured the administrative complex of the Hart Middle School. Petitioner was not assigned to that school as a principal but was reassigned to the Vernon L. Davey Junior High School as a ten-month principal.

Barring violation of the statutes or an arbitrary or capricious act by the Board, the Commissioner finds such action to be a proper exercise of the statutory powers of the Board. N.J.S.A. 18A:11-1 Nor will the Commissioner substitute his judgment for that of the Board.

The Commissioner has previously said in 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):

> "***[I]t is not the function of the Commissioner*** to substitute his judgment for that of the board members on matters which are by statute delegated to the local boards.***"
> (at 13)

See also Schinck v. Board of Education of Westwood Consolidated School District, 60 N.J. Super. 448, 476 (App. Div. 1960)

For the aforestated reasons the findings of the Court are herewith set aside. The Commissioner finds and determines that the Board acted properly to restructure the administrative organization of the Hart Middle School and, accordingly, to reassign petitioner.

There being no finding of improper action on the part of the Board, the Petition of Appeal is herewith dismissed.

IT IS SO DIRECTED.

COMMISSIONER OF EDUCATION

October 13, 1981

Pending State Board

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5992-80
AGENCY DKT. NO. 375-7/80A

IN THE MATTER OF:

MORRIS KLEIN,
Petitioner
v.
BOARD OF EDUCATION OF THE BOROUGH OF LEONIA, BERGEN COUNTY,
Respondent.

Record Closed: August 13, 1981
Received by Agency: 9-1-81

Decided: August 28, 1981
Mailed to Parties: 9-9-81

APPEARANCES:

Anthony N. Gallina, Esq., for Petitioner
(Aronsohn & Springstead, attorneys)

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

BEFORE **STEPHEN G. WEISS,** ALJ:

In September 1980, Morris Klein (hereinafter "Klein") filed a Petition of Appeal with the Commissioner of Education, alleging that the notice of non-renewal allegedly sent to him in April 1980 by the Board of Education of Leonia, his employer, was not

actually received until May 5, 1980. Accordingly, he claimed that pursuant to N.J.S.A. 18A:27-10 the untimely nature of that notice gave him a right to accept employment for the 1980-81 year (which he had exercised) and to receive any salary lost by him. The Board, in its Answer, maintained that Klein had actual notice of his non-renewal prior to April 30, 1980 and that he deliberately avoided technical receipt of the written notice until after the statutory deadline date.

Following the joinder of issues, the matter was transmitted by the Commissioner of Education to the Office of Administrative Law pursuant to N.J.S.A. 52:14F-1 et seq. In the pretrial conference conducted before me on December 1, 1980, the following issue was agreed to: did petitioner receive effective notice of nonrenewal on or before April 30, 1980 and, if not, to what relief, if any, is he entitled.

TESTIMONY FOR PETITIONER

The sole witness for petitioner was Klein himself. He was a third-year teacher at Leonia High School in the 1979-80 school year. During the course of that school year, evaluation conferences were conducted with Klein by his superiors. As a result of discussions during those conferences, Klein became aware that his superiors were not satisfied with his teaching performance and that they would not recommend his tenure appointment. Klein conceded that prior to April 30, 1980, he was aware that the Superintendent of Schools, Dr. Charles J. Murphy, would recommend to the Board that his contract not be renewed. However, Klein adamantly insisted that the first official written notice he had of any such Board action was on May 5, 1980. On that date, he went to the Post Office in New Rochelle, New York, where he lives, in response to a notice left at his home on May 2, 1980 which informed him that a certified letter was being held for him (Exhibit P-2). Since May 2, 1980 was a Friday, he said he was unable to get to the Post Office until the following Monday, May 5, 1980. When he picked up the letter and opened the envelope addressed to him, he found in it a copy of a letter from the Superintendent of Schools, dated April 22, 1980, which specifically advised Klein that on the previous evening the Board had voted not to issue him a contract for the 1980-81 school year (Exhibit P-4).

Subsequently, in a letter dated May 21, 1980, Klein advised the Superintendent that since timely notice of non-renewal had not been given to him, he was exercising his right pursuant to law by informing the Superintendent that he was accepting employment for the 1980-81 school year. See N.J.S.A. 18A:27-12 (Exhibit P-6).

On cross-examination, Klein readily admitted that prior to April 30, 1980, he knew that a recommendation would be made to the Board that his employment should not be renewed for the 1980-81 school year. After some initial confusion Klein conceded that he certainly became aware of the proposed negative recommendation prior to April 1, 1980. He also acknowledged receipt of a letter dated April 2, 1980 via the school mail from Superintendent Murphy, in which he advised Klein that he was not going to recommend that a contract be issued for the next school year and that a discussion concerning the subject of his non-renewal would be placed on the agenda for a public meeting of the Board if Klein so insisted. Absent any such request, the matter was to be discussed in executive session only (Exhibit R-2).

Klein also acknowledged that he was aware of the statutory requirement that written notice of non-renewal has to be received no later than April 30 of a school year in order to be effective, but insisted that such insight played no part in the fact that he simply did not receive any writing from the Board until May 5. In order to attempt to impeach his credibility, counsel for the Board asked whether or not Klein was actually present in school on April 30. He answered that to the best of his knowledge he was present. When confronted with the proposition that the employee attendance records would demonstrate he was absent on that date, Klein agreed that it was possible that he was not there. When asked whether or not his possible absence was due to the fact that he wanted to avoid timely receiving a copy of a notice of non-renewal, Klein insisted that was not the case. So too, Klein denied that he had told various persons that he intended to take the position that he never got the notice of non-renewal in timely fashion.

TESTIMONY FOR RESPONDENT

Testimony on behalf of the Board of Education was offered by the Principal of Leonia High School, Melvin Zirkes, and the Superintendent, Dr. Murphy. Zirkes testified

that he had met with Klein on a variety of occasions during 1979-80 to discuss the fact that his potential receipt of a tenure appointment was in jeopardy unless improvement was demonstrated in his overall performance. According to Zirkes, following the determination by the Board in April 1980 not to renew certain teachers in their employment, including Klein, letters informing those teachers of the Board's action were dispatched through the inter-office mail in regular course to the various schools, to be placed in the particular teacher's mailbox. Zirkes, however, had no personal knowledge that the letter to Klein actually was placed in his box - he merely assumed that this would have been accomplished through the normal procedure. On April 30, 1980, Zirkes received a call from Dr. Murphy's secretary regarding the fact that there was a "rumor" that Klein would avoid receipt of the notification and that in fact he was not in school that day. Zirkes said that he, too, had heard "some rumors" previous to that date to the effect that Klein intended to say that he did not timely receive notice. In any event, upon discovering Klein's absence from school on April 30, 1980, Zirkes suggested that a copy of the non-renewal letter forthwith be sent to Klein and this was in fact accomplished.

On cross-examination, the precise conversation that took place between Zirkes and Klein during the evaluation conferences was explored in some detail. Basically, the testimony corroborated Zirkes' previous assertions that he had brought directly to Klein's attention during the period prior to April 30, 1980, that unless there was a substantial improvement he, Zirkes, would recommend to the Superintendent that Klein's contract not be renewed.

In response to a question from the court regarding the source of the rumors concerning alleged statements by Klein, Zirkes could not remember when they were said, where they were said, or who said them.

The next witness for the Board was Superintendent Murphy. He recalled that following the end-of-year evaluation by Zirkes of Klein's performance (Exhibit R-1), in which Zirkes listed a litany of serious weaknesses and recommended that Klein's employment be terminated, he had a phone conversation with Klein concerning it. According to Murphy, he told Klein that he agreed with Zirkes' recommendation. Thereafter, Murphy himself recommended to the Board that Klein not be offered tenure.

According to Murphy, on the day following the Board meeting of April 21, 1980, letters were sent to those teachers who were not going to be renewed in their employment, either because of unsatisfactory performance or because of a reduction in force. Klein was in that group. The procedure with respect to the dispatch of those communications was to have the letter prepared in Murphy's office, and then taken by a courier to the various schools to be placed in the individual mailboxes of the teachers involved. According to Murphy, this was the procedure used in sending the original letter of April 22, 1980 to Klein. However, like Zirkes, Murphy had no personal knowledge as to whether or not Klein actually had received the original letter, either through inter-office mail or otherwise. Klein, of course, insisted that no such original was ever received by him at any time.

With respect to the events of April 30, 1980, Murphy recalled that his secretary came into his office on that date and said that she had spoken to Zirkes, who told her that he heard that Klein allegedly was going to claim he did not receive the April 22 letter. Accordingly, Murphy directed the secretary to make another copy and to have Zirkes give it to Klein personally. When the secretary informed Murphy that Klein was not in school, he directed her to send a copy by registered mail.

Following the completion of the testimony on behalf of respondent, Klein was recalled to the stand for rebuttal testimony. According to Klein, the first time he ever received any communication regarding his potential non-renewal was during mid-March 1980. Zirkes had testified that he informed Klein earlier of the great "jeopardy" surrounding the likelihood of his renewal. In addition, Klein could not remember calling Dr. Murphy to discuss the year-end evaluation; rather, the first conversation he had with Murphy was following his receipt of the letter of April 2, 1980 in which Murphy advised that he would recommend non-renewal to the Board.

DISCUSSION

The position taken by the Board in this case is that the Petition must be dismissed since Klein had actual notice of the Board's determination of April 21, 1980 not to renew him in employment, and that such knowledge was enjoyed by Klein prior to April

30, 1980. To support that assertion, the Board points to the following facts: (1) Klein was well aware that both Zirkes and Murphy would recommend non-renewal to the Board; (2) Klein was rumored to have told other persons that he was going to avoid the timely receipt of the written notice; (3) that on April 30, 1980, Klein was absent from school in furtherance of that preconceived plan; and (4) Klein's experience in union matters and his knowledge of employment principles vis-a-vis probationary employees demonstrates his lack of credibility.

Based upon the testimony presented at the hearing, I make the following findings of fact:

1. Petitioner, Morris Klein, was first employed as a teacher at Leonia High School in September 1977 and continued in such employment for the 1977-78, 1978-79 and 1979-80 school years. The employment contract for 1979-80 contained a 60-day notice of termination clause (Exhibit P-1).

2. During the third year of his employment, Klein had conferences with his superiors, at which time he was informed that unless his performance improved, there was a substantial likelihood that he would not be renewed for his tenure-year appointment.

3. No later than mid-March 1980, Klein was informed by the Principal of Leonia High School, Melvin Zirkes, that Zirkes intended to recommend that Klein not be renewed in employment. Thereafter, by letter dated March 24, 1980 to Dr. Murphy, the Superintendent of Schools, Zirkes specifically articulated the deficiencies which had been found in Klein's performance and in which he advised Murphy that he would not recommend that Klein be renewed in employment (Exhibit R-1). Klein acknowledged receipt of a copy of that document.

4. By letter dated April 2, 1980, Klein was advised by Dr. Murphy that in view of Zirkes's evaluation he, Murphy, was going to recommend to the Board that Klein not receive a contract for the 1980-81 school year, and that Klein had the right to insist that the Board's discussion of that subject be held at a public session (Exhibit R-2). Klein did not make a request for such a public discussion, and at its meeting of April 21, 1980, the Board determined not to renew Klein in employment for the following school year.

5. A letter from Dr. Murphy to Klein advising him of the Board's non-renewal decision, dated April 22, 1980, was dispatched on that day in the school mail. However, there is no evidence that it was ever placed in Klein's mailbox or that he received that original in some other fashion.

6. On April 30, 1980, Klein was absent from school. Upon discovering the fact that Klein was absent, and based upon rumors to the effect that Klein intended to claim that he never received timely notice of non-renewal, a copy of the April 22 letter was sent by certified mail that day to Klein's home in New Rochelle, New York (Exhibits P-3 and P-4).

7. The letter was delivered to Klein's home on May 2, 1980. However, since he was apparently not home that day, the mailman left a notice informing him that the letter was awaiting his pickup at the New Rochelle Post Office (Exhibit P-2).

8. On May 5, 1980 Klein went to the New Rochelle Post Office and signed for the envelope which contained a copy of the April 22 letter informing him of the Board's determination not to renew him in employment (Exhibit P-5).

9. By letter dated May 21, 1980, Klein informed the Board through Dr. Murphy that he was accepting employment for the 1980-81 school year (Exhibit P-6).

10. There is no competent proof that Klein deliberately schemed to avoid receipt of the letter of April 22 until after April 30, the statutory deadline date.

In view of the above findings of fact, and absent competent proof by a preponderance of the credible evidence that Klein in fact deliberately schemed to avoid the receipt of written notice, I **CONCLUDE** that he did not receive notice as required by N.J.S.A. 18A:27-10 et seq. until May 5, 1980, five days after the statutory deadline date. Although there was some suspicion and innuendo expressed about Klein's avoidance of the receipt of notice, those were based solely upon mere unsubstantiated rumor.

Further, although Klein reasonably should have concluded prior to April 30, 1980 that the Board had determined not to renew him in employment and, indeed, possibly knew well of such action, the statute requires that written notice must be received by the

teacher involved. In this case, written notice was not received by Klein until May 5, 1980 - a violation of N.J.S.A. 18A:27-10. See Roy v. Bd. of Educ. of Middle Tp., 1976 S.L.D. 569, aff'd, State Bd. 1976 S.L.D. 574.

Accordingly, given the statutory violation, the remaining issue to be determined is the extent of the relief, if any, to which Klein may be entitled. Klein insists that he has to be re-employed for the 1980-81 school year (which would give him tenure) and that he ought to be compensated for any salary losses suffered by him. In a separate defense contained in its Answer, the Board takes the position that reinstatement is not appropriate. In its post-hearing brief, the Board argues that in the event the requisite statutory notice was not given to Klein, nevertheless, the extent of his relief would be to pay him for the number of days set forth in any contract termination clause, as mitigated by income received by him during the period involved.

As noted, the contract utilized in the school district contains a 60-day written notice of termination clause (Exhibit P-1). Where such a provision does exist, then even though the written notice of non-renewal is late, nevertheless, the receipt is tantamount to a contract notice of termination, with the 60-day time period considered to begin as of September-1 of the succeeding school year. Thus, Klein would be entitled to the receipt of 60 days' pay, subject to normal deductions, in accordance with his position on the 1980-81 salary guide. That guide was submitted as an attachment to a Stipulation of Facts* signed by both counsel. It reveals that Klein's salary for 1980-81 would have been $25,370. Thus, he is entitled to the receipt of a pro-rated portion equal to 60 days' pay, as mitigated by salaries received by him for any employment during the hours that he would have been teaching. In that respect, Klein testified that beginning in September 1980, when he ordinarily would have been working for the Leonia Board of Education had he been renewed, he was employed four mornings per week, three hours per day, at $15 per

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* For purposes of the record, the court marked the Stipulation as Court Exhibit 1.

hour. In other words, his gross hourly wages for the morning employment would have been $180 per week. That sum, then, must be considered by way of mitigation in connection with the 60 days' salary due and owing to Klein as a result of the Board's failure to afford him timely notice. Counsel should be able to agree on the precise amounts involved and submit the same by way of affidavit, so that the amount due and owing to Klein can be ascertained without difficulty.

In view of the findings set forth above, it is the conclusion of this court that the Board failed to provide the petitioner with notice of non-renewal in strict accordance with the language of N.J.S.A. 18A:27-10, but that the receipt by petitioner of a copy of the notice of non-renewal on May 5, 1980 was tantamount to a notice of termination, which limited the Board's liability for damages to 60 days' pay commencing in September 1980, mitigated by the amount of salary earned by petitioner during that 60-day period and attributable to the hours which would have coincided with his teaching employment. Klein is not entitled to reinstatement with tenure.

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 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 5992-80

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

August 28, 1981
DATE

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

9/1/81
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

9-9-81
DATE

Ronald I. Parker TZ
FOR OFFICE OF ADMINISTRATIVE LAW

ms

WITNESSES

For Petitioner:

Morris Klein

For Respondent:

Melvin Zirkes

Dr. Charles J. Murphy

APPENDIX

EXHIBIT NO.	DESCRIPTON
P-1	1979-80 Contract between Morris Klein and the Board of Education of Leonia
P-2	Photocopy of notice of delivery of certified letter
P-3	Envelope with certified mail sticker # P14 3006833
P-4	Copy of letter, dated April 22, 1980, from Charles J. Murphy to Morris Klein and attached typewritten note, dated April 30, 1980
P-5	Certified mail return receipt card
P-6	Letter, dated May 21, 1980, from Morris Klein to Charles J. Murphy
P-7 (for identification)	Observation report of Morris Klein, dated February 7, 1980
P-8 (for identification)	Observation report of Morris Klein, dated October 30, 1979
P-9 (for identification)	Certified mail receipt (white copy)
R-1	Memorandum from Melvin Zirkes to Charles Murphy, dated May 24, 1980
R-2	Copy of letter, dated April 2, 1980, from Charles Murphy to Morris Klein
R-3 (for identification)	Copy of letter, dated April 2, 1980, from Charles J. Murphy to Morris Klein
C-1	Stipulation of Facts (1980-81 salary guide)

MORRIS KLEIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF LEONIA, 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 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 Board shall pay petitioner sixty days' pay mitigated by salaries received by him during the hours that he would have been teaching, beginning September 1, 1980.

IT IS SO DIRECTED.

COMMISSIONER OF EDUCATION

October 15, 1981

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4903-80
AGENCY DKT. NO. 343-7/80A

IN THE MATTER OF:

CHERYL ROGERS,
Petitioner
v.
BOARD OF EDUCATION OF THE BOROUGH OF LAWNSIDE, CAMDEN COUNTY,
Respondent.

Record Closed: July 20, 1981
Received by Agency: 9-2-81

Decided: August 31, 1981
Mailed to Parties: 9-9-81

APPEARANCES:

John E. Collins, Esq., (Selikoff & Cohen, P.A.) for the Petitioner

Harvey C. Johnson, Esq., for the Respondent

BEFORE **AUGUST E. THOMAS,** ALJ:

Petitioner, a nontenured teacher, was employed by the Board of Education of the Borough of Lawnside (Board) in October 1978. She was reemployed for the 1979-80 school year; however, she was not reemployed for the next academic year. Petitioner

alleges that the Board's determination not to reemploy her for the 1980-81 school year was in violation of the protection afforded her by statute.

After filing her Petition of Appeal with the Commissioner of Education, 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. A hearing was conducted on February 10, 1981, in the Somerdale Municipal Court, Somerdale, New Jersey. Fourteen documents were admitted as evidence and post-hearing briefs were filed.

Petitioner was hired initially as a Compensatory Education Teacher in October 1978. She taught a class of six pupils and was evaluated twice, once on April 5 and again on April 10, 1979 (P-1, R-1). The second of these evaluations contained the comment "try to refrain from having students call out responses while you are teaching your lesson." She was rated "good" by her administrative principal (principal) after her first evaluation. Petitioner was transferred to a position as a science teacher in April 1979 and was reemployed as a science teacher in the Lawnside Middle School, grades 6, 7, and 8, for the 1979-80 academic year.

Petitioner asserts that she was not evaluated during the 1979-80 academic year in accordance with N.J.S.A. 18A:27-3.1, which provides:

> Every board of education in this State shall cause each nontenure teaching staff member employed by it to be observed and evaluated in the performance of her or his duties at least three times during each school year but not less than once during each semester. . . . Each evaluation shall be followed by a conference between that teaching staff member and his or her superior or superiors. The purpose of this procedure is to recommend as to employment, identify any deficiencies, extend assistance for their correction and improve professional competence.

She also asserts that the Board failed to comply with N.J.A.C. 6:3-1.19(e). This State Board regulation identified the purposes of the evaluation procedure as follows:

> The purposes of this procedure for the observation and evaluation of nontenured teaching staff members shall be to identify deficiencies, extend assistance for the correction of such deficiencies, improve professional competence, provide a basis for recommendations regarding reemployment, and improve the quality of instruction received by the pupils served by the public schools.

Citing N.J.A.C. 6:3-1.19(a)(1), petitioner states that, "[e]ach of the three observations required by law shall be conducted for a minimum duration of one class period in a secondary school, and in an elementary school for the duration of one complete subject lesson." In the instant case, the class periods in the Lawnside Middle School were forty-five minutes in length, and petitioner testified that her three administrative observations lasted only thirty minutes each (P-2, P-3, P-4). Despite petitioner's testimony that the Lawnside School District is an elementary school district, she also testified that she taught grades six, seven and eight in the Lawnside Middle School. Thus, petitioner argues, for purposes of determining whether her observations were sufficient in length to satisfy N.J.A.C. 6:3-1.19(a)(1), it is first necessary to determine whether she taught in a "secondary school" or "elementary school."

The State Board of Education has announced that a junior high school with grades seven through nine should be considered a secondary school [N.J.A.C. 6:27-1.2(a)]. No reference is made in Chapter 26 or Chapter 27 of Title 6 to the concept of a middle school which includes grades six, seven, and eight; nevertheless, the record shows that the classes in the Lawnside Middle School rotated among different teachers for different subjects. Therefore, petitioner concludes that the Middle School was closer in form to the traditional junior high school and senior high school than it was to a traditional elementary school with self-contained classes. Accordingly, in connection with her evaluations, petitioner asserts that she should have been observed for a minimum of forty-five minutes, pursuant to N.J.A.C. 6:3-1.19(a)(1).

The record shows that Lawnside has always been an elementary school district for grades K-8 and that its pupils have attended secondary schools outside its district for grades 9-12. When its middle school was built, some subject matter departmentalization was instituted; however, there was no change in designation of the middle school as a secondary school. The State Board of Education rule clearly designates grades 9-12 as secondary school grades; consequently, the Lawnside Middle School must be considered as an elementary school only (N.J.A.C. 6:27-1.2). Having reached this conclusion, I **FIND** that petitioner's classroom observations were sufficient in length to satisfy the State Board rule, provided the observations lasted for the duration of one complete subject lesson.

The record shows that petitioner was evaluated three times during the 1979-80 school year (P-2, 3, 4). These evaluations are critical of petitioner's classroom

performance and of her inability to control classroom discipline to the satisfaction of her superiors. The evaluations also include an annual performance summary, dated June 18, 1980. Although petitioner testified that the principal had not observed a complete lesson on January 30, 1980, the principal testified that he had (P-3).

Petitioner alleges that her superiors also failed to make suggestions as to how she might improve. She contends, also, that her evaluation conferences were insufficient in length and substance to help her with her identified deficiencies. Finally, petitioner argues that her evaluation of April 14, 1980, and her summary evaluation of June 18, 1980, were not known to the Board, nor did it review them before it voted on April 14, 1980, not to reemploy her.

In support of the Board's position, the principal testified that he had talked to petitioner several times about the improvement of her classroom performance and how to handle discipline problems. The evaluations (P-2, 3, and 4) also contain suggestions on improvement. Petitioner conceded that she received further help from an assembly program concerning discipline which was conducted by the principal.

The principal testified that he observed a lesson for a "top group" of eighth grade pupils on October 31, 1979. The pupils were combing their hair, wrestling in the back of the classroom and three-fourths of the pupils were standing. He testified that they never settled down and the lesson was dragged out by petitioner's review of a test. He testified that he reviewed this lesson with her on November 2, 1979, at her request.

Incidentally, the principal testified that he observed a complete lesson during his visits to her classroom, despite the fact that his visits lasted only thirty minutes.

Responding to an observation report in an undated note (P-7) to one of her supervisors, petitioner asked him to "write out" any suggestions for improvement. It appears to me that a more reasonable approach at this juncture would have been a request by petitioner for a conference to discuss, personally, methods and techniques to improve her performance. Petitioner also responded to other evaluations (P-6, 7, 9).

The principal testified that the Board was presented a summary evaluation when it considered petitioner's over-all performance at its meeting on April 14, 1980. This summary included the April 14, 1980 observation, although a change was made later

in that observation report. Petitioner was notified prior to April 30, 1980, that she would not be reemployed.

Finally, in response to petitioner's request for reasons why she would not be reemployed, the Board sent the following letter, dated April 28, 1980:

> 1. Review of your previous performance clearly indicates that you have not remedied areas of weakness previously indicated to you in written evaluations.
>
> 2. Administrative personnel have evaluated your ability to improve your performance and have determined that you have failed to comply sufficiently with the criteria of the administrative personnel as stated in written evaluations and conferences held following each evaluation.
>
> 3. Your overall performance has not been consistent with normal standards of performance for teacher personnel.
>
> 4. Finally, you have repeatedly failed to correct noted deficiencies to a satisfactory level of accepted classroom teacher proficiency.

[P-8]

Petitioner, having the burden of proof, has failed to support her contentions that (1) she was not given suggestions for improvement in connection with her evaluations; (2) she was not observed for sufficient lengths of time; (3) her evaluation conferences were inadequate, both in terms of time and content; and (4) the Board did not consider her third evaluation when it voted not to reemploy her. The record does show that the Board did not consider her annual written performance evaluation, and especially her response thereto, when it voted not to reemploy her. Nevertheless, the school administrators were in substantial compliance with the statutes and the State Board rules governing the reemployment of nontenured teachers.

Based on the foregoing testimony and evidence, I **FIND** that:

1. The Lawnside school district is an elementary school district.

2. The Lawnside Middle School, grades 6, 7, and 8, is an elementary school despite the fact that it offers a departmentalized program.

3. Petitioner received three observations followed by evaluations and conferences in the 1979-80 school year.

4. Petitioner was notified prior to April 30, 1980, that she would not be reemployed.

5. Petitioner received a statement of reasons as requested.

CONCLUSIONS OF LAW

The Board has the statutory authority to regulate the conduct and discharge of its employees consistent with the law (N.J.S.A. 18A:11-1). It has complied with the provisions of N.J.S.A. 18A:27-10 et seq. by giving written notice to petitioner prior to April 30, 1980. Regarding the provisions for classroom visitations, there has been full compliance with N.J.S.A. 18A:27-3.1 and N.J.A.C. 6:3-1.19.

There is no statutory requirement or State Board rule mandating that the teacher's annual evaluation be completed prior to a Board's determination not to reemploy her. It is true that a Board may not act in ways which are arbitrary, unreasonable, capricious, or otherwise improper [Cullum v. North Bergen Board of Education, 15 N.J. 285 (1954)]. However, petitioner failed to make any such showing.

In Ronald J. Perry v. Board of Education of the River Dell Regional High School, 1979 SLD _____, the administrative law judge's decision became effective as the Commissioner's by operation of N.J.S.A. 52:14B-10, on December 10, 1979. Upon appeal to the State Board of Education, the Commissioner's decision was affirmed on April 8, 1980, for the reasons expressed therein. In an unpublished opinion, the New Jersey Superior Court (App. Div.) affirmed the State Board on April 8, 1981 (A-3476-79).

In Perry, the local board of education failed to comply with N.J.S.A. 18A:27-3.1 which requires periodic evaluation of teaching staff members. The court held that the Board's failure to evaluate does not automatically demand relief for petitioner, holding that:

> The school law decisions cited in support of petitioner's position are clearly distinguishable. Even if they were not, the fact that the Commissioner had seen fit in those cases to take corrective

> action upon a local board's failure to comply with the evaluation law does not mandate that corrective action be taken in petitioner's case. While the Legislature has required local boards to evaluate their teaching staff members, it has not provided for the imposition of any sanction for a board's failure to do so in a given case. Certainly the Commissioner and State Board are at liberty to take corrective action when it is deemed warranted. That is not to say, however, that such corrective action is required in every case.
>
> We are satisfied that there is no basis either in the statutes or case law to support petitioner's assertion of entitlement to either financial compensation or reinstatement. The decision of the State Board is affirmed.

In the instant matter, there is no basis in case law to provide any remedy to petitioner. The Board has carried out its obligations to petitioner, pursuant to the statutes.

Absent a showing of abuse of its discretionary powers, the Board's determination is entitled to a presumption of correctness [Quilan v. Board of Education of North Bergen Township, 73 N.J. Super. 40 (App. Div. 1962)].

Accordingly, the determination of the Board is **AFFIRMED** and 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.

31 August 81
DATE

August E. Thomas
AUGUST E. THOMAS, ALJ

Receipt Acknowledged:

2 September 81
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

Sept 9, 1981
DATE

Ronald I. Parker Jr.
OFFICE OF ADMINISTRATIVE LAW

fms

DOCUMENTS IN EVIDENCE

P-1 Evaluation, dated 4/5/79

P-2 Evaluation, dated 10/31/79

P-3 Evaluation, dated 1/30/80

P-4 Evaluation, dated 4/14/80

P-5 Annual performance summary, dated 6/18/80

P-6 Response to P-3 evaluation, dated 2/6/80

P-7 Response to P-4 evaluation, undated

P-8 Statement of Reasons, dated 4/28/80

P-9 Response to P-5, dated 6/26/80

P-10 Evaluation Handbook for 1979-80 school year.

R-1 Report of classroom visitation, dated 4/10/79

R-2 Absence Report, dated 2/19/80

R-3 Response to P-4, dated 4/29/80

R-4 Doctor's note

CHERYL ROGERS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF LAWNSIDE, 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 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 August E. Thomas, ALJ that the Lawnside Middle School is an elementary school. Petitioner contends that it is closer in form to the traditional junior high school or senior high school. Petitioner, noting a conflict in testimony between the principal and herself regarding suggestions by him to improve her alleged weaknesses, attacks the credibility of the principal. Petitioner relies heavily on arguments of not being observed long enough and not having conferences of sufficient length with the principal about her evaluations. The Commissioner finds no merit in petitioner's exceptions.

A thorough examination of the record herein including the documents in evidence and the testimony of witnesses convinces the Commissioner that Judge Thomas properly weighed and evaluated the evidence therein.

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)

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.

October 15, 1981

COMMISSIONER OF EDUCATION

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6677-80

AGENCY DKT. NO. 493-10/80A

IN THE MATTER OF:

ALEX KLEIN,
Petitioner
v.
BOARD OF EDUCATION
OF CEDAR GROVE,
Respondent.

Record Closed: August 27, 1981
Received by Agency: 9-11-81

Decided: September 3, 1981
Mailed to Parties: 9-11-81

APPEARANCES:

Gregory T. Syrek, Esq., (Goldberg & Simon, attorneys)
for Petitioner

Stuart R. Koenig, Esq., (Stickel & Koenig, attorneys)
for Respondent

OAL DKT. NO. EDU 6677-80

BEFORE **ROBERT P. GLICKMAN**, ALJ:

Petitioner, Alex Klein, an art teacher at Memorial High School in Cedar Grove, contends that he was denied a salary increment by respondent for the 1980-81 school year in violation of N.J.S.A. 18A:29-14 and that such Cedar Grove Board of Education action was arbitrary, capricious or unreasonable. Additionally, petitioner asserts that the Board action was fatally defective in that it failed to give him written reasons within ten days of its action pursuant to N.J.S.A. 18A:29.14. The Board denies that it acted arbitrarily, capriciously or unreasonably in withholding petitioner's increment. The Board asserts that it substantially complied with N.J.S.A. 18A:29-14 and that any noncompliance would be harmless and should not result in the setting aside of the Board's action.

On October 9, 1980 petitioner filed an appeal with the Commissioner of Education. Respondent's answer was filed on October 17, 1980, and the matter was transmitted to the Office of Administrative Law on October 27, 1980 as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

At a prehearing conference on January 9, 1981, the following issues were identified:

1. Was respondent's failure to grant petitioner a salary increment for the 1980-81 school year in violation of N.J.S.A. 18A:29-14 and/or was such action arbitrary, capricious or unreasonable?

2. What relief, if any, is petitioner entitled to?

3. Should the petition be dismissed for petitioner's failure to exhaust his administrative remedies?

Respondent filed a motion to dismiss the petition based on petitioner's failure to exhaust his administrative remedies by way of arbitration pursuant to the applicable collective bargaining agreement. This Court in a letter decision dated March 6, 1981 denied respondent's application and set the matter down for hearing. The Court's letter decision of March 6, 1981 is incorporated herein by reference.

A hearing was held at the Office of Administrative Law, Newark, New Jersey, on July 27, 1981. A posthearing brief was filed by petitioner and the record was deemed to be closed on August 27, 1981.

At the hearing, the parties stipulated that if petitioner had received the proper increment for the 1980-81 school year he would have received a salary of $25,550. As a result of not receiving an increment, petitioner received a salary of $23,800. Petitioner's loss in not receiving his increment was $1,750.

The following events were testified to at the trial and, being uncontroverted, are adopted by this Court as part of its **FINDINGS** of **FACT:**

1. A staff member evaluation of Alex Klein conducted by Kenneth Brino on March 13, 1979 indicates, among other things, that Mr. Klein requires improvement in the area of discipline (R-1).

2. A staff member evaluation of Alex Klein by William O'Toole dated March 12, 1980 indicates, among other things, that Mr. Klein requires improvement in the area of discipline. This evaluation also contains a recommendation that Mr. Klein be granted an increment for the 1980-81 school year (P-1).

3. On April 10, 1979, a letter by Kenneth Bechtold, Superintendent of Schools, to Alex Klein expressed concern regarding Mr. Brino's evaluation of Mr. Klein in the area of disciplining students (P-2).

4. On May 26, 1980, Alex Klein wrote a letter to Kenneth Bechtold wherein he indicated that he did not feel that he was in violation of any procedures dealing with discipline (R-2).

5. On May 29, 1980 a letter from Kenneth Bechtold, Superintendent of Schools, to Alex Klein stated the following:

...Since you have not given me rationale in your letter which indicates that there has been significant growth in discipline between last year's evaluation and this year's and with a letter from me in between, I have come to the conclusion that you cannot substantiate that. Therefore, I wish to inform you that I will not recommend any salary advancement for you in the coming school year .... (P-3).

6. On June 2, 1980, Alex Klein wrote a letter to Mr. Robert LaVigne, Secretary, Board of Education, requesting a meeting before the Board of Education to present his views concerning the Superintendent's decision not to recommend a 1980-81 salary increment (R-3).

7. On July 2, 1980, Mr. Klein, Mr. Restaino, Ms. Merz, Mr. Brino, Mr. O'Toole, Mr. Bechtold, Mr. LaVigne, and the five Board members conducted a meeting, at which time Mr. Klein read a prepared statement to the Board dealing with the anticipated withholding of his salary increment (R-5).

8. On August 19, 1980, the Superintendent made a recommendation to the Board of Education to withhold Mr. Klein's salary increment for the 1980-81 school year (P-5).

9. On August 26, 1980, the Board voted to withhold the increment from Alex Klein for the 1980-81 school year (P-6).

10. On August 28, 1980, the following letter was written by Kenneth Bechtold, Superintendent of Schools, to Alex Klein:

Dear Mr. Klein:

At the regular meeting on August 26, the Board of Education took action on the status of your salary increase. As you know, you had an NJEA representative in Mrs. Merz CGEA President with you when you presented your case at a Staff meeting of our Board of Education. Following that, Board members reviewed your evaluations. At the meeting they voted not to grant a salary increase for the coming school year.

> As I had previously stated to you, the administration stands ready to give you assistance and guidance which will certainly insure the means whereby a similar situation will not reoccur .... (P-7).

The thrust of Mr. Klein's problems with discipline, as testified to by William O'Toole and Kenneth Bechtold, involved his inability to relate to students. Mr. Klein's manner in handling discipline problems, such as shouting at students and using profanity, brought him to the level of the student rather than remaining on the level of a teacher. Thus, the basis for the withholding of the increment for the 1980-81 school year was the two evaluations which indicated Mr. Klein needed improvement in the area of student discipline.

Mr. Klein, in testifying about the student discipline problem, stated that he felt that his behavior did not involve serious infractions. Mr. Klein admitted that on two separate occasions he used bad language. On one occasion he told a student: "You are a pain in the ass." And on another occasion he told a student: "Steve, I don't have to take your crap." He was aware as of May 1980 that the Superintendent was going to recommend that his increment be withheld because of the two evaluations which contained the notation "requires improvement."

Everyone who testified agreed that Mr. Klein never received a statement of reasons after the Board action on August 26, 1980 why his increment was withheld.

Findings of Fact

Based on a careful consideration of the testimony and evidence, this Court additionally **FINDS:**

1. Respondent withheld petitioner's increment for the 1980-81 school year based on two evaluations which indicated that he needed improvement in the area of student discipline.

2. Petitioner never felt that his deficiency in the area of student discipline was of a serious nature.

3. Petitioner never received a statement of reasons after the Board's action on August 26, 1980 why his increment was being withheld.

Conclusions of Law

The law is clear that a board of education may withhold a teacher's increment where it has a reasonable factual basis for its conclusion. This Court may not substitute its judgment for that of the Board, but must ascertain whether the Board had such a reasonable factual basis for its conclusion. See Kopera v. West Orange Bd. of Education, 60 N.J. Super. 288 (App. Div. 1960). In the instant case, it is undisputed that the Board withheld petitioner's increment because of his deficiency in the area of student discipline. Apropos, there is no question that the Board had a reasonable factual basis for its action.

The threshold issue, which becomes dispositive of this case, is whether respondent's failure to give petitioner written reasons within ten days of its action on August 26, 1980 is a fatal defect which would require this Court to set aside the Board's action.

N.J.S.A. 18A:29-14 states:

> Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a recorded roll call majority vote of the full membership of the board of education. It shall be the duty of the Board of Education, within 10 days, to give written notice of such action, together with the reasons therefor, to the member concerned.... (Emphasis added.)

It is clear that Mr. Klein knew that he was deficient in the area of student discipline as a result of receiving the staff evaluations of March 13, 1979 and March 12, 1980. On April 10, 1979, Mr. Klein received a letter from the Superintendent in which concern was expressed about his deficiency in the area of disciplining students. On May 29, 1980, Mr. Klein received a letter from the Superintendent informing him that there would be a recommendation not to give him a salary advancement for the coming school year. On July 2, 1980, petitioner and members of the NJEA met with the Board of Education. Mr. Klein read a prepared statement dealing with the anticipated withholding of his salary increment. Although the Superintendent made his formal recommendations to the Board on August 19, 1980 and the Board voted on the increment withholding on August 26, 1980, there is no question that Mr. Klein knew of his deficiencies as early as March 1979, knew of the Superintendent's proposed action on May 29, 1980, and addressed the Board on the very subject of the anticipated withholding on July 2, 1980.

Even though the Board technically did not comply with the statutory requirement that petitioner be supplied with a written statement of the reasons why the increment was withheld within ten days of the Board's action, it did substantially comply with the statute based upon the Superintendent's prior notice to petitioner as well as the granting of permission to petitioner to address the Board on the very subject of the withholding of his increment. This Court is in no way sanctioning the action of the Board in failing to comply with the procedural mandates of N.J.S.A. 18A:29-14. However, these procedural omissions, under the totality of the circumstances, are harmless and shall not warrant setting aside the Board's action. Or, put another way, the Board's action prior to its vote on August 26, 1980 constitutes substantial compliance with the statute. The statutory prescription is satisfied since there is no question that Mr. Klein knew the reasons why he was denied an increment.

The Commissioner of Education has concluded that substantial compliance with N.J.S.A. 18A:29-14 is all that is required when an increment is withheld. See June v. Bd. of Ed. of Haddonfield, OAL DKT. NO. EDU 3060-79 (adopted July 22, 1980); Marshall v. Bd. of Southern Reg. High Sch. Dist., 1978 S.L.D. 593, 596 and Baker v. Bd. of Ed. of Bergenfield, 1978 S.L.D. 740, 741.

In June, supra, the administrative law judge determined that the failure to provide written reasons was not fatal where the petitioner did in fact have knowledge of the reasons. In June, the superintendent had informed petitioner that he would not

recommend an increment on account of petitioner's evaluations and the principal had an opportunity to make a written response to the evaluation. Such circumstances established that petitioner had actual knowledge of the reasons and the board's conduct constituted substantial compliance with N.J.S.A. 18A:29-14.

In Trautwein v. Bd. of Ed. of Bound Brook, Dkt. No. A-2773-78 (New Jersey Superior Court, App. Div., April 8, 1980), cert. denied, 84 N.J. 469 (1980), the Court found that the board's substantial compliance with the procedural requirements of N.J.S.A. 18A:29-14 necessitated affirmance of the local board's action. In Trautwein, the petitioner spoke to the board on April 9 concerning her absence and was told that the board would consider her increment on April 19. On that day, the board voted to withhold the increment; on July 26, the board confirmed its earlier action by a recorded roll call vote. 1978 S.L.D. 445, 447-48, aff'd, St. Bd. (March 7, 1979), rev'd, Dkt. No. A-2773-78 (N.J. Super. Ct., App. Div., April 8, 1980), cert. denied 84 N.J. 469 (1980). Although the Commissioner had rejected the board's argument that its noncompliance was not fatal since the teacher knew the reasons for the withholding, even though she did not receive written notice within ten days, the Court apparently accepted the board's argument.

Accordingly, based on the Board's substantial compliance with N.J.S.A. 18A:29-14 and based on petitioner's knowledge of the reasons for the withholding even though he did not receive written reasons within ten days of the Board's action, it is **CONCLUDED** 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 6677-80

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

September 3, 1981
DATE

Robert P. Glickman
ROBERT P. GLICKMAN, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

Sept 11, 1981
DATE

Ronald I. Parker FZ
FOR OFFICE OF ADMINISTRATIVE LAW

db

APPENDIX

LIST OF WITNESSES

1. William O'Toole
2. Kenneth Bechtold
3. Alex Klein

LIST OF EXHIBITS

P-1 Cedar Grove Public Schools Staff Member Evaluation Report of Alex Klein, dated March 12, 1980

P-2 Letter addressed to Alex Klein from Kenneth Bechtold, Superintendent of Schools, dated April 10, 1979

P-3 Letter addressed to Alex Klein from Kenneth Bechtold, Superintendent of Schools, dated May 29, 1980

P-4 Board of Education Teacher's Salary Guide 1980-81, dated June 24, 1980

P-5 Cedar Grove Board of Education Minutes, dated August 19, 1980

P-6 Cedar Grove Board of Education Minutes, dated August 26, 1980

P-7 Letter addressed to Alex Klein from Kenneth Bechtold, Superintendent of Schools, dated August 28, 1980

P-8 Letter addressed to Alex Klein from Robert J. LaVigne of Cedar Grove Board of Education, dated July 28, 1980

R-1 Cedar Grove Public Schools Staff Member Evaluation, dated March 13, 1979

R-2 Letter addressed to Kenneth Bechtold, Superintendent of Schools, from Alex Klein, dated May 26, 1980

R-3 Letter addressed to Robert LaVigne, Secretary, Board of Education of Cedar Grove, from Alex Klein, dated June 2, 1980

R-4 Letter addressed to Alex Klein from Kenneth Bechtold, Superintendent of Schools, dated July 26, 1980

R-5 Cedar Grove Board of Education Minutes, dated July 2, 1980

ALEX KLEIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CEDAR GROVE, 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 the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Petitioner excepts to the conclusion by the Honorable Robert P. Glickman, ALJ that the Board was in substantial compliance with N.J.S.A. 18A:29-14. Petitioner argues that the Board's failure to supply him with a written statement of reasons fatally taints its decision to withhold petitioner's increment. Petitioner contends that he was denied any semblance of "fair play" in this matter. Respondent's reply exceptions refute those of petitioner and affirm the initial decision. The Commissioner finds respondent's arguments persuasive.

The Commissioner addressed the problem of a board not notifying a teacher in writing of its reasons to withhold his salary increment in Marshall, supra, wherein was said:

> "***The Commissioner has carefully reviewed the legal arguments set forth by respective counsel in light of relevant statutory and case law. He finds that the Board was indeed remiss in not following the letter of the law by its failure to notify petitioner in writing of its reasons to withhold his salary increment adjustment within ten days of its action. He determines, however, that such failure is not fatal in the total circumstances of the instant matter. For full compliance with the statute, albeit tardy, the Commissioner now directs the Board to provide petitioner with a complete statement of its reasons to withhold his salary increment adjustment.***" (at 596)

Although the record herein convinces the Commissioner that petitioner knew the reasons for the withholding of his increment, nevertheless the Commissioner, as in Marshall, directs that the Board provide petitioner with a complete statement of its reasons to withhold his salary increment adjustment. The Commissioner finds it appropriate to here repeat his warning to boards of education in Marshall wherein he said:

> "***The Commissioner is constrained to issue a caveat to this Board and all other local boards of education that the withholding of any salary or adjustment increment is to be accomplished in accordance with the provisions of N.J.S.A. 18A:29-14. Such compliance, even if considered redundant by a local board, will prevent allegations of improper procedures and litigation.***"
>
> (at 597)

The Commissioner finds no merit in petitioner's pleadings of not receiving "fair play" at the hands of the Board. Although not required to do so by law, the Board accorded petitioner the opportunity to appear before it to address it on the withholding of his increment. Petitioner's failure to dissuade the Board from withholding his increment does not mean that he was not accorded full measure of "fair play." The Commissioner so holds.

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

October 26, 1981

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3328-80
AGENCY DKT. NO. 237-5/80A

IN THE MATTER OF:

MICHAEL LAW

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF PARSIPPANY-TROY HILLS, MORRIS COUNTY

Record Closed: July 31, 1981
Received by Agency: 9-11-81

Decided: September 9, 1981
Mailed to Parties: 9-17-81

APPEARANCES:

Sheldon H. Pincus, Esq., for Petitioner
(Goldberg & Simon, attorneys)

Myles C. Morrison, III, Esq., for the Board
(Dillon, Bitar & Luther, attorneys)

BEFORE **WARD R. YOUNG**, ALJ:

Petitioner, a tenured teaching staff member, alleges the Board violated N.J.A.C. 6:3-1.21 in that Professional Improvement Plans were not mutually developed for the 1979-80 school year.

The matter was transmitted to the Office of Administrative Law by the Commissioner of Education on May 29, 1980 as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

Prehearing conferences were held on October 9 and December 22, 1980, at which it was determined that the matter would not be consolidated with a companion petition, docketed as OAL EDU 3754-80, Agy. 269-6/80A, but the record established in that case would be utilized for an adjudication here.

Two days of hearing were held on May 1 and 12, 1981. The transcripts, documentary evidence, and judge's notes were transmitted to the Commissioner with the case file in Agy. 269-6/80A, and are all incorporated herein by reference.

Exhibits P-4, P-11 and P-12 represent Performance Improvement Plans for petitioner for the 1979-80 school year. It was stipulated by counsel for the Board that they were not mutually developed.

> N.J.A.C. 6:3-1.21(f) states:
>
> The annual written performance report shall be prepared by a certified supervisor who has participated in the evaluation of the teaching staff member and shall include but not be limited to:
> . . .
>
> 3. An individual professional improvement plan developed by the supervisor and the teaching staff member.
>
> N.J.A.C. 6:3-1.21(h) states:
>
> For the purposes of this section:
> . . .
>
> 3. Individual professional improvement plan is a written statement of actions developed by the supervisor and the teaching staff member to correct deficiencies or to continue professional growth, timeliness for their implementation, and the responsibilities of the individual teaching staff member and the district for implementing the plan.

It was clearly established the department chairman and petitioner developed professional improvement plans during the Spring of 1980 for the 1980-81 school year.

The issue here involves professional improvement plans unilaterally prepared by the principal during the 1979-80 school year for that school year. Due to the stipulation, no further findings of fact are required.

The Initial Decision in Agv. Ref. 269-6/80A ordered restoration of petitioner's salary increment withheld by the Board for the 1980-81 school year, with backpay, there having been a finding of no rational basis for the Board's action.

The professional improvement plans unilaterally prepared by the principal in violation of N.J.A.C. 6:3-1.21 are deemed here to be null and void. **I SO FIND.**

It is **ORDERED**, therefore, that said plans be expunged from petitioner's personnel file, and further that the Board and its agents fully comply with N.J.A.C. 6:3-1.21 henceforth.

In light of the Initial Decision in Agv. Ref. 269-6/80A, I **FIND** no further relief to which petitioner is entitled.

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 September 1981
DATE

WARD R. YOUNG, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

Sept. 17, 1981
DATE

Ronald I. Parker
FOR OFFICE OF ADMINISTRATIVE LAW

g

MICHAEL LAW,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PARSIPPANY-TROY HILLS, 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 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 Commissioner is constrained to observe that there must not be the assumption herein that the professional improvement plan must be totally approved by the teacher. The Commissioner has previously considered this matter in Henry Douma v. Board of Education of the Township of East Brunswick, Middlesex County, decided April 22, 1981, wherein he affirmed the findings of the Honorable Daniel B. McKeown, ALJ which said of the requirements of N.J.A.C. 6:3-1.21, in pertinent part:

> "***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.***
>
> "***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.***" (Slip Opinion, at p. 15)

In the present case it has been stipulated that the professional improvement plans for petitioner for the 1979-80 school year were unilaterally prepared by the principal.

Accordingly, those plans shall be expunged from petitioner's personnel file.

IT IS SO DIRECTED.

COMMISSIONER OF EDUCATION

October 21, 1981

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2291-81
AGENCY DKT. NO. 80-3/81A

IN THE MATTER OF:

CHARLES H. LANZA,
Petitioner
v.
EATONTOWN BOARD OF EDUCATION,
MONMOUTH COUNTY,
Respondent.

Record Closed: August 3, 1981
Received by Agency: 9-15-81

Decided: September 15, 1981
Mailed to Parties: 9-18-81

APPEARANCES:

Robert M. Schwartz, Esq., (General Counsel, Principal and Supervisor Associations) for Petitioner

Eugene A. Iadanza, Esq., (Gagliano, Tucci and Kennedy) for Respondent

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

This is an action for an order declaring violation by the Eatontown Board of Education (Board) of the decision and order of the Commissioner of Education dated March 2, 1981, involving these parties. OAL DKT. NO. EDU 5687-79, adopted, Commissioner of Education (March 2, 1981). Charles H. Lanza (petitioner) also seeks requirement of Board compliance with the order.

I

In July 1979, the Board certified tenure charges against petitioner. The matter was heard by Eric G. Errickson, ALJ, who concluded the charges should be dismissed and petitioner restored to his position of principal. After a review of exceptions filed by the parties, the Commissioner affirmed and adopted Judge Errickson's decision. The order directed the Board to reinstate petitioner "to his position of principal together with all benefits and responsibilities pertinent thereto." Slip opinion at p. 14.

The Board adopted a resolution on March 6, 1981, transferring petitioner from the position of principal of Meadowbrook School to the position of Administrator of Federal/State and Special Projects for the 1980-81 school year, effective March 9, 1981. The instant petition of appeal was filed on March 24, 1981.

II

Petitioner argues the Board has deliberately circumvented the Commissioner's order to reinstate him to the position of principal. This is not a transfer case, in which an employee was transferred from one position to another. Here, petitioner simply was not returned to the principalship, despite dismissal of the tenure charges against him and an order to do so.

Petitioner alleges his present position is not comparable to the principalship in terms of salary or duties. He has no direct responsibility as to pupils, curriculum, hiring and dismissal, teacher evaluation or a school library.

Morrel v. Parsippany-Troy Hills Bd. of Ed., 1980 S.L.D. - (decided June 5, 1980, rev'd by State Board December 3, 1980), referring to Williams v. Plainfield Bd. of Ed., 176 N.J. Super. 154 (App. Div. 1980) states that comparability of rank of position is determined by three elements: certification required for the position, its duties and responsibilities, and its tenure status. The official job description for Administrator of Federal/State and Special Projects satisfies the first two elements, but not the third. (Respondent's exhibit B). His actual duties are minimal. He has no support staff. He has none of the duties set forth above.

Conceding the Board's authority to assign its personnel, petitioner contends the Board has given him a "make-work" position and has accomplished his removal from a principalship, even though it could not do so under the Tenure Employees Hearing Act.

III

The Board argues that, while an order of the Commissioner is binding until reversed, it does not prohibit a board from exercising its lawful powers and managerial prerogatives. The Board submits that petitioner objects to the position he was transferred to, not the fact of transfer. The matter must be decided on the question of the validity of the transfer.

N.J.S.A. 18A:25-1 grants boards broad authority to transfer or reassign staff members within the scope of their certifications. The determination here must rest on whether the transfer meets the requirements set forth in Williams, above.

Petitioner is receiving the same salary he did as a principal. Since the position is on the same salary schedule as for principals in the district, he will suffer no monetary loss. The job description requires that the person filling the position hold a principal's certificate, thus assuming protection of petitioner's tenure.

A review of the job description shows it is comparable in rank and status and superior in responsibilities to a principalship. Petitioner had spent less than four months in the position during the 1980-81 school year. He has not yet had the opportunity to perform all the duties he will ultimately be responsible for.

IV

Only those positions stated in statute are tenure-eligible positions. Moresh v. Bayonne Bd. of Ed., 52 N.J. Super. 105 (App. Div. 1958). The Commissioner has held that a title may not be given to a person as a device to deprive that person of a right or benefit. Boeshore v. North Bergen Board of Education, 1974 S.L.D. 805, 817. N.J.S.A. 18A:28-6 states, in pertinent part, "[A] teaching staff member under tenure. . ., who is transferred or promoted with his consent to another position . . . shall not obtain tenure in the new position until" he serves more than two calendar years in the new position unless a shorter time is fixed by the board or he serves two academic years in the new position,

together with employment in that position at the beginning of the third academic year or he serves the equivalent of more than two academic years in the new position within a period of any three consecutive academic years. [Emphasis supplied].

On March 2, 1981, the Commissioner ordered the Board to reinstate petitioner to the position of principal. This it failed to do. The powers given the boards of education in N.J.S.A. 18A:25-1 are broad, but not without limits and certainly cannot be invoked to produce an unjust result.

Petitioner in this matter clearly has not given his consent to the transfer. Even if all the elements set forth in Williams, above, were satisfied, the Commissioner's order is unequivocal: petitioner is to be reinstated as a principal. Absent his consent, the transfer is in direct contravention of that order. This would be so even if the move were a promotion rather than an ostensibly lateral transfer.

Therefore, I **FIND** and **CONCLUDE** that the order of the Commissioner of Education, dated March 2, 1981, has been violated by the Eatontown Board of Education. I further **CONCLUDE** that the order must be given effect immediately.

Accordingly, summary judgment is entered in favor of Charles H. Lanza and the Eatontown Board of Education is **ORDERED** to place him in an elementary school principalship 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.

OAL DKT. NO. EDU 2291-81

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

15 SEPTEMBER 1981
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

9/15/81
DATE

Seymour Wess
DEPARTMENT OF EDUCATION

Mailed To Parties:

Sept. 18, 1981
DATE

Ronald I. Parker
OFFICE OF ADMINISTRATIVE LAW

bm

CHARLES H. LANZA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF EATONTOWN, 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 by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Respondent excepts to the finding by the Honorable Bruce R. Campbell, ALJ that the Board's transfer of petitioner was an involuntary one to an other than tenure-eligible position. Respondent contends that its transfer of petitioner complied with existing legal criteria for transfers. Petitioner's exceptions affirm the initial decision and assert that the action of the Board to transfer him was an exercise in bad faith. Respondent's reply exceptions refute petitioner's declaration of bad faith on the part of the Board and argue for dismissal of the Petition. The Commissioner finds no merit in respondent's exceptions.

The Commissioner finds, as in Williams, supra, at 157, that "a certificated tenure employee may not be unilaterally transferred without consent to other than a tenure-eligible position." Respondent errs in its argument that all legal criteria for petitioner's transfer have been met. The Commissioner finds it amply clear that petitioner did not agree to his transfer to a position of unrecognized title.

The Order of the Commissioner of Education of March 2, 1981 has not been observed by the Eatontown Board of Education. Petitioner shall be immediately placed in an elementary school principalship.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

October 23, 1981
Pending State Board

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 3053-81

AGENCY DKT. NO. 166-5/81A

IN THE MATTER OF:

THE BOARD OF EDUCATION
OF THE TOWNSHIP OF
LOWER ALLOWAYS CREEK,
Petitioner
v.
TOWNSHIP COMMITTEE OF THE
TOWNSHIP OF LOWER ALLOWAYS
CREEK, SALEM COUNTY,
Respondent.

Record Closed: August 3, 1981
Received by Agency: 9-16-81

Decided: September 14, 1981
Mailed to Parties: 9-18-81

APPEARANCES:

A. Paul Kienzle, Esq., (Casarow, Casarow & Kienzle attorneys) for the Petitioner

Raymond J. Zane, Esq., for the Respondent

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

The Board of Education of the Township of Lower Alloways Creek (Board) appeals from an action of respondent Township Committee of the Township of Lower Alloways Creek (Committee) taken pursuant to N.J.S.A. 18A:22-37, certifying to the Salem County Board of Taxation a lesser amount of appropriations for the 1981-82 school

year than the amount proposed by the Board in its budget which was rejected by the voters. The Board filed its Petition of Appeal before the Commissioner of Education on May 5, 1981, with the Committee filing its timely Answer thereto on May 15, 1981. 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. A prehearing conference was conducted on June 18, 1981, at the Trenton Office of Administrative Law and, subsequently, on August 3, 1981, a hearing in this matter was held at the Freeholder's Meeting Room, Salem County Courthouse, Salem, New Jersey.

UNCONTESTED FACTS

At the annual school election held April 7, 1981, the Board submitted to the electorate a proposal to raise $1,149,354 by local taxation for current expenses of the school district. These items were rejected by the voters and the Board subsequently submitted its budget to the Committee for determination of the amounts necessary for the operation of a thorough and efficient public school system in the Township of Lower Alloways Creek for the 1981-82 school year, pursuant to the mandatory obligation imposed on the Committee by N.J.S.A. 18A:22-37.

After consultation with the Board, the Committee made its determination and certified to the Salem County Board of Taxation an amount of $925,280 for current expenses for the 1981-82 school year. This total amount was a reduction of $224,074 from the amount the Board had determined was required to operate a thorough and efficient system of public education for the 1981-82 school year.

The Township of Lower Alloways Creek imposes no local purpose taxation for public education. By virtue of the Salem nuclear electric generating facility having been located in the Township, the governing body is in receipt of $4.4 million per year in gross receipt taxes. The local municipal government, through the Committee, appropriates the funds to operate the Board's public schools on an annual basis subsequent to a vote by the electorate.

By way of Resolution No. 96-81, the Committee, on April 13, 1981, recommended the following reductions in the Board's 1981-82 current expense budget:

A. Deletion of $64,629.00 as restoration for minimus state aid, as same was restored by the legislature.

B. Elimination of a duplication in administrators and two compensatory education teachers salaries in the amount of $69,445.00.

C. Elimination of five teaching positions, classroom, physical education, guidance, librarian and others totaling $90,000.00. . . .

The Board operates a one school building district for grades kindergarten through eight, with the two (2) classes for handicapped children, pursuant to N.J.S.A. 18A:46-1 et seq. The schoolhouse provides instruction areas as follows: eighteen (18) regular classrooms; two (2) compensatory education classrooms; and one (1) each of the following: home economics, industrial arts shop, music, art, science, health gymnasium and library media center (P-9).

The Board's pupil enrollment and use of classrooms as of June 30, 1981, is set forth as follows:

K-17	-	1 classroom
1-23	-	2 classrooms
2-22	-	2 classrooms
3-30	-	2 classrooms
4-19	-	1 classroom
5-27	-	2 classrooms
6-29	-	2 classrooms
7-29	-	2 classrooms
8-31	-	2 classrooms
P.P.I.-10	-	(Primary Perceptually Impaired) - 1 classroom
I.P.P.-12	-	(Intermediate Perceptually Impaired) 1 classroom

Total enrollment 249 (P-5)

The Board's projected enrollment and use of classrooms for the 1981-82 school year and reflecting the Committee recommended reductions, in part, is as follows:

K-15	-	1 classroom
1-18	-	1 classroom
2-18	-	1 classroom
3-20	-	1 classroom
4-30	-	2 classrooms

5-17	-	1 classroom
6-28	-	2 classrooms
7-27	-	2 classrooms
8-29	-	2 classrooms
P.P.I.-11	-	(Primary Perceptually impaired) - 1 classroom
I.P.P.-10	-	(Intermediate Perceptually Impaired) 1 classroom)

Total Enrollment 223 (P-5)

Finally, the Board's actual Teaching Staff Personnel for the 1980-81 school year and projected for the 1981-82 school year reflecting the Committee's recommended reductions is set forth as follows:

Teaching Staff Personnel	1980-81	1981-82	
Elementary Teachers	18	15	
Handicapped Student Teachers	2	2	
Art Teacher	1	1	
Industrial Arts Teacher	1	1	
Home Economics Teacher	1	1	
Music Teacher	1	1	
Health & Phys. Ed. Teachers	2	1	
Curriculum Coordinator/Student Personnel	1	1	
School Nurse	1	1	
Media Specialist/Librarian	1	0	
Speech Correctionist (2 days per week)	1	1	
Child Study Team	3	3	
Teachers Aide (Special Ed.)	2	1	
TOTAL	35	29	(P-4)

STIPULATIONS

By way of a letter from the Board's counsel, dated July 24, 1981, the Board abandoned its claim for the restoration of two of the Committee's recommended reductions as follows:

> . . .I have been authorized by the petitioning School Board to indicate to Your Honor that the only outstanding issue is the issue of the $90,000 reduction in the Teacher Salary Account. The

> statement with respect to the restoration of State Aid has been verified by the Board of Education and therefore the appeal based upon cuts related to State Aid is abandoned (this amount was $64,629.00). Also, the School Board has verified that there was in fact a duplication in the administrators and compensatory education teachers' salaries and the school Board accepts the cut made relative thereto in the anount of $69,445.00. For that reason, the appeal and hearing will only concern the elimination of line item amount calling for reduction in the numbers of teaching positions in the school ($90,000.00). . . .

Thus the only matter in controversy to be determined is the Committee's reduction of five (5) teaching positions in the amount of $90,000.

TESTIMONY OF THE WITNESSES

The relevant testimony presented at hearing with regard to the issue of the Committee's recommended reduction of $90,000 established that the school district administrative principal and the Board met with the Committee in January 1981 to discuss a cap waiver for the Board's 1981-82 current expense budget. The administrative principal testified that the school district cap limit for the 1981-82 budget year was 7.6% over its 1980-81 budget and that the Board has negotiated 9% salary increases with its teachers for the 1981-82 school year. The testimony reveals that the Board requested of the Committee an appropriation of $108,000 over and above its cap limit for the 1981-82 budget year. The Committee had, in fact, granted the Board's requests for additional appropriations to exceed its cap limits in the past. In this instance, however, the Committee refused to grant the waiver and the additional appropriation. The administrative principal testified that in January 1981, in order to remain under the Board's cap limit of 7.6%, he recommended a reduction in force (RIF) of four teaching staff members and one teacher aide. He testified that said recommended reductions in staff included one teacher each in grades one, two and three, the elimination of one compensatory education teacher and a teacher's aid.

The Board, in a meeting with the Committee in February 1981, asserted that it did not wish to reduce its teaching staff positions, believing that the community wanted to maintain the current teacher-pupil ratios and the individualized instruction it offered. The Committee was not persuaded that the Board needed the additional appropriation and, the administrative principal testified, its advertised budget for the 1981-82 school year reflected a budget under the cap limit (P-2).

The administrative principal and the Mayor testified that subsequent to the defeat of the Board's 1981-82 current expense budget, the administrative principal held an ex parte discussion with the Mayor, at which the administrative principal advised the Mayor that certain reductions in staff could be effectuated without jeopardy to the Board's educational program. The Mayor testified that he recommended the $90,000 reduction in the Board's 1981-82 budget based upon the administrative principal's recommendation that five positions could be eliminated. The Mayor testified that the administrative principal advised him that reductions in positions in grades one, two, three, and one physical education teacher could take place without adversely affecting the quality of the educational program. The Mayor stated that he computed an average salary of $18,000 for each of the five positions to arrive at the $90,000 reduction. The Mayor testified further that the position of school librarian was also discussed.

The administrative principal testified that he ultimately recommended the reduction of three classroom teachers, one physical education teacher and one teacher's aide to keep within the Board cap limits. (P-1)

With regard to the Committee's resolution to reduce the Board's current expense appropriations in an amount of $90,000, the Mayor testified that it was the Committee's intent to eliminate five teaching positions, including one position each for grades one through three, one compensatory education teacher and one physical education teacher. Although its resolution also called for the elimination of a guidance and librarian position, the Mayor testified that the Township Clerk mistakenly included the latter two positions in the resolution. The Mayor admitted that the Resolution was read by title only when it was adopted by the Committee on May 4, 1981 and, further, that he did not read the contents of the Resolution when he affixed his signature thereto.

The record herein reflects that the Board's final budget eliminated three classroom teachers, one health and physical education teacher, one librarian and one teacher's aide. (P-4, P-3).

FINDINGS OF FACT

Having reviewed all of the testimony and other evidence offered in this matter and having given fair weight thereto, and having observed the demeanor of the witnesses and assured their credibility, I **FIND** that:

1. Those uncontroverted facts set forth hereinbefore are hereby adopted by reference as **FINDINGS OF FACT.**

2. Prior to presenting its 1981-82 current expense budget to the electorate, the Board requested of the Committee an appropriation of $108,000 over and above its cap limit.

3. The Committee rejected the Board's request for the additional appropriation.

4. Thereafter, the Board's administrative principal recommended to the Board that it reduce in force five (5) positions, including three (3) classroom teachers, one (1) physical education teacher and one (1) teacher's aide.

5. Subsequent to the Board's budget having been rejected by the electorate, the administrative principal held an ex parte discussion with the Mayor, at which he stated that five (5) teaching positions could be eliminated without jeopardy to the Board's educational program.

6. Thereafter, the Committee, by way of Resolution 96-81, acted to reduce the Board's 1981-82 current expense budget in the amount of $224,074.

7. The Board conceded and, therefore, abandoned its claim for the restoration of $64,629 in loss of state aid and $69,445 in duplication of salaries, for a total of $134,074.

8. The Committee's Resolution recommending the $90,000 in teachers' positions and salaries is imprecise and failed to meet the spirit of the Court's directive in Board of Education of East Brunswick v. Township Council of East Brunswick., 48 N.J. 94 (1966).

9. The Mayor, and Committee, failed to read into the record the entire Resolution 96-81, containing the errors, before affixing the appropriate signatures thereto.

10. The Board's final 1981-82 budget reflected the elimination of six positions, including three classroom teachers, one physical education teacher, one librarian and one teacher's aide.

11. The Committee's recommended reduction of three classroom teachers in grades one through three will not adversely impact upon the pupil-teacher ratio for the 1981-82 school year (P-5).

12. The reduction of one (1) of two (2) of the Board's Health and Physical Education teachers will not adversely affect the quality of the Board's instructional program.

CONCLUSIONS

Having found that the Committee's recommended reduction of $90,000 through the elimination of teaching staff positions did not meet the spirit of East Brunswick, supra, it is necessary to recite the Court's directive as follows:

> . . .The governing body may, of course, seek to effect savings which will not impair the educational process. But its determination must be independent ones properly related to educational considerations rather than voter reactions. In every step it must act conscientiously, reasonably and with full regard for the State's educational standards and its own obligation to fix a sum efficient to provide a system be considered thorough and efficient in view of the makeup of the community. Where its action entails a significant aggregate reduction in the budget and a resulting appealable dispute with the local board of education, it should be accompanied by a detailed statement setting the governing body's underlying determination and supporting reasons. . . . (at pp. 105-106) (Emphasis supplied.)

The Committee failed to provide to the Board its detailed statement setting forth its underlying determination and supporting reasons. Having carefully reviewed and considered the testimony of the Mayor and the administrative principal, I **CONCLUDE** that the Committee's reasons to eliminate certain teaching positions was based upon the advice and representation of the Board's administrative principal that such a reduction in force would not jeopardize the Board's education program. Having thus reached this

finding and conclusion, I further **CONCLUDE** that the Committee's failure to set forth its detailed statement with supporting reasons is not fatal and, therefore, let stand for the purposes of this dispute its reduction of $90,000 to the Board's 1981-82 budget.

Having found that the Committee's Resolution was in error wherein it included the elimination of the Board's librarian and, in fact, the Board eliminated the position from the 1981-82 budget, I **CONCLUDE** that the loss of such position is not in the best interests of the pupils or the community at large. The uncontroverted testimony shows that the Board provides a complete library facility for its pupils and has provided a certificated school librarian in the past. The elimination of this position, I **CONCLUDE**, does not serve to provide a thorough and efficient system of education to the Board's pupils, (N.J.A.C. 6:8-4.3, N.J.A.C. 6:84.5). Accordingly, it is **ORDERED** that the position of school librarian be restored to the Board's teaching staff and that an amount of $18,000 be hereby restored to the Board's 1981-82 current expense budget.

Therefore, it is **ORDERED** that the additional amount of $18,000 for current expenses be and is certified to the Salem County Board of Taxation for school purposes for the year 1981-82, to be included in the taxes to be assessed, levied and collected in the municipality, so that the total amount to be raised by public taxation for current expenses of the Board will be $943,280.

In all other respects, the Board has failed to carry its burden of proofs for the restoration of the remaining funds reduced by the Committee and, therefore, 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 3053-81

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

14 September 1981
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

16 September 1981
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

Sept. 18, 1981
DATE

Ronald E. Perlstein
OFFICE OF ADMINISTRATIVE LAW

plb

DOCUMENTS IN EVIDENCE:

P-1 Final revised budget, dated 4-23-81 (14 pages)

P-2 1981-82 Advertised Budget (14 pages)

P-3 Final budget 80-81 (16 pages)

P-4 Teaching Staff Personnel 1980-81, 1981-82

P-5 Enrollment as of June 30, 1981 and Projected Enrollment for 1981-82 school year

P-6 Salaries for Certificated Personnel 1980-81, 1981-82

P-7 Schedule A, Salary Guide - 1980-81

P-8 Schedule B, Salary Guide - 1981-82

P-9 Lower Alloways Creek Township. 1 School - Lower Alloways Creek Elementary School

P-10 Diagram of Lower Alloways Creek Elementary School

P-11 Board of Education, Lower Alloways Creek Township, dated January 25, 1978, by Lower Alloways Creek Board of Education, Jack A. Nestor - President (4 pages)

BOARD OF EDUCATION OF THE TOWNSHIP OF LOWER ALLOWAYS CREEK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
TOWNSHIP COMMITTEE OF THE TOWNSHIP OF LOWER ALLOWAYS CREEK, SALEM 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 petitioning Board excepts to the Order by the Honorable Lillard E. Law, ALJ for the specific restoration of the position of school librarian. The Board alleges that it is within its discretion as to the use of restored monies. The Township Committee's reply exceptions do not argue against the restoration of the position of librarian but contend that, if it is the assertion of the Board that the money is not needed nor intended to be used (for that purpose), proper clarification must be provided by the Board or addressed by the Commissioner. The Commissioner finds merit in the Township Committee's exceptions.

An examination of the record herein clearly reveals to the Commissioner that for the 1980-81 school year the Board employed a media specialist/librarian (P-4, 9) for a comprehensive school library facility (P-10). Further, from his own records, the Commissioner finds that the district's adopted goals and objectives include library reference skills and services. In the opinion of the Commissioner, such goals cannot be met or the extensive facility properly managed, based upon present standards, without a professional librarian.

Accordingly, the Commissioner affirms in the strongest terms the restoration of the position of school librarian and the additional amount of $18,000 for current expenses for that purpose to insure a thorough and efficient education for the pupils of the district. The Commissioner concurs with the certification of the additional amount of $18,000 to the Salem County Board of Taxation for school purposes for current expense for the school year 1981-82 so that the total amount to be raised by public taxation will be $943,280.

COMMISSIONER OF EDUCATION

October 23, 1981

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3754-80
AGENCY DKT. NO. 2696/80

IN THE MATTER OF:

MICHAEL LAW

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF PARSIPPANY-TROY HILLS, MORRIS COUNTY

Record Closed: July 31, 1981
Received by Agency: 9-11-81

Decided: September 9, 1981
Mailed to Parties: 9-17-81

APPEARANCES:

Sheldon H. Pincus, Esq., for Petitioner
(Goldberg & Simon, attorneys)

Michael Law, Petitioner

Howard Johannessen, Representative,
Parsippany-Troy Hills Education Association

Myles C. Morrison, III, Esq., for the Board
(Dillon, Bitar & Luther, attorneys)

Thomas Santarsiero, Science Department Chairman

Anthony R. Scatton, High School Principal

BEFORE **WARD R. YOUNG**, ALJ:

Petitioner, a tenured teaching staff member, alleges the Board's action in withholding his salary increase for the 1980-81 school year was arbitrary, capricious, unreasonable and violative of N.J.S.A. 18A:29-14.

The Board denies that its action was arbitrary, capricious or unreasonable; admits its actions were not in full compliance with N.J.S.A. 18A:29-14, but asserts its failure to give timely notice should not set its actions aside.

The matter was transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14 F-1 et seq. on June 13, 1980. Prehearing conferences were held on October 9 and December 22, 1980, and two days of hearing were held on May 1 and May 12, 1981. The matter was briefed and the record closed on expiration of the date established for petitioner's rebuttal, July 31, 1981.

RELEVANT TESTIMONY OF WITNESSES AND DOCUMENTARY EVIDENCE

The petitioner testified he has been employed in respondent's district as a teacher of science for nine years; was first observed during the 1979-80 school year on November 30, 1979 by his department chairman, who recorded no negative aspects of petitioner's performance (Tr. I-16/17; P-1); and his plan book had always been approved (Tr. I-19).

Petitioner further testified he was absent for eleven days up to December 18, 1979, five of which were attributed to multiple injuries sustained by his wife in an automobile accident, and six of which were due to personal illness (Tr. I-19/20). He also testified he attended a conference with his chairman, assistant principal and principal, at which he was generally commended (Tr. I-18), and that his principal never formally observed his teaching in 1979-80 (Tr. I-21), nor at any time during the past nine years (Tr. I-29).

The principal completed a Performance Evaluation Report on petitioner which indicated a conference date of December 1979 when no conference was held (Tr. I-22; P-3), but petitioner testified that a conference took place in January 1980 (Tr. I-23).

In response to a February 5, 1980 memo from the principal to petitioner's assistant principal and department chairman (P-5), petitioner testified that his grading practices were not questionable; that no student ever indicated a misunderstanding of grade determination; that no student ever indicated that course material was not being covered or covered inadequately; that his students have reading assignments but not written homework nightly and are required to take their text home every night; that his department chairman did not express concerns about his planning and organization; and that his principal never personally discussed with him the essence of the complaints incorporated in P-5. (Tr. I-26-29).

In response to an undated memo (P-9) of a conference at which the petitioner, his chairman and principal were present, prepared by the principal, and at which the principal discussed alleged complaints, the petitioner testified that he was advised by his Association-representative to listen and not respond as the principal refused to permit the representative to be present (Tr. I-39). He further testified that the principal was very upset; swore several times; "indicated that he was displeased with my teaching performance; and "mentioned the absenteeism and . . . that my planning and organization was poor" (Tr. I-39). He also testified that the principal stated that he and the assistant principal "would be in my classroom several times a day" (Tr. I-41, P-9). The principal has yet to observe him (Tr. I-42, 43).

The petitioner testified that he was told to report to the principal on February 26, 1980, at which time the principal handed three documents to him for signature, which are marked in evidence as P-10, P-11 and P-12. P-10 is a Performance Evaluation Report, signed by the principal (who had never observed petitioner), and in addition to items mentioned needing immediate improvement, stated "He has also been given a time line as to when we would expect to see improvement, however, at this time it is recommended that Mr. Law not be given an increment for the 1980-81 school year." P-11 and P-12 represent separate Performance Improvement/Development Plans, each dated February 15, 1980, which, according to the documents themselves, state relative to the Evaluation Category to "complete at time of appraisal conference." Typed on the document adjacent to "Estimated Date(s) when objective will be achieved" was "Immediate." The petitioner testified that "nothing was mutually developed."

The department chairman sent a progress report on the petitioner to the principal on April 16, 1980 (P-13), which was highly commendable.

The Board acted to withhold the employment and adjustment increments from petitioner at its April 10, 1980 meeting. The Board secretary advised the petitioner in a letter under date of April 30, 1980 (P-22), that the reasons for the Board's action were:

1. Absenteeism resulting in a loss of continuity of instruction.

2. Questionable rating practices with students.

3. Lack of planning and implementation of course of study.

Petitioner testified about a memo sent to his department chairman and assistant principal by the principal concerning a parental complaint (P-6). The complaint was about the grading of lab reports submitted during the first marking period, returned to the students during the second marking period and included in the second marking period grade. He testified this procedure had been done with supervisory approval in the past; that he discussed the procedure with his students; and that the students expressed a preference for the carry-over to facilitate a more detailed review of the reports by petitioner (Tr. I-31-33).

The petitioner further testified that he met in conference with the principal on March 20, with an Association representative in attendance, at which the principal outlined his rationale for recommending the increment withholding, and indicated that the petitioner had made progress, and if such progress continued the granting of the increment would be recommended (Tr. I-50). The representative testified in corroboration (Tr. I-77).

The department chairman testified that he had not disapproved of petitioner's lesson plans, but on two occasions did comment for additional inclusions and up-dating (Tr. I-121). An inspection of the plan books, R-2 in evidence, reveals the chairman's "ok" on five separate inspection dates from September 24, 1979 to April 8, 1989.

The chairman also testified about petitioner's absences. He stated he felt petitioner was excessively absent, eleven days up to December 18, and testified that concern arose over the way absences occurred rather than the number. He testified that a better continuity of instructions could be maintained if the absences were on successive days rather than sporadic (Tr. I-107, 108, 127).

The chairman also agreed with the principal that withholding of petitioner's increment would be in order (Tr. I-113).

The principal testified that he and two vice-principals write evaluations, and that nine department chairmen observe and supervise (Tr. II-4). He wrote two evaluations of petitioner during the school year, one in December and one in February (Tr. II-4) (P-3 and P-10). His testimony indicated concern over petitioner's absenteeism and that "we were experiencing difficulties with the plans that were submitted by Mr. Law (Tr. II-5,6). He testified that he did not formally observe the petitioner (Tr. II-8). Source of the information that led to his evaluations was the department chairman (Tr. II-8).

The principal testified he wrote a memo to petitioner's chairman and vice-principal about pupil concerns with grading practices (P-5). He also testified that he wrote a memo to the Superintendent on May 7 about a review of petitioner's progress with the department chairman, which was not commendatory (P-24).

On cross-examination, the principal admitted he received a memo dated April 16 from the department chairman that stated all the goals achieved by the petitioner were most commendable (Tr. II-59, P-13).

The principal testified that no vice-principals observed the petitioner and that he would observe tenured teachers who were deemed to have problems (Tr. II-36). He testified he did not observe the petitioner. His evaluation of petitioner was based "not just on that year but previous incidents." (Tr. II-38). The principal did not analyze petitioner's planbooks. His reliance on the chairman served as the basis for his evaluation, as "I have the knowledge of what the teacher is doing." (Tr II-44).

The principal's response to an interrogatory was read into the record about the identification of loss and continuity of instruction, to which the principal said: "The loss of continuity and instruction was attributable to Mr. Law's numerable absences. Other than to identify such absences it is not possible at this time to identify particular incidences of loss of continuity" (Tr. II-46).

The principal testified he had no personal knowledge that petitioner had not completed the course of study for his biology classes in 1979-80. He stated "after twenty-five years as a principal I know whether or not a teacher is doing — is doing his job or not" (Tr. II-63).

FINDINGS OF FACT

1. By stipulation, respondent failed to notify petitioner in writing of its action and the reasons therefore within ten (10) days of said action pursuant to N.J.S.A. 18A:29-14.

2. During the course of the 1979-80 school year, petitioner's teaching performance was formally observed only by his department chairman.

3. During 1979-80, the principal prepared two Performance Evaluation Reports on the petitioner.

4. The post observation conference after the chairman's first observation report included a concern over petitioner's eleven absences to date, but was otherwise commendatory.

5. The chairman was less concerned about the number of absences than he was about the random pattern.

6. The principal unilaterally completed three Performance Improvement/Development Plans for petitioner.

7. There is no evidence in the record supporting the contention of a lack of continuity of instruction due to petitioner's early absences.

8. The record is void of supportive evidence of grading difficulties other than one lab report.

9. The assistant superintendent was critical of the principal's failure to submit a second evaluation of petitioner for review due to the apparent significant improvement between February 26, when the recommendation to withhold the increment was made, and April 15, when the action to withhold the increment was taken by the Board.

10. The principal based his evaluations of petitioner on the observations of the chairman and apparent parental and pupil input.

11. The principal had no knowledge of any lack of continuity of instruction; did not assess petitioner's plan books; had no knowledge related to completion of petitioner's instructional program; did not feel petitioner was absent an inordinate amount of time after February 15; and based his recommendation to withhold petitioner's increment partially on the latter's performance prior to the 1979-80 school year.

DISCUSSION

It is well established in case law that the Commissioner of Education is not to substitute his judgment for that of a local Board of Education, but to determine if there was a rationale basis, in fact, for the Board's action. See J. Michael Fitzpatrick v. Board of Education of the Borough of Montvale, 1960 S.L.D. 4; Kopera v. West Orange Board of Education, 60 N.J. Super. 288 (App. Div. 1960); 1958-59 S.L.D. 96, aff'd State Board of

Education 98; rem. Commissioner 60 N.J. Super. 288 (App. Div. 1960); Decision on Remand 1960-61 S.L.D. 57; aff'd New Jersey Superior Court, Appellate Division January 10, 1963 (1961-62 S.L.D. 23)]; Fanella v. Washington Township Bd. of Ed., 1977 S.L.D. 383.

In the instant matter, the department chairman was the only supervisor who observed the petitioner but he did not write evaluations. The principal, however, did not observe the petiitoner, but he wrote evaluations.

The record is devoid of any evidence the chairman made any recommendation to withhold petitioner's increment, but he did acquiesce in the prinicpal's determination to do so.

The three reasons given (albeit untimely) for the Board's action have been carefully analyzed, and it is determined here that the record establishes an insufficient basis of support for increment withholding. Further, the principal's recommendation was founded on little more than hearsay and lacked a rational basis in fact. I **SO FIND.**

In this matter, I **FIND** that the record fails to show a rationale basis for the reasons given for the Board's action.

I **CONCLUDE,** therefore, the Board's action must be deemed arbitrary and capricious. It is **ORDERED** that petitioner's withheld increment for the 1980-81 school year be restored, together with back pay.

In light of the determination in this matter, I **FIND** no compelling reason to address the issue of the Board's procedural violation of N.J.S.A. 18A:29-14.

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 September 1981
DATE

WARD R. YOUNG, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

Sept. 17, 1981
DATE

Ronald I. Parker
FOR OFFICE OF ADMINISTRATIVE LAW

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EXHIBITS

Exhibit	Description
P-1	2-page Observation Report dated 11/30/79
P-2	Memorandum from Santarsiero to Scatton dated 12/18/79
P-3	2-page Performance Evaluation Report dated 12/1979
P-4	Performance Improvement Development Plan dated 12/1979
P-5	Memorandum from Scatton to Merola & Santarsiero dated 2/5/80
P-6	Memorandum from scatton to Merola dated 2/5/80
P-7	Memorandum from Santarsiero to Scatton dated 2/7/80
P-8	Observation Report dated 2/14/80
P-9	Memorandum - no date
P-10	Evaluation Report signed 2/26/80
P-11	Performance Improvement Development Plan dated 2/15/80
P-12	Performance Improvement Development Plan dated 2/15/80
P-13	Progress Report dated 4/16/80
P-14	2-page memorandum from Monahan to Scatton dated 5/1/80
P-15	Evaluation Report dated 5/6/80
P-16	Performance Improvement Development Plan dated 5/23/80
P-17	Absence schedule
P-18	Absence schedule entitled Employee Attendance Records
P-19	Letter dated 4/8/80
P-20	Letter dated 4/10/80
P-21	Letter dated 4/15/80
P-22	Letter dated 4/30/80
P-23	Letter dated 8/21/80
P-24	Letter to Mr. Sheehy dated 5/7/80
R-1	Planning Books 2 books 1979-80

MICHAEL LAW,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PARSIPPANY-TROY HILLS, 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 parties 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 the Board did not have a rational basis on which to make the decision to withhold petitioner's increment. Respondent argues that petitioner's attendance record showed excessive absenteeism that adversely affected the continuity of instruction of pupils and relies on Trautwein v. Board of Education of Bound Brook, Docket No. A-2773-78, Superior Court of New Jersey, Appellate Division, April 8, 1980, cert. den. 84 N.J. 469 (1980).

Petitioner's reply exceptions affirm the initial decision contending that respondent's action was arbitrary, capricious and unreasonable. Petitioner relies on his previously submitted findings of fact as rendering respondent's exceptions meritless. The Commissioner cannot agree with petitioner.

The Commissioner notes with approval respondent's reliance on Trautwein, supra, wherein the Court found that the teacher's record of absenteeism averaging 20.6 days per year warranted the withholding of her increment. This was determined to be so despite the legitimacy of her absences. Further, the Court in disagreement with the Commissioner's finding that "No prima facie showing was made that her performance was lessened" said

> "***[T]his improperly placed the burden of proof on the board rather than on the teacher, where it belonged.***"
> (Slip Opinion, at p. 9)

Petitioner herein was absent during the 1979-80 school year on twenty occasions randomly spread from 10/3/79 to 6/20/80 as single day absences. In the opinion of the Commissioner such absenteeism is excessive and constitutes good cause for the withholding of the increment. Trautwein, supra Accordingly, the Commissioner finds and determines that Judge Young erred in concluding that the Board had no rational basis for deciding to withhold petitioner's increment. The Commissioner determines that in doing so the Board properly exercised its discretionary authority.

The Commissioner is constrained to observe that this Board and all others must be vigilant in the exercise of the broad powers for which they are responsible to insure that their administrative agents are in full compliance with the rules for the supervision of instruction, observation and evaluation of nontenured and tenured teaching staff members. N.J.A.C. 6:3-1.19, 1.20 and 1.21

The action of the Court herein restoring petitioner's increment is set aside. Judgment is accorded the Board and the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

October 26, 1981

Pending State Board

IN THE MATTER OF THE	:	
CLASSIFICATION APPEALS OF THE	:	
BOARD OF EDUCATION OF THE TOWNSHIP	:	
OF EAST BRUNSWICK, MIDDLESEX	:	
COUNTY,	:	
APPELLANT-CROSS RESPONDENT,	:	
V.	:	COMMISSIONER OF EDUCATION
S.S., on behalf of her daughter,	:	DECISION
D.S.,	:	
RESPONDENT-CROSS APPELLANT.	:	
	:	

For the Appellant-Cross Respondent, Rubin, Lerner & Rubin (David Rubin, Esq., of Counsel)

For the Respondent-Cross Appellant, Theodore A. Sussan, Esq.)

This matter was opened before the Commissioner through Petition of Appeal submitted by counsel for the East Brunswick Board of Education (Board) on April 23, 1981 seeking reversal of a decision of the Chief Classification Officer awarding tuition payments to the parent of a child residing in the district but enrolled in a private day school. The parent of D.S., through Notice of Cross Appeal dated April 27, 1981, appealed that portion of the classification officer's decision which denied reimbursement for past transportation and future payment of tuition at the New Grange School.

D.S. is a handicapped child originally classified as neurologically impaired in 1977. In the spring of 1978, she was reevaluated by the Board's CST and classified as educable mentally retarded (EMR). D.S., with parental approval, was enrolled in the district's EMR class for the school year 1978-79. D.S.'s mother, expressing doubts concerning the appropriateness of her classification and placement, enrolled her in the New Grange School of Princeton in October 1979 and subsequently requested reimbursement for tuition and transportation from the Board. Upon denial, she then requested an impartial hearing which was conducted on September 10, November 10, and December 8, 1980.

The Commissioner has reviewed the record in this matter and carefully considered the positions of the parties. The Commissioner notes that the classification officer's decision in the matter herein controverted gives great weight to private and independent evaluations undertaken by D.S.'s parent subsequent to her removal from the program in the Board's district. The Commissioner likewise notes that said evaluations place greater emphasis upon neurological impairment and suggest the possibility of potential for learning greater than those evaluations promulgated by the district's CST. The Commissioner is constrained to observe, however, that no testimony was adduced nor does the record indicate that the Board's CST ever acted in any way other than as responsible professionals seeking to provide an appropriate educational setting for D.S. The documentation of letters, case notes, and reports points to an essentially postive relationship between the parent and the members of the district's special services team.

The Commissioner notes that the controverted matter herein revolves solely and exclusively over the appropriateness of D.S.'s classification as between NI and EMR. He likewise notes that said difference of opinion might have readily been ameliorated through the seeking of an independent evaluation pursuant to N.J.A.C. 6:28-1.6(m) or through resort to those same due process procedures utilized herein. N.J.A.C. 6:28-1.9 The Commissioner cannot agree with the classification officer's conclusion that the parent's action herein was involuntary. Nor can he accede to a finding that a local district CST, acting in good faith and reaching a classification determination that is different from that reached by either an independent evaluation or a classification officer, is therefore subject to a determination of failure to provide an appropriate placement. Such determination implies a degree of exactitude in reaching conclusions relative to classification and/or placement which does not, in fact, exist and which has the effect of imposing a penalty upon honest professional disagreement.

Accordingly, the Commissioner finds that the decision by the parent of D.S. to remove her from the placement deemed to be appropriate by the Board's CST and place her in a private school special education program was a voluntary action pursuant to N.J.A.C. 6:28-4.8. The Commissioner, therefore, reverses the finding of the classification officer relative to tuition and transportation reimbursement for all periods of attendance at the New Grange School. The Commissioner does, however, affirm the classification officer's determination that a new IEP appropriate to D.S.'s needs is to be immediately developed and implemented. Should the Board's CST and the parent of D.S. still remain at odds as to appropriate classification, there is to be immediate resort to an independent evaluation pursuant to the provisions of N.J.A.C. 6:28-1.6(m).

IT IS SO ORDERED this 27th day of October 1981.

COMMISSIONER OF EDUCATION

October 27, 1981
Pending State Board

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3170-81
AGENCY DKT. NO. 169-5/81A

IN THE MATTER OF:

BOARD OF EDUCATION OF THE TOWNSHIP OF BRANCHBURG,
Petitioner
v.
TOWNSHIP COMMITTEE OF THE TOWNSHIP OF BRANCHBURG,
Respondent.

Record Closed: August 26, 1981
Received by Agency: 9-11-81

Decided: September 10, 1981
Mailed to Parties: 9-16-81

APPEARANCES:

William B. Rosenberg, Esq., (Blumberg, Rosenberg, Mullen & Blumberg, attorneys) for Petitioner

Mark S. Anderson, Esq., (Woolson, Guteri, Sutphen & Anderson, attorneys) for Respondent

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

On April 7, 1981, the electorate of the Township of Branchburg rejected the school budget proposed by the Branchburg Board of Education (Board). Subsequently, the Branchburg Township Committee (Committee) certified to the Somerset County Board of Taxation an amount which it determined was necessary to provide a thorough and

efficient system of schools in the district. This amount is less than the amount which was proposed to and rejected by the electorate at the annual election. The Board contends that the reduction was procedurally defective, contrary to statutory directive (N.J.S.A. 18A:22-37) and so great as to render the Board unable to present a thorough and efficient program of education in the 1981-82 school year. The Committee contends, conversely, that its action was in compliance with education law and that the reduction was not such as to render the Board's program less than that required by N.J.S.A. 18A:7A-1 et seq.

The Board appealed to the Commissioner of Education on May 4, 1981. A timely Answer was filed on May 18, after which the Commissioner of Education transmitted this matter to the Office of Administrative Law on May 27 for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. and N.J.S.A. 52:14B-1 et seq.

UNCONTESTED FACTS

The following evidence is uncontested and is therefore **ADOPTED AS FACT.**

At the school election held on April 7, 1981, the School Board submitted to the electorate the following proposed amount to be raised by local taxation for 1981-82:

Current expense	$4,645,244

The current expense proposal was rejected by the voters.

Subsequent to the rejection, the Board submitted its proposal to the Committee for review and determination pursuant to N.J.S.A. 18A:22-37.

After considering the Board's budget, the Committee certified to the Somerset County Board of Taxation, $4,537,244 to be raised by public taxation. Thus, the Committee reduced the amount to be raised by public taxation for the Board's current expense budget by $108,000.

DISCUSSION AND CONCLUSIONS:

APPLICATIONS FOR SUMMARY DECISION

The Board contends that it is entitled to be awarded summary decision by reason of the Committee's alleged failure to discharge its responsibility under prevailing education law. The Committee advances similar allegations against the Board.

N.J.S.A. 18A:22-37 provides:

> The governing body of the municipality, or of each of the municipalities, included in the district shall, after consultation with the board, and by April 18, determine the amount which, in the judgment of said body or bodies, is necessary to be appropriated, for each item appearing in such budget, to provide a thorough and efficient system of schools in the district, and certify to the county board of taxation the totals of the amount so determined to be necessary. . . .

The standards for determining disputes arising over defeated school budgets are set forth in E. Brunswick Twp. Bd. of Ed. v. E. Brunswick Twp. Council, 48 N.J. 94 (1966). Therein the following is stated:

> . . . the Commissioner in deciding the budget dispute here before him, will be called upon to determine not only the strict issue of arbitrariness but also whether the State's educational policies are being properly fulfilled. Thus, if he finds that the budget fixed by the governing body is insufficient to enable compliance with mandatory legislative and administrative educational requirements or is insufficient to meet minimum educational standards for the mandated "thorough and efficient" school system, he will direct appropriate corrective action by the governing body or fix the budget on his own within the limits originally proposed by the board of education. On the other hand, if he finds that the governing body's budget is not so inadequate, even though significantly below what the Board of Education had fixed or what he would fix if he were acting as the original budget-making body under R.S. 18:7-83, then he will sustain it, absent any independent showing of procedural or substantive arbitrariness. (at p. 107)

A careful analysis of the voluminous written and oral testimony offered by both parties convinces the undersigned that there was substantial compliance with applicable school law governing defeated school budgets. Accordingly, I **CONCLUDE** that summary decision should not be awarded either litigant and that the case should be decided on the basis of the proofs.

This conclusion is grounded on the fact that, after the budget defeat on April 7, representatives of the Board met on two separate occasions with members of the Committee to discuss the budget. There was also prompt transfer of documents to the Committee and use of those documents by the Committee members in reviewing the Board's budget. The facts that the Board requested another meeting on a date unsatisfactory to the Committee and that the Committee adjourned yet another scheduled meeting prior to the late arrival of Board members do not negate the reality that other meetings of substantial duration were held. While it is unfortunate that the testiness of both bodies forstalled what might otherwise have resulted in an amicable settlement, the bodies have exhibited sufficient compliance with existing law to proceed to a determination on the proofs. Summary decision is **DENIED** to both parties.

COMMITTEE'S PROPOSED INCREASE TO THE REVENUE PORTION OF THE BUDGET

The Committee asserts, in partial justification of its reduction of the Board's request for tax funds, that the Board has understated its anticipated revenues at $45,423. The Committee proposes that two component revenue items be increased a total of $62,000, thus increasing balances appropriated to $107,423. The two component revenue items are as follows:

	BOARD'S PROPOSAL	COMMITTEE'S PROPOSAL	INCREASE IN REVENUE
Miscellaneous Income	$20,000	$52,000	$32,000
Appropriation from June 30, 1981 Unappropriated Balance	45,423	75,423	30,000
Committee's Total Proposed Revenue Increase			$62,000

MISCELLANEOUS INCOME: Increase: $32,000

The Board introduced documentary evidence and oral and written testimony from its members, its Superintendent and its Board secretary. Essentially, the testimony was that interest income had been received during the 1980-81 school year totaling $111,672.92 (P-26). They testified that although the Board had appropriated only $20,000 from interest income to its 1980-81 budget, it had utilized $83,000 of the excess revenue to make payments for negotiated dental plan benefits for its employees and to meet unanticipated obligations in the form of tuition because of an influx of nine additional special education pupils (P-26).

The Board secretary testified that, in entering $20,000 as miscellaneous income for the 1981-82 budget, she had considered the possibility that interest rates could decline and the possibility that further emergencies could arise, necessitating the use of such uncommitted income to meet the Board's unanticipated obligations. She testified that her present assessment of probable interest income, on the basis of having realized approximately $24,000 of interest income for July, August and September 1981, is that the Board will realize at least $70,000 of interest income during the 1981-82 school year.

The Board secretary testified and the Superintendent corroborated that they assume the excess revenue from interest will be needed, since they are now aware that the Board has underbudgeted in the following line items:

Heat	$30,000
Pupil Transportation	28,786
Total	$58,786

On the basis of a preponderance of credible evidence, I **CONCLUDE** that the Board did understate its anticipated revenue from miscellaneous income. It must be recognized that only a few years ago interest rates were only half of what they are today; yet, there was reason to believe in December 1980 when the budget was formulated that interest income alone would be substantially greater than $20,000. The present deposits in interest-bearing securities accounts totaling $477,000 will fluctuate during the school year with the impact of payrolls for teachers. Nonetheless, two successive years' experience with interest income over $100,000, coupled with sustained high interest rates in the economic sector indicate that the Board, with yet additional interest income from deposits in its recently established interest-bearing checking account, can, by conservative estimate, anticipate at least $70,000 of miscellaneous income beyond the $20,000 it appropriated as miscellaneous income in the revenue portion of the 1981-82 budget. In support of this estimate, it must be recognized that the Board receives annually lesser amounts of miscellaneous income, approximating $5,000 from tuition, fines, rental, and refunds.

I further **CONCLUDE** that the Board and its agents have been relying on this additional income as a contingency for emergencies that may arise. This contingency is over and beyond that available to the Board in its unappropriated balance (surplus) in its current expense account.

Given the conclusions set forth above, the Committee has conclusively proven that the Board's miscellaneous revenue was understated. Accordingly, it is DETERMINED that the additional amount of $32,000 that the Committee contends should be added to the miscellaneous revenue portion of its budget shall be added to the $20,000 already appropriated so that the miscellaneous revenue line item of 1981-82 budget is increased by $32,000 to a total amount of $52,000.

CURRENT EXPENSE BALANCE APPROPRIATED: Increase: $30,000

The Board secretary testified and produced documents concerning those items that have affected the Board's unappropriated current expense balances since June 30. Those figures are summarized as follows:

C.E. Balance June 30, 1980 (audited)	$168,170.57
Plus Unexpended Appropriations & Excess Revenues 1980-81	135,554.61
	303,725.18
Less Balance Appropriated to 1980-81 Budget & Additional Appropriations & Adjustments during 1980-81	209,282.00
Balance June 30, 1980	94,443.18
Less Appropriation to 1981-82 Budget	45,423.57
Less Reserve for Residential Placement	25,000.00
Unappropriated Balance July 1, 1981	$ 24,019.61

[P-26]

The Board secretary and the Superintendent testified that the $25,000 being held in reserve for residential placement was placed in the 1978-79 budget at the recommendation of the County Superintendent to provide for what appeared to be impending charges for two resident pupils who are in residential placement as the result of anticipated action by the Division of Youth and Family Services (DYFS). They testified that the $25,000 was part of an approved CAP appeal approved by the County Superintendent, who has annually, since 1978-79, recommended that the Board continue to carry the $25,000 as a contingent fund to defray possible transfer of liability for residential placement charges from DYFS to the Board.

It is readily apparent that without the $25,000 being held in reserve for residential placement contingency, the Board does not have a total of $30,000 in its unappropriated current expense balance. As of the last date of the hearing, however, the

Board, after almost one-fourth of the 1981-82 school year, had received no notice of liability for the residential placement. Accordingly, I **CONCLUDE** that approximately one-fourth of the $25,000, or $6,250, will not be needed during 1981-82, thus increasing the Board's available surplus, while still providing for contingent residential costs, as follows:

Balance July 1, 1981	
(Without the $25,000)	$24,019
One-fourth of the $25,000	6,250
	$30,269

The Board's unappropriated balance under ordinary circumstances would not appear an excessive amount to hold in reserve for contingencies for a district with an annual budget in excess of five million dollars. It must, however, be viewed within the context of the electorate's mandate for economy.

It is clearly apparent that this Board has been using its miscellaneous income revenue line item as a second contingent account. Even if the Board should experience deficiencies totaling $58,786 in its line item accounts for heat and pupil transportation, ante, as previously shown, it can be expected to generate, by conservative estimates, additional unbudgeted revenues of $70,000. This exceeds the Board's currently foreseeable overrides in heat and transportation by approximately $11,000. This balance, coupled with careful economizing, should sustain this district which admittedly has been exceeding the minimum program for a thorough and efficient system of education. In any event, the district is not without recourse should yet unforeseen emergencies arise. The law provides for the holding of a supplemental budget referendum should such be necessary.

Given the above contextual setting, it is **DETERMINED** that by a preponderance of credible evidence, the Committee has proven that the additional amount of $30,000 may, without threat to the Board's ability to provide a thorough and efficient education, be appropriated to revenue from unappropriated balances in the current expense account. By so doing, the total amount appropriated for the 1981-82 school year will be increased from $45,423.57 to $75,423.57.

COMMITTEE'S PROPOSED LINE ITEM REDUCTIONS

The Committee proposed to reduce the following line item in the Board's current expense budget:

		BOARD'S PROPOSAL	COMMITTEE'S PROPOSAL	REDUCTION
J-130	Administration-Other Exp.	$ 35,580	$ 35,483	$ 97
J214	Other Inst. Staff Sals.	194,621	170,143	24,478
J230	Library, A.V. Expenditures	26,169	17,923	8,246
J550	Transportation	154,768	146,768	8,000
J800	Fixed Charges	2,169,829	2,164,650	5,179
Total Proposed Reductions				$46,000

J130 Administration-Other Expenses — Reduction $97

The Board offered no testimony or documentary evidence to show that the reduction is one which the Board cannot sustain. In view of the Board's burden of proof in such proceeding, it is **DETERMINED** that the Committee's proposed reduction is sustained in the amount of $97.00.

J214	Other Inst. Staff Sals.	Reduction $24,478
J230	Other Inst. Expenses	Reduction $8,246
J800	Fixed Charges	Reduction $5,179

These proposed cuts all relate to the Board's library programs. The salaries item represents the continuation of one of the Board's certified librarians on staff during 1980-81 and the addition of one certified librarian whom the Board intends to hire for 1981-82.

The Superintendent testified that the Board, in 1978-79, embarked on the first step of a three-year program of providing three certified librarians in its three elementary schools. He testified that, with the addition of a third librarian in 1981-82, this staffing would be completed. He testified that when the Board was forced by financial exigencies to obtain a CAP waiver for 1981-82, it indicated that it would be necessary to decrease its certificated library staff to one unless the waiver were approved (P12). The waiver which was approved authorized the salaries of the two librarians (thus increasing the certified librarian staff to three). It also authorized attendent expendi-

tures of $5,179 for fixed charges and $8,246 for equipment and supplies. The Commissioner's authorization, dated February 27, 1981 stated, in pertinent part, that:

> All programs are specifically approved as a condition of this waiver. County Superintendents will be responsible to monitor all programs and to recommend tax levy adjustments if specifically approved programs are not implemented. They must be maintained in the 1981-82 and all future budgets and cannot be considered for elimination in future cap waiver requests without the express approval of the county superintendent of schools. [Emphasis in text.]
>
> Any changes made after public hearings or elections would not alter the necessity to operate specifically approved programs. . . .
> [P-11]

These CAP restrictions, while not graven in stone, may not be lightly disregarded.

The Superintendent testified that the Board's desire to hire only certified librarians was prompted by a State Department of Education recommendation (P-4). That recommendation, stemming from a T & E monitoring visit, was that pupils should receive library instruction from school librarians who are certified to teach. He further testified that in his opinion, the loss of budgetary funds to pay two librarians would be a regressive step which would be contrary to the established goals under N.J.S.A. 18A:7A-1 et seq.

The Superintendent testified further that the fixed charges (J-800) and the audio visuals including a laminator and taping equipment, are necessary, inherent facets of operating its library instruction program as approved under the CAP waiver.

One Committee member testified that when these line items were cut, the Committee was not aware that it was a cut to an existing program. He further testified that it was his desire and that of other Committee members not to cut any existing program.

After considering the evidence in the record dealing with the Committee's cuts in these line items, it is **DETERMINED** that these cuts should be restored in full.

As was stated by the Commissioner in Bd. of Ed. of Plainfield v. City Council of Plainfield, 1974 S.L.D. 913 at pp. 920-21:

> . . .While the constitutional requirement which imposes on local school districts the obligation to conduct "thorough and efficient" programs of education is nowhere precisely defined, the Commissioner holds that it must be interpreted to mean that as a minimum such programs are entitled to a continuing sustenance of support, one marked by constancy and not by vacillation of effort. . . .

Such a continuing constancy of effort is called for herein. The Board instituted its program of adding a certified librarian beginning in 1979-80, to be completed in the 1981-82 school year. The electorate, in approving the two prior years' budgets, gave tacit assent to that upgrading of programs which should now be completed in keeping with the T & E monitors' recommendations. This fact, coupled with the testimony of the Committee member that it was not the Committee's intent to cut an existing program, argue persuasively against allowing these cuts to stand. Accordingly, the following amounts are restored:

J-214	$24,478
J-230	8,246
J-800	5,179

J550 Transportation Reduction $8,000

The Board had planned to house its school buses in a new facility to be provided by the Committee on an increased rental basis. This facility, however, will not be available during the 1981-82 school year and the Board will not have to pay the increased rental. Accordingly, the Board does not contest this line item reduction. Therefore, this reduction is sustained in the full amount of $8,000.

The Committee detailed additional line item reductions which the parties agreed would be viable only if the Committee's proposal to increase the revenue portion of the budget were not sustained (P-22). Although testimony and documentary evidence were entered concerning these items, no useful purpose would be served in summarizing that evidence, since all of the Committee's proposed increases in revenue have been sustained, ante.

SUMMATION:

Those reductions which have been sustained and the restorations which have been set forth above are summarized as follows:

		PROPOSED REDUCTION	AMOUNT RESTORED	AMOUNT NOT RESTORED
J-130	Administration-Other Exp.	$ 97	-0-	97
J214	Other Inst. Staff Sals	24,478	24,478	-0-
J230	Library A.V. Expenditures	8,246	8,246	-0-
J550	Transportation	8,000	-0-	8,000
J800	Fixed Charges	5,179	5,179	-0-
Totals		$46,000	$37,903	$8,097

The Committee's proposal to add $62,000 to the revenue portion of the Board's budget has been sustained. Also sustained were the Committee's proposed reductions in current expense line items in the amount of $8,097. On the basis of a preponderance of credible evidence, however, the Board has proven its need for a restoration of $37,903. Accordingly, it is **ORDERED** that the additional amount of $37,903 for current expenses be and is certified to the Somerset County Board of Taxation for school purposes for the 1981-82 school year. This additional amount to be included in the taxes to be assessed, levied and collected in the township will increase the total amount to be raised by public taxation for the current expenses of the Board in 1981-82 as follows:

Amount Certified for C.E. April 18, 1981	$4,537,244
Additional Amount Certified	37,903
Total Certification for Current Expense	$4,575,147

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 3170-81

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

September 10, 1981
DATE

Eric G. Errickson
ERIC G. ERRICKSON, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

Sept 16, 1981
DATE

Ronald I. Parker
OFFICE OF ADMINISTRATIVE LAW

plb

DOCUMENTS IN EVIDENCE:

P-1 Budget Statement, dated March 16, 1981

P-2 Budget Statement, dated March 16, 1981

P-3 Pastre to Van Sant

P-4 Van Sant to Pastre, et al

P-5 Board Minutes, dated April 27, 1981

P-6 Extract of Board Minutes, dated May 18, 1981

P-7 Statement of 1980-81 Free Appropriation Balances

P-8 Negotiated Agreement 1980-82

P-9 Annual Improvement Program Budget, dated January 15, 1981

P-10 Parker to Errickson, dated June 9, 1981

P-11 Burke to Reeves - 1981-82 CAP Increase Approval

P-12 CAP Review Fact Sheet 1981-82

P-13 Reeves to Walsh, dated April 8, 1981

P-14 Township Committee Minutes, dated April 13, 1981

P-15 Township Committee Minutes, dated April 15, 1981

P-16 Township Committee Minutes, dated April 18, 1981

P-17 Staff and Enrollment Data

P-18 Replacement Equipment Items

P-19 New Equipment Items

P-20 Total Miscellaneous Revenues 1980-81

P-21 Estimated Current Expense Balances

P-22 Anderson to Errickson, dated June 19, 1981

P-23 Per Pupil Costs 1979-1981

P-24 T & E Compliance Report, dated July 1, 1981

P-25 Branchburg Board Reports, Vol. 5, No. 8

P-26 Statement of Current Expense Free Balance

P-28 Rogut to Township Committee

P-29 Pastre to Township Committee

R-1 June 30, 1981 Board Secretary Statement of Accounts

BOARD OF EDUCATION OF THE TOWNSHIP OF BRANCHBURG,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
TOWNSHIP COMMITTEE OF THE TOWNSHIP OF BRANCHBURG, 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.

The Board excepts to the denial by the Honorable Eric G. Errickson, ALJ of its motion for summary judgment and contends that there was no consultation between the parties as required by N.J.S.A. 18A:22-37. The Board objects to Judge Errickson's determination to increase the miscellaneous revenue portion of its budget by $32,000. Finally, the Board objects to the conclusion by Judge Errickson that an additional $30,000 may be appropriated to revenue from its unappropriated balance.

The Committee's reply exceptions refute the exceptions of the Board and affirm the initial decision wherein Judge Errickson's determinations support the proposals made by the Committee. In cross-exceptions the Committee objects to the line item restorations of $37,903 recommended by Judge Errickson.

The Commissioner finds no merit in the Board's exception to Judge Errickson's denial of its motion for summary judgment and holds that the Court properly decided that sufficient compliance with N.J.S.A. 18A:22-37 requiring consultation between the parties existed to warrant a determination by hearing on the proofs of the parties therein.

The Commissioner, however, does find merit in the Board's concern expressed for Judge Errickson's concurrence with the Committee's proposals regarding the Board's revenue income and the amount of the Board's unappropriated free balance. The Commissioner has previously addressed such matters in the decision on remand in Board of Education of the City of Bridgeton v. Mayor and City Council of the City of Bridgeton, Cumberland County, decided January 26, 1981, wherein he said:

> "***[T]he Commissioner is constrained to observe that the provisions of N.J.S.A. 18A:22-37 limit the Board's current expense reduction to those line items contained in the proposed current expense budget which was rejected by the electorate. It is clear that Council's reductions reveal suggested line item economies totaling $418,607. However, it is further observed that Council applied an additional reduction in the amount of $60,000 from the unappropriated free balance in current expenses not committed to said budget by the Board.***
>
> "The Commissioner finds and determines herein that the additional $60,000 reduction constitutes a reduction in Board revenues rather than expenses it requested to be raised by the voters in the local tax levy. In the Commissioner's judgment Council was without authority, pursuant to the provisions of N.J.S.A. 18A:22-37, to impose such a revenue reduction in the local current expense tax levy. Such reduction will not be considered herein. The Commissioner so holds.***"
>
> (Slip Opinion, at p. 8)

Also, as was said in Board of Education of the Borough of Fair Lawn v. Mayor and Council of the Borough of Fair Lawn, 143 N.J. Super. 259 (Law Div. 1976), aff'd 153 N.J. Super. 480 (App. Div. 1977):

> "***It is also clear that the board has the right, subject to ultimate review by the Commissioner of Education, to maintain a reasonable surplus in order to meet unforeseen contingencies. See Penns Grove-Upper Penns Neck Reg'l School Dist. Bd. of Ed. v. Penns Grove Mayor and Council, etc., 1971 School Law Decisions 372; City of East Orange Bd. of Ed. v. East Orange Mayor and Council, 1976 School Law Decisions ____ (March 26, 1976). Patently, the whole purpose of the board's maintenance of a surplus would be defeated if it were required to be expended for regularly budgeted and appropriated purposes. It is thus clear that surplus funds, not being legally available for regular budgeted expenses, could hardly be compelled by the municipality to be used to offset anticipated regular expenditures.***"
>
> (at 273)

In today's unstable economy there are many probable fluctuations in such items as heating, insurance, maintenance, residential costs and numerous other items difficult to anticipate. Nor does the Commissioner find any authority for the Committee to reach into the Board's source of revenues and unappropriated free balance to be used to offset anticipated regular expenditures.

Accordingly, the Commissioner sets aside the determination of the Court herein to increase the miscellaneous revenue portion of its budget by $32,000 and appropriate an additional $30,000 from unappropriated free balance.

From his own records the Commissioner notes that certain corrections must be made in the amounts shown in the initial decision. Accordingly, the amount submitted to the electorate to be raised for local taxation should be $4,645,224. The correct amount certified to the Somerset County Board of Taxation by the Committee should be $4,537,224. Therefore, the Commissioner notes that the amount certified by the Court herein for current expense to be raised by local taxation for 1981-82 should be $4,575, 127.

The Commissioner hereby certifies the additional amount of $62,000 to the Somerset County Board of Taxation. As a result of this additional certification, the total tax levy for current expenses for school year 1981-82 shall be $4,637,127.

COMMISSIONER OF EDUCATION

October 26, 1981

Pending State Board (Printed in 1983 SLD)

A.L. AND E.L., on behalf of L.L.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF LONG BRANCH, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

For the Petitioners, Barrett, Jacobowitz, and Bass (Peter B. Bass, Esq., of Counsel)

For the Respondent, Jacob Rand, Esq.

Petitioners, acting on behalf of their son (L.L.), allege that the Chief Classification Officer of the New Jersey State Department of Education, Division of School Programs, Bureau of Special Education and Pupil Personnel Services erred in approving the classification and individualized educational plan (IEP) dated May 25, 1977 designed for L.L. Petitioners urge the Commissioner to order the Chief Classification Officer's decision of June 21, 1977 set aside. They further pray that L.L. be given an opportunity to attend a special facility geared to his disability and that an educational plan be prepared which will more adequately provide for his education.

The Board of Education of the City of Long Branch, hereinafter "Board," denies that it has wronged L.L. in any way. The Board contends that it has complied with all the statutes governing the education of children with special needs, including L.L., and requests that the Commissioner dismiss the Petition of Appeal.

Pursuant to N.J.A.C. 6:28-1.11(d) now 6:28-1.9(g), the Chief Classification Officer held a hearing in January 1977 on petitioners' contention that the placement recommendation proposed by the Board was improper for the education of L.L. The hearing examiner ruled that L.L. was not properly classified according to N.J.A.C. 6:28-2.2(c) now 6:28-1.6(g) and ordered that L.L. be independently evaluated within 30 days. The evaluation was to include a psychological evaluation, a learning assessment, a social case study, a comprehensive medical examination and a neurological and psychiatric examination.

The hearing examiner also ordered that, upon receipt of the evaluations, the Board's Child Study Team would classify L.L. in accordance with the provisions of N.J.A.C. 6:28-1.1 et seq.

and develop a program for L.L. in accordance with N.J.A.C. 6:28-3.5 now 6:28-1.8. (Hearing Examiner Decision, January 11, 1977)

On June 21, 1977 the Chief Classification Officer determined that the Board's

> "*** basic child study team has corrected its procedural errors and has established Perceptually Impaired as the educational classification determination*** and described a written individualized educational plan to be implemented in a tailored academic program at respondent's high school with supplemental instruction in remediation of L.L.'s perceptual difficulties.***" (at p. 2)

On July 20, 1977 the Chief Classification Officer wrote that

> "***[H]aving undertaken a review of all the evidence and testimony, including new materials from professionals employed at the Jersey [Shore] Medical Center, I find no cause to alter my decision in the above-cited matter***." (Tr.5, 14-20)

Subsequent to the above decisions, the instant matter was appealed before the Commissioner. Conferences of counsel were held on October 7 and November 16, 1977 during which a Board motion to prohibit additional testimony at the formal hearing as being precluded under N.J.A.C. 6:24-11 was denied. (Tr. 14)

A formal hearing took place in the office of the Monmouth County Superintendent of Schools, Freehold, on December 16, 1977. The only witness was a licensed physician who appeared on behalf of petitioners. He testified that L.L. suffered from a minimal brain dysfunction syndrome characterized as

> "***difficulty in the area of perception, hyperactivity, and short attention span which includes many other things such as poor concentration, impulsive behavior with peer relationships***." (Tr. 18)

The physician testified further that there was emotional interference with L.L.'s learning (Tr. 29) but that he should be classified as neurologically impaired. (Tr. 26) The physician recommended that L.L. be placed in a small school or small class situation. (Tr. 33) He noted that records show that there has been improvement in L.L.'s attitude and behavior since a new program for him has been established under the perceptually impaired category established by the Board's Child Study Team

(Tr. 38) and that the Long Branch school system has made a decided effort to help L.L. (Tr. 37)

The hearing examiner having reviewed the testimony and the briefs of counsel does not find reason to recommend reversal or modification of the Chief Classification Officer's decision of June 21, 1977 that L.L. not be removed from control of the Board and placed in a private school. The IEP developed by the Board's Child Study Team appears to be meeting the needs of L.L. as well as any private school program.

The actions of the Board in the instant case are neither arbitrary nor discriminatory. Therefore, the hearing examiner recommends to the Commissioner that the decision of the Chief Classification Officer of June 21, 1977 which was reaffirmed on July 20, 1977 be upheld and the Petition of Appeal be dismissed.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner as well as the record of the matter herein controverted. The Commissioner notes that exceptions to the hearing examiner report were filed pursuant to the provisions of N.J.A.C. 6:24-1.17(b).

Petitioners take exception to the hearing examiner's determination that the actions of the Board herein were neither arbitrary nor discriminatory. Petitioners ground such exception upon medical evidence submitted in the hearing process that L.L. was neurologically impaired (N.I.) contrary to the district's classification as perceptually impaired. Petitioners further argue that the Board's failure to meet L.L.'s needs is illustrated by subsequent events, such evidence being L.L.'s inability to successfully meet minimal skills requirements in reading, writing, and mathematics on the Brookdale Community College entrance examination and that L.L. was required to repeat special remedial courses several times before all three skill areas were revised to the level of minimum competency.

Petitioners further allege that no follow-up evaluation was ever conducted on the effectiveness of L.L.'s IEP, nor was a CST report developed within the time frame established for such evaluations.

Petitioners finally assert a claim for damages against the Board because ultimate determination in this matter has been extended for over three years.

The Commissioner has reviewed petitioners' arguments herein as well as the report of the hearing examiner and the two decisions rendered by the classification officer. The Commissioner notes the existence of differences between the medical testimony adducing L.L.'s handicap to neurological impairment rather than to perceptual impairment as determined by the Board's CST. He likewise notes that the testimony of Dr. DeSpirito, petitioners' witness, acknowledged improvements in L.L.'s attitude and behavior as a result of the program offered by the Board subsequent to the re-evaluation procedure undertaken at the direction of the Chief Classification Officer and also recognizes the efforts of the Long Branch Public Schools in attempting to deal with L.L.'s educational handicap. Thus the Commissioner holds, despite the procedural errors indicated by the Chief Classification Officer's original decision of January 12, 1977, that the Board's CST had corrected such deficiencies as indicated by the Chief Classification Officer's second decision of June 21, 1977 and made a good faith effort to provide L.L. with an appropriate program to meet his special needs as required by regulation. N.J.A.C. 6:28-2.2(a)

Relative to petitioners' argument that L.L.'s inability to meet minimum entrance requirements at Brookdale may be attributed to the Board's alleged failure to properly classify and assign L.L., the Commissioner cannot find merit in such argument. Since the Commissioner has already herein determined that the Board's action in developing an educational plan and providing a placement was appropriate and in conformity to statute, he cannot find that L.L.'s continuing lack of proficiency may be attributable to the actions of the Board herein. The Commissioner is constrained to observe that "educational malpractice suits" seeking damages have uniformly failed to receive favorable decision in the courts. In one such case, Donohue v. Copiague Union Free School District, 407 N.Y.S. 2d 874 (Supreme Court, Appellate Division, Second Department, 1978), aff'd Court of Appeals, 418 N.Y.S. 2d 375, the Court stated:

> "***The failure to learn does not bespeak a failure to teach.*** A school system cannot compel a particular student to study or be interested in education.*** In addition to innate intelligence, the extent to which a child learns is influenced by a host of social, emotional, economic and other factors which are not subject to control by a system of public education.***"

See also Doe v. San Francisco Unified School District, 131 Cal. Rptr. 854 (Court of Appeal, First District, Division 4. 1976)

Accordingly, and for the reasons stated herein, the Commissioner affirms the findings and conclusions of the hearing examiner and adopts them as his own. Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

November 6, 1981

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3316-80
AGENCY DKT. NO. 224-5/80A

IN THE MATTER OF:

ANGELA SGRO,
Petitioner
v.
BOARD OF EDUCATION OF THE SHORE REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,
Respondent.

Record Closed: August 5, 1981
Received by Agency: 9-21-81

Decided: September 21, 1981
Mailed to Parties: 9-24-81

APPEARANCES:

Thomas W. Cavanagh, Esq., (Chamlin, Schottland, Rosen & Cavanagh, attorneys) for Petitioner

Alexis Tucci, Esq., (Eugene A. Iadanza, Esq., on the Brief) (Gagliano, Tucci & Kennedy, attorneys) for Respondent

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

Petitioner, a teacher with a tenure status employed by the Board of Education of the Shore Regional High School District (Board), alleges that she has been denied proper placement on the Board's adopted salary guide at the master's degree plus 30 credits level for the academic year 1979-80 and thereafter. The Board asserts that petitioner was fully compensated for all graduate credits to which she is entitled.

The pleadings having been joined before the Commissioner of Education, the matter was subsequently 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 September 26, 1980, a prehearing conference was held where the issues to be determined were set forth as follows:

STATEMENT OF ISSUES

1. Subsequent to petitioner's receipt of her master's degree, did the Board improperly deny her request to be placed at the master's plus 30 credits level of the board's salary policy?

2. Does the Board's salary policy provide that, in order to be placed at its master's plus 30 credits level, the teaching staff member must earn 30 graduate credits subsequent to the receipt of a master's degree?

3. Does the Board's salary policy require the superintendent's prior approval of academic and/or graduate credits to be applied to the Board's master's degree plus 30 credits on the salary schedule?

Thereafter, a hearing in this matter was conducted on March 2, 1981, at the Freehold Township Municipal Court and on May 7, 1981, at the Monmouth County Hall of Records, Freehold, New Jersey. The parties submitted post-hearing briefs and the matter was closed on August 5, 1981.

STATEMENT OF FACTS

Petitioner is a licensed and certificated teacher with a tenure status employed by the respondent Board. Currently, and at the time the petition arose, petitioner is employed as a work program coordinator and business teacher at the high school. In January 1980, while in the employ of respondent Board, petitioner received a master's degree in administration and supervision from Rutger's University. Between 1977 and 1980, petitioner had attended Rutger's University and during that time earned the necessary credits to obtain a master's degree. All of the credits earned by petitioner at Rutger's during this time period were accepted, authorized and reimbursed under the collective bargaining agreement by the respondent Board.

In addition to the credits referred to above and obtained in order to receive her master's degree, petitioner took graduate school courses between 1971 and 1976 at various institutes of higher learning and these credits were taken subsequent to and in excess of her bachelor's degree. During the five-year period previously mentioned, 1971-1976, petitioner assimilated 30 credit hours of graduate credits that were also accepted, authorized and reimbursed by the respondent Board. These 30 credits were obtained at Monmouth College and Jersey City State College and are separate and distinct credits from those 30 credits earned between 1977 and 1980 and utilized by petitioner in order to obtain her master's degree. During the five-year time period referred to above, 1971-76, petitioner utilized the 30 credits taken separate and apart from her master's degree to obtain placement on the salary schedule guide in effect at the time, both at the B.A. plus 15 level and at the B.A. plus 30 level.

In January 1980, after petitioner had obtained her master's degree, petitioner sought, pursuant to the collective bargaining agreement in effect between the parties, to be placed on the salary schedule guide under the designation of M plus 30. The aforementioned designation indicates a master's degree plus 30 credits. The respondent Board declined to effectuate her request and instead placed the petitioner on the M salary schedule designation, indicating payment in accordance with a master's degree.

Respondent's witness, Dr. Campanella, has been Superintendent of the District since 1979. Prior to that date, his predecessors on occasion apparently recommended to the Board various salary changes for teachers, based on what is now Article X of the 1979-1982 Contract. Dr. Campanella disagreed with the interpretation of this Article by his predecessors and has taken steps to enforce the literal language of the Contract. As a result, a recommendation of denial of petitioner's request was made.

TESTIMONY OF THE WITNESSES

The relevant testimony at hearing established that at least seven teaching staff members in the Board's employ had been treated differently than petitioner with regard to academic credits previously earned and their placement on the Board's adopted salary guides. The first witness called by petitioner, in support of her contention, was Daniel Sorkowitz, a teacher in the Board's employ since the beginning of the 1966-67 school year. He testified that in June 1973 he was elevated to the salary schedule designation of M.A. (1T 65) and that eight of the credits he utilized for the M.A.

designation in 1973 had previously been utilized in obtaining a placement on the B.A. plus 15 salary schedule in 1968 (1T-69). The witness further testified that in September 1978, he was elevated to the M.A. plus 30 salary guide designation, and in so doing, he utilized three credits to constitute the 30 graduate credits necessary, which credits had been earned before he received his master's degree (1T 77). In addition, he testified that, of the 30 graduate credits he used to obtain placement on the M.A. plus 30 salary guide designation in 1978, 15 had been used to obtain placement on the M.A. plus 15 salary guide designation. Mr. Sorkowitz also testified that certain of the credits he used for placement on the B.A. plus 15 salary guide designation were used for placement on the M.A. plus 30 salary guide designation (1T 77), and that 17 of the credits utilized to obtain the M.A. plus 30 salary guide designation had been earned prior to the M.A. plus 15 designation (1T 101).

Aldo Delpino, who has been employed as a language teacher by the respondent since December 1963, testified that he received his master's degree in 1975 (1T 111) and that since that time, he had taken only three graduate credits (1T 111). The witness further testified that the 15 credits he utilized in order to gain placement on the M.A. plus 15 salary guide designation were all earned prior to the time he obtained his master's degree (1T 117). Under cross-examination, the witness also testified that previous to his being paid on the M.A. plus 15 salary guide designation, he had been paid on the B.A. plus 15 salary guide designation, predicated upon the same courses (1T 119).

James Fiasconaro, who has been an English teacher at Shore Regional High School since 1970 (1T 123), testified that he began being paid on the salary guide designation M.A. plus 15 in September 1975 (1T 123 to 124). Mr. Fiasconaro had previously been paid on the B.A. plus 15 salary guide designation beginning in September 1971 and on the M.A. designation prior to 1975 (1T 125). Mr. Fiasconaro testified that at the time he was elevated to the B.A. plus 15 designation, he had earned 17 graduate credits and that those credits were utilized in 1971 to justify his movement to B.A. plus 15 (IT 129). In 1975 when he was elevated to the M.A. plus 15 designation, Mr. Fiasconaro testified that the exact same credits which were utilized for the B.P. plus 15 designation were utilized for the M.A. plus 15 designation (IT 130). In addition, the witness testified that all 17 credits utilized to move him upwards to M.A. plus 15 in 1975 were earned prior to the awarding of his master's degree.

Mr. Michael Krautheim, who is employed as a science teacher by Shore Regional, and has been so employed since February 1964, testified that he was elevated to the M.A. plus 30 designation in June 1969 (IT 135). Mr. Krautheim testified that he utilized 27 credits that were earned prior to his receiving his master's degree in order to be placed on the M.A. plus 30 scale (IT 138), and he also testified that he was paid previously on the B.A. plus 15 and the B.A. plus 30 designation, and that the basis for those designations was the same credits utilized for the M.A. plus 30 designation (IT 139).

Edward Miller, who has been a chemistry teacher at Shore Regional High School since 1963 (1T 145), testified that he was raised to the M.A. plus 30 designation in 1976 (1T 146). Mr. Miller indicated that he had received his master's degree in 1967 (1T 147). The witness went on to testify that in 1976 when he was raised to the M.A. plus 30 designation, he utilized eight credits that had been earned during the fall and spring of 1966-67 prior to the time his master's degree was awarded (1T 147). He also testified that the eight graduate credits earned during 1966-67 were utilized for placement on the M.A. plus 15 salary designation and that the same credits were utilized with the addition of 15 extra to comprise a requirement for M.A. plus 30 (1T 146 to 148). The witness went on to testify that in 1976, when he submitted his request for upgrade to M.A. plus 30, and he submitted his salary change request form dated September 1976 (P 3), five of the credits listed in the additional 15 credits necessary to satisfy the upgrade from M.A. plus 15 to M.A. plus 30 were completed before the M.A. plus 15 designation was allotted to him in 1971 (1T 154 to 156).

Mervin Edwards, who has been employed as a mathematics teacher at Shore Regional High School since 1962, indicated that he was currently being paid on the M.A. plus 30 salary schedule (1T 158) and that he had been elevated to the M.A. plus 15 schedule in September 1968 (1T 159). Mr. Edwards testified that, in obtaining the M.A. plus 30 designation, he utilized two credits within the 30 credit makeup that had been earned prior to obtaining his master's degree (1T158).

The final witness called by the petitioner was Mr. Charles Keller, who has been employed as an English teacher at Shore Regional High School since 1962. Mr. Keller testified that he was awarded his master's degree in 1968 from Brown University (1T 162) and that in obtaining placement on the M.A. plus 15 salary guide designation, he had utilized 15 credits that he had earned at Brown University, in addition to the requirements for his master's prior to the time his master's degree was awarded (1T 162).

During his direct testimony, Dr. Alfred Campanella, the Superintendent of Schools, confirmed that the petitioner had come to him sometime in January 1980 and requested a salary scale change from B.A. plus 30 to the M.A. plus 30 level (1T 192). The Superintendent testified that after referring to the current salary article in the collective bargaining agreement (P 4), he could not recommend to the Board of Education that the change requested be granted (1T 195). He stated that he based his decision not to grant petitioner's request, in part, upon Article X of the Board's salary policy which provides, inter alia, that:

> (a) For the first 15 credits beyond the BA or MA,....
>
> [and;]
>
> (b) For each 30 credit advancement,...

The Superintendent testified, among other things, that he interpreted the words "beyond" and "advancement" to mean that the credits must be earned subsequent to the teacher's last placement on the salary guide in order to be credited to the next succeeding step on the salary guide. He testified further that he considered other factors with regard to petitioner's request, which included the salary change document filed with the Board's administration and a consideration as to whether the party requesting the salary change had previously used credits for the placement on the next higher step on the salary guide. He stated that all of the above factors were used by him in making his determination not to grant petitioner's request to be placed at the M.A. plus 30 credit level of the Board's salary guide. The Superintendent could not explain the reasons for his predecessor superintendents to recommend, and the Board to grant, the salary changes of the teachers who testified in this matter.

DISCUSSION

Petitioner contends that there can be no meaningful argument that the petitioner did not earn a sufficient number of graduate credits to justify placement on the M.A. plus 30 salary guide designation. The singular issue in dispute in this litigation is the temporal relationship between the period of time in which the 30 credits were earned and the date upon which petitioner earned her master's degree. The Commissioner must, therefore, determine whether the time period within which the 30 credits were earned will disqualify petitioner from utilizing them for the salary guide designation she seeks.

Petitioner argues that the fundamental issue, which is set forth above, has clearly and consistently been resolved in petitioner's favor, whenever the issue has been considered by the Commissioner. Attention is respectfully directed to McAllen v. Board of Education of the Borough of North Arlington, 1975 S.L.D. 90. In that case, a tenured teacher sought placement on the salary guide for 1973-74 at the M.A. plus 30 level. The Board asserted that the proper placement was at the M level because staff members had to receive prior approval from the Superintendent for courses taken beyond the master's degree, and additional graduate courses for placement on the M.A. plus 30 designation could only be undertaken after a master's degree was confirmed. A review of the facts in that case discloses that all of the 30 credits that the petitioner sought to use were completed before he earned his master's degree. There was no provision in the Board's policy (collective bargaining agreement between the parties) that the courses had to be taken after receipt of the master's degree, except for a directive from the Superintendent's office issued prior to the petitioner's taking the courses. However, there was no evidence that such a policy was ever adopted by the Board of Education prior to the negotiation of the current salary guide.

The Commissioner concluded that the Superintendent's directive was not board policy and that, if the Board desired to adopt such policy, it could have done so. The Commissioner held that nowhere in the Board's adopted policies could he find a requirement that graduate credits must be earned after the acquisition of a master's degree in order for a teacher to use them on an M.A. plus 10, 20 or 30 designation.

Petitioner argues that the above decision of the Commissioner must, at least, stand for the proposition that graduate credits earned prior to a master's degree must be accepted by a Board of Education for placement on an M plus salary designation unless there is a formal board policy preventing utilization of same.

Petitioner asserts that more recently the same issue was addressed by the Commissioner in Siebold et al. v. Board of Education of the Borough of Oakland, 1980 S.L.D. _____ (decided June 2, 1980). In that case, a number of teachers alleged that, despite the fact that a number of graduate credits were earned before the obtaining of a master's degree, those courses could still be used to obtain the designation of M.A. plus 15 in the appropriate salary guide. The Board took the position that all 15 graduate credits had to be earned after the completion of the requirements for the master's degree. The Board further contended that the practice in the district had been in contradistinction to

the teachers' position and that, in 1978, that interpretation had been implemented in formal board policy. The Commissioner considered the formal policy adopted by the Board in 1978 which read as follows:

> In order for graduate courses to be applied to the bachelor's plus 15 or the master's plus 15, 30 or 45, training levels on the teachers' salary guide, said courses must be taken after the bachelor's or master's degree respectively has been completed.

The Commissioner concluded that the clear and precise policy set forth above was sufficient to require the credits which the petitioner sought to utilize to be taken after the master's or bachelor's degree, as a result of the formal adoption of board policy to that effect. However, the Commissioner concluded that prior to the formal policy adoption set forth above, which is unequivocal in its language, the Board of Education could not insist that the credits sought to be utilized had to precede the earnings of a master's or bachelor's degree. The Commissioner held that, in the absence of specific formal board policy, the rationale in McAllen would be determinative.

Petitioner contends that the issue was once against considered as recently as March of this past year in Hutchinson v. Board of Education of the Township of Greenwich, 1981 S.L.D. _____ (decided March 23, 1981). In that case a teacher who had received a master's degree in 1972 sought to be placed on M.A. plus 15 salary level designation in 1973 and was denied that right because certain of the credits were earned before she received her master's degree. In the summer of 1979 she earned additional credits, which gave her a total of 32 credits beyond her master's degree. In framing the issue to be determined, the Administrative Law Judge articulated it as follows:

> At issue is whether or not graduate credits, otherwise appropriate, are countable toward advance placement on the salary guide if earned prior to receipt of an advanced degree.

The Administrative Law Judge concluded that the applicability of graduate credits used for higher placement on a salary guide, if received before the award of an advanced degree, was subject to the principle of stare decisis as a result of McAllen. The Administrative Law Judge went on to conclude that, in that case, the board did not even assert that it had a policy, thereby underscoring the legal principle established in McAllen that, in the absence of a formal board policy, the issue had to be resolved in favor of the teacher.

Petitioner asserts that the above authority makes it clear that, unless the Board can demonstrate that a formal board policy restricting the use of graduate credits earned prior to the master's degree was in effect at the time of petitioner's request, the relief sought by petitioner must be granted. The petitioner has demonstrated that she is entitled to the salary schedule designation she seeks, absent the type of board policy mandated by the aforementioned case law. It is incumbent upon the Board herein to demonstrate and support the existence and cogency of formal board policy in order to offset the prima facie case established by petitioner.

The Board observes that petitioner herein seeks to be placed on the MA plus 30 guide as a result of credits obtained both prior to and after the obtaining of her master's degree. She argues that she is entitled to use prior credits earned, based on the decision in McAllen v. Board of Education of the Borough of North Arlington, 1975 S.L.D. 90 and its progeny. See also, Mary Siebold, et al. v. Board of Education of the Borough of Oakland, 1980 S.L.D. _____ (June 2, 1980), aff'd, State Board of Education 1980 S.L.D. _____ (October 1, 1980); Hutchinson v. Board of Education of the Township of Greenwich, 1981 S.L.D. _____ (March 27, 1981). The fundamental principle of law established by the aforesaid cases in situations such as that which is before the court appears clear that in the absence of board policy concerning the use of graduate credits, a teaching staff member may apply credits earned prior to a degree in order to accelerate his or her placement on the guide. In McAllen, Siebold, and Hutchinson, it was either stipulated or found that the Board had no policy at the appropriate time in question concerning use of prior credits.

In the instant matter, the Board has argued and contends that it did, in fact, have a policy concerning the use of prior credits (P-4). Since there has already been a ruling in the within matter that board policy can be established through contractual language (1T-183), the real issues involved are substantially reduced to two main inquiries: (1) What is the meaning of the board policy established by Article X of the Contract? and; (2) Is respondent barred from correcting a misinterpretation by its previous administrators?

The Board argues that when determining the issue of meaning of a board policy, it is not what was intended or what may have been considered desirable or acceptable by one or both of the parties involved. The common meaning of the language

agreed upon must prevail. As was said in Harry A. Romeo, Jr. v. Board of Education of the Township of Madison, Middlesex County, 1973 S.L.D. 102, 106:

> . . .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 term [cites omitted] . . . .

Additionally, when a difference of interpretation of language could have the possibility of a windfall for one of the parties, close scrutiny is called for. Agnes D. Galop v. Board of Education of the Township of Hanover, Morris County, 1975 S.L.D. 358.

The Board contends that it and the Shore Regional Education Association, of which petitioner has been member since at least 1975, have agreed on the language of a policy concerning use of credits for placement on the guide (P-4, P-5, and P-6). Paragraph A 2 of Article X in its pertinent parts states as follows:

> 2. The following is the policy for credits toward BA + 15, BA + 30, MA + 15, MA + 30, and MA + 60.
>
> (a) For the first 15 credits beyond the BA or MA,
>
> (b) For each 30 credit advancement,. . .

The Board contends that one must assume that the parties were aware of the common significance to the words "beyond" and "advancement." Websters New World Dictionary, College Edition defines "beyond" as "1. on or to the far side of; farther on than; past. 2. farther on in time than, later than. 3. outside the reach, possibility, or understanding of. 4. more or better than, in addition to; exceeding." It defines "advancement" as: "1. an advancing or being advanced. 2. promotion; success. 3.progress; improvement, furtherance" (emphasis added). The Random House Dictionary of the English Language, College Edition defines "beyond" as: "1. on or to the far side of. 2. farther on than; more distant than. 3. outside the understanding, limits, or reach of; in excess of. 4. superior to; surpassing, above...." It defines "advancement" as "1. the act of moving forward. 2. promotion, as in rank..." (emphasis added). It is clear from the above information and the way that it was used in the board policy that the common meaning understood by the parties was not to allow the use of prior credits, in most situations, for advancement on the guide. Romeo, supra. Obviously, when one moved

from the B.A. plus 15 to B.A. plus 30 or M.A. plus 15 to M.A. plus 30 or M.A. plus 60, the original credits obtained would logically be used in computing the advance. This is not so for a move from B.A. plus 30 to M.A. plus 30. Where board policy exists on the subject, credits completed after the awarding of the B.A. degree are not properly considered "graduate credits for placement on the M.A. guides". See, N.J.S.A. 18A:29-6 (definition of master's degree). In the Matter of the Tenure Hearing of Michael A. Pitch, School District of the Borough of South Bound Brook, 1974 S.L.D. 1176, aff'd, State Board of Education, 1975 S.L.D. 763, remanded, New Jersey Superior Court, Appellate Division, September 11, 1975, decision on remand, 1975 S.L.D. 764, aff'd, Docket No. A-2671-74, Appellate Division, April 2, 1976 (1976 S.L.D. 1159).

Based on the foregoing, respondent contends that it had a viable policy on use of graduate credits which petitioner did not comply with as presently administered. This being so, the only remaining question concerns whether she may rely on the apparently erroneous previous applications of the policy by Dr. Campanella's predecessors. The fact that for whatever reasons respondent's prior administrative personnel and various teaching staff members involved misinterpretated same, does not preclude nor prohibit the respondent in exercising its lawful obligations and responsibilities to the citizens and taxpayers of the district to correct erroneous actions when they are discovered. Robert A. Larson v. Board of Education of the East Windsor Regional School District, Mercer County, 1978 S.L.D. 948; Galop, supra.

FINDINGS OF FACT

Having carefully considered all the testimony and other evidence offered in this matter, and having given fair weight thereto; and having observed the demeanor of the witnesses and assessed their credibility, I **FIND** that:

1. The Statement of Facts set forth hereinbefore is hereby adopted, by reference, as Findings of Fact.

2. The Board, through its collective negotiations with its teachers, adopted a policy which, in part, provides additional salary compensation to its teachers for earned academic credits in addition to the Bachelor of Arts/Science and Master of Arts/Science degrees on its salary guide.

3. At least seven (7) of the Board's teaching staff members have been advanced on its advanced salary guide to the B.A. plus and M.A. plus levels by virtue of crediting those teachers with academic course work they had completed prior to, rather than subsequent to, the award of the degree.

4. Certain teaching staff members have been permitted by the Board to use the same prior credits earned to advance to the B.A. plus 15 credits and the M.A. plus 30 credits on the Board's salary guide.

5. The present Superintendent's interpretation of the Board's salary policy was inconsistent with the Board's past practice and interpretation of said policy.

6. The Board has neither amended nor modified the language of its policy since awarding advanced credit on its salary guide to the seven (7) teaching staff members who testified herein.

CONCLUSIONS

The broad statutory authority in N.J.S.A. 18A:11-1 authorizes boards of education to:

> c. Make, amend and repeal rules, not inconsistent with this title or with the rules of the state board, for its own government and the transaction of its business and for the government and management of the public schools and public school property of the district and for the employment, regulation of conduct and discharge of its employees.
>
> 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.

Additionally, at N.J.S.A. 18A:29-4.1, boards of education are extended the authority to promulgate and adopt salary policies as follows:

> A board of education of any district may adopt a salary policy, including salary schedule for all full-time teaching staff members

> which shall not be less than those required by law. Such policy and schedules shall be binding upon the boards in the same district for a period of two years from the effective date of such policy but shall not prohibit the payment of salaries higher than those required by such policy or schedule nor the subsequent adoption of policies or schedules providing for higher salaries, increments or adjustments.

Thus legislative authority for boards of education to effectuate policies regarding the "management of the public schools," and in this instance policies governing salaries of its employees, is embodied within the corpus of school law.

The question herein is whether the Superintendent's interpretation of the Board's policy is consistent with the Board's interpretation, as evidenced by the Board's past practices, and the language of the policies as promulgated.

In regard thereto, the courts of this State have consistently held that statutes should not be given a meaning that may lead to absurd, unjust or contradictory results, nor should a statute be construed to permit its purpose to be defeated by evasion. In re Jersey City, 23 N.J. Misc. 311 (1945); Grogan v. De Sapio, 11 N.J. 308 (1953). This clear maxim applies equally to local boards of education policies.

In Betty Eagle, et al. v. Board of Education of the Borough of Englewood Cliffs, Bergen County, Docket No. L-15025-70 New Jersey Superior Court, Law Div., March 8, 1971, the court stated in its oral decision that:

> It cannot be said that the language is clear and unambiguous. Under the circumstances the Court must resort to the rules of construction. First Nat. Bank v. Burdett, 121 N.J.Eq. 277 (Sup. Ct. 1937). Professor Williston states:
>
> > The fundamental object of all rules interpretation, whether primary or secondary, is to ascertain and give effect to the intention of the parties.
>
> Further, the Court said:
>
> The court must strictly construe any agreement against the draftsman. Bouton v. Litton Industries, Inc., 423 F.2d 643 (3rd Cir. 1970). Couched in other words, 'the language must be interpreted in the sense that the promisor knew, or had reason to know, the promisee understood it... American Lithographic Co. v. Commercial Ins. Co., 81 N.J.L. 271 (Sup. Ct. 1911).

> In Russell v. Princeton Laboratories, Inc., 50 N.J. 30, 38 (1967), the Court said:
>
> A contract should not be read to vest a party or his nominee with the power virtually to make his promise illusory.

In the herein matter, petitioner applied for and was denied placement on the M.A. plus 30 credits levels of the Board's salary guide. Petitioner relied upon the Board's policy and its interpretation thereof that the credits accumulated were in "excess" of the M.A. plus 30 credits required to meet the terms and conditions of the policy. Notwithstanding the Board's contention that the language of its policy, wherein the words "beyond" and "advancement" are used, does the policy expressly state that two credits to be considered must be earned subsequent the last advancement on the salary guide. The testimony herein was clearly to the contrary.

I **CONCLUDE,** therefore, that petitioner has met her burden and set forth a prima facie case that the Board's denial of her request to be placed upon its M.A. plus 30 salary guide was improper pursuant to the Board's policy and past practice.

Accordingly, it is **ORDERED** that the Board of Education of the Shore Regional High School District forthwith place petitioner on its M.A. plus 30 credits level and the corresponding step of its salary guide for the number of years' experience, retroactively beginning with January 1980. McAllen, supra.

Nothing expressed herein prevents the Board from adopting a policy to express such terms and conditions that academic credits to be considered for the next higher salary level must be taken subsequent to the previous salary advancement.

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 3316-80

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

9-21-81
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

9-24-81
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

Sept. 24, 1981
DATE

Ronald E. Parker Jr.
OFFICE OF ADMINISTRATIVE LAW

bm

OAL DKT. NO. EDU 3316-80

DOCUMENTS IN EVIDENCE:

P-1 Salary Schedule Change for Mrs. Sgro

P-2 Salary Schedule Change for Mr. Sorkowitz

P-3 Salary Schedule Change for Mr. Miller

P-4 Article X, Salary from the 1979 through 1982 contract

P-5 Article XI, Salary from the 1977 through 1979 contract

P-6 Article X, Salary from the 1975 through 1977 contract

R-1 Article X, Salary

R-2 Salary Schedule Change Re: Sgro

ANGELA SGRO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SHORE REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the entire record of the instant matter including the initial decision rendered by the Office of Administrative Law, Lillard E. Law, ALJ.

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

The Board's exceptions to the initial decision are grounded on the following points:

1. The Administrative Law Judge's ruling that the language of Article X (R-1) did not expressly require the use of only subsequently acquired course credits for advancement on the Board's salary schedule was in error.

2. The Administrative Law Judge's ruling that past practice of the previous superintendents with respect to the matter herein controverted was crucial is in error.

The Board in its exceptions does not take issue with the interpretations of prior case law recited by Judge Law in the initial decision of this matter. It argues, however, that his determination which holds that the language of its policy as set forth in Article X (R-1) is insufficient to deny petitioner advanced placement on the MA+30 salary schedule is in error. The Board maintains that the language of Article X (R-1) which uses the specific words such as "beyond" and "advancement" are sufficient to fall within the requirements of the rulings handed down in McAllen, Siebold and Hutchinson, supra.

The Board argues further that, contrary to Judge Law's holding that past practice of previous Superintendents and Boards was crucial to the manner in which its present policy was interpreted and applied, it has the authority as a changing entity from year to year to correct prior erroneous application of the contract language regarding the compensation of teachers for the acquisition of credits earned in advancing their placement beyond the BA and MA degree levels.

In conclusion, the Board maintains that, should the Commissioner uphold Judge Law's ruling in this regard, it would be left without any viable means of correcting what it believes to be an erroneous and serious misapplication of Board policy.

Petitioner, in her reply exceptions, strongly rejects the position taken by the Board. Petitioner maintains that the conduct of the parties cannot be disregarded throughout the time that the contractual language has existed affecting advanced placement of teaching staff members on the Board's salary guide.

Petitioner further maintains that Judge Law correctly reasoned that the parties had a right to rely on the conduct that had resulted from utilizing the language of the salary policy over many years, notwithstanding whether it had correctly or incorrectly been interpreted by previous Superintendents, since both parties relied on those interpretations in accepting successor collective bargaining agreements.

The Commissioner has carefully reviewed the exceptions and reply exceptions of the parties to the initial decision.

The Commissioner observes the pertinent language contained in both the past and present Board policies, with minor exceptions, is consistent for each of the contract periods in question (1975-77, P-6); (1977-79, P-5); (1979-82; R-1).

It is further observed from a reading of each of the aforementioned Board policies (P-5; P-6; R-1) that the Board established certain course credit intervals whereby compensation would be granted to teaching staff members who had acquired approved graduate credits "***For the first 15 credits beyond the BA or MA [degree]*** and "For each 30 credit advancement***." (Emphasis supplied.) (at para. 2)

In the Commissioner's view the appropriate application of this policy leaves no doubt that compensation for graduate course credits was granted to those persons who had satisfied the degree level requirements in the salary schedule by attaining placement on the BA or MA salary step levels.

In each instance the graduate course credits commence with the first 15 credits acquired subsequent to attaining placement on the BA or the MA degree level. Thereafter, according to the language of the Board policy (R-1), the same incremental graduate course credits have been established conditioned upon whether the teaching staff member has attained the appropriate degree level step on the salary guide, BA or MA.

The Commissioner observes from the Salary Schedule Change form (R-2) provided by the Board for the approval of compensation for advanced graduate course credits that the following wording appears:

"Since being placed on the _____ salary schedule, I have successfully completed the following approved courses and request that I be placed on the _____ schedule.***"
(R-2)

In the Commissioner's judgment the logical interpretation to be given to the application made by a teaching staff member requesting advanced placement and compensation on the Board's salary guide is for the teaching staff member to provide the required information in the first blank space indicating the current degree placement level (BA or MA) for which he or she was being compensated by the Board.

In the instant matter it is clear that the information provided on petitioner's Salary Schedule Change form (R-2) is inappropriate by virtue of the fact that it would lead to the erroneous conclusion that she was requesting a salary schedule change from the BA+30 salary level directly to the MA+30 salary level without acknowledging the fact that the Board was at the time compensating her at the MA degree level. Moreover, the Commissioner is constrained to observe that none of the graduate course credits for which petitioner seeks compensation were earned prior to the time she received her MA Degree. Consequently none of these credits in whole or in part represent the "***first 15 credits [or, in fact, 30 credits] beyond the ***MA***" (R-2) salary degree level for which she was being duly compensated by the Board.

In view of the above factual observations, the Commissioner finds and determines that the Board's salary policy (R-1) controverted herein is sufficient in both form and content to be construed as specifically providing for the compensation of advanced course credits predicated upon the incremental steps set forth therein which allow a teaching staff member to receive compensation for only those graduate courses taken subsequent to the attainment of the BA or MA degree in accordance with current placement and compensation.

In conclusion therefore, the Commissioner reverses that portion of the administrative law judge's findings and determination which hold that the Board's existing salary policy (R-1) lacks specificity with respect to the manner in which teaching staff members are compensated for advanced placement beyond the BA and MA degree salary levels.

Moreover, the Commissioner finds no merit in petitioner's argument that the Board may not take the appropriate action to prospectively correct the erroneous interpretation it had given to the application of its existing salary policy (R-1). The Commissioner so holds.

Accordingly, for the reasons set forth by the Commissioner's findings and determination herein, the instant Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

November 5, 1981

Pending State Board

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5648-81
AGENCY DKT. NO. 275-7/81A

IN THE MATTER OF:

"A.L." AS FATHER AND
NATURAL GUARDIAN OF "L.L.",
Petitioner
v.
THE BOARD OF EDUCATION OF
SCOTCH PLAINS-FANWOOD, UNION COUNTY,
Respondent.

Record Closed: September 15,1981
Received by Agency: 9-28-81

Decided: September 25, 1981
Mailed to Parties: 10-1-81

APPEARANCES:

"A.L.", Pro se, Petitioner

Casper P. Boehm, Jr., Esq. (Boehm & Campbell, attorneys), for the Respondent

BEFORE BEATRICE S. TYLUTKI, ALJ:

The petitioner alleges that the Board of Education of Scotch Plains-Fanwood (hereinafter referred to as "Board") arbitrarily denied the request to place "L.L." in a Level 1 Biology course in the ninth grade during the 1981-82 school year. The respondent denied the allegation and, on August 24, 1981, the matter was referred to the Office of Administrative Law for a decision as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq.

There was a Prehearing Conference on September 3, 1981, and the hearing took place on September 15, 1981.

The undisputed facts pertinent to this matter are as follows:

(1) As of the 1981-82 school year, ninth-grade students in the Scotch Plains-Fanwood School District (hereinafter referred to as "District") are being taught in the high school. Prior to this year, the ninth grade was in the junior high schools.

(2) According to the provisions of the high school program book, a full-year Science course is required for graduation (R 3). A one-year Biology course would satisfy this requirement. It has been the policy of the Board, for at least 25 years, to require ninth-grade students to take Earth Science. This course also satisfies the one-year Science requirement.

(3) As of the 1981-82 school year, the ninth-grade Earth Science course has been revised (R 6). The students are now divided into two groups based on their ability. The course is designed to act as an introduction for other Science courses taught in the high school and stresses such basic considerations as laboratory safety requirements. As in the past, the Earth Science course is taught on a self-pace basis.

(4) In January 1981, "A.L." asked the Guidance Department of the High School to permit his daughter, "L.L." to take the Level 1 Biology course, rather than the Earth Science course, in the ninth grade. This request was denied based on the school policy to require ninth grade students to take the Earth Science course.

(5) "A.L." appealed this decision to the principal of the high school, Dr. Riegel, and argued that other school districts in the area permitted ninth-grade students to take Biology (P 1, P 2, P 3).

(6) Dr. Riegel denied the request, but stated that "L.L." would be permitted to take both Earth Science and Biology in the ninth grade.

(7) Ninth-grade students in the district are required to take five courses -- Earth Science, English 1, Western Civilization, Physical Education, and a mathematics course -- and are permitted to take an additional two courses from a list of other courses offered to ninth-grade students.

(8) "A.L." was not satisfied with the compromise offered by Dr. Riegel and appealed his decision to Dr. Elena Scambio, the Assistant Superintendent for Instruction for the District.

(9) Dr. Scambio met with "A.L."; discussed the matter with Dr. Riegel, Kurt Winhamer, the Assistant Principal of the High School in charge of Curriculum, and Maryanne Hulo, the Science Department Chairperson in the high school; and affirmed the decision of the principal (R 1).

(10) Dr. Scambio informed "A.L." that he could take an appeal from her decision to the Board. She informed him that the Board usually sets up an ad hoc committee to consider such appeals.

(11) By letter dated April 24, 1981, "A.L." asked the President of the Board to consider his request, but did not specifically request the Board to create an ad hoc committee (R 2).

(12) During the executive meeting of the Board on May 19, 1981, there was a discussion of "A.L.'s" request and a decision was made to support Dr. Scambio's decision.

(13) Ms. Rielly, the newly elected president of the Board, sent "A.L." a letter setting forth the decision of the Board.

(14) "A.L." objected to the Board's action, since an ad hoc committee had not been created and he had not been given an opportunity to speak on the matter. Ms. Rielly appointed an ad hoc committee.

(15) "A.L." met with the ad hoc committee and Dr. Scambio and, on June 23, 1981, the Board again voted to affirm Dr. Scambio's decision. "A.L." then filed a petition with the Commissioner of Education.

(16) The high school has a recommended Science-Mathematics program (R 4), and optional independent-of-study projects, with or without class credit (R 5), available for gifted students.

(17) In 1978, Maryanne Hulo conducted a survey of high schools to determine the type of science courses offered to students. This survey showed that a majority of high schools in New Jersey do not permit ninth-grade students to take Biology.

(18) "A.L." represented that there may be other ninth-grade students at the high school who are qualified and who want to take Biology in the ninth grade. Mr. Winhamer and Ms. Hulo stated that any change in current courses by a large number of students could cause scheduling and financial problems.

(19) The high school has a Curriculum Committee, consisting of parents, students, teachers and administrators, who review the curriculum prior to its submission to the Board for approval.

"A.L." argues that the Board acted in an arbitrary manner when it denied permission for "L.L." to take Level 1 Biology instead of Earth Science in the ninth grade. "A.L." feels that "L.L." has already had the topics to be taught in Earth Science in the lower grades and that she is qualified to take Biology in ninth grade. "A.L." rejected the compromise, since he feels his daughter will get nothing from the Earth Science course and there are other elective courses she wants to take. "A.L." argues that the respondent should permit his daughter to take Biology in lieu of Earth Science, since other school districts in the immediate area permit this to be done.

Mr. Boehm, on behalf of the school district, argues that the establishment of the school curriculum is a management perrogative and that "A.L." has not shown that the Board has acted in an arbitrary manner or that the high school does not have a science program for gifted children.

It is the responsibility of the local school Board to establish the course curriculum for the schools within the district, N.J.S.A. 18A:11-1, N.J.A.C. 6:8-3.5. The curriculum established by the Board is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that the decision of the Board was arbitrary or unreasonable. Thomas v. Board of Education of Morris Township, 89 N.J. Super. 327, 332 (App. Div. 1965). In this matter, "A.L." has not shown that the Board's decision was arbitrary or unreasonable. The fact that a number of other school districts in the area permit a ninth-grade student to take Biology does not, in itself, prove that the Board acted in an arbitary manner. At the hearing, "A.L." assumed, without any proof, that the subject matter of the Earth Science course will be equivalent to courses his daughter had had in the seventh and eighth grades. I **FIND** no evidence to support this assumption.

Therefore, I **CONCLUDE** that the decision of the Board of Education to deny the request of the petitioner that "L.L." take Biology 1 instead of Earth Science in the ninth grade is reasonable and within its management prerogative, and that the proceedings in this matter be and are 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.

OAL DKT. NO. EDU 5648-81

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

September 25, 1981
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

September 28, 1981
DATE

Suzanne Ulrich
DEPARTMENT OF EDUCATION

Mailed To Parties:

Oct. 1, 1981
DATE

Ronald I. Parlow
OFFICE OF ADMINISTRATIVE LAW

ij

OAL DKT. NO. EDU 5648-81

ADDENDUM

EXHIBITS ADMITTED INTO EVIDENCE:

FOR THE PETITIONER:

P 1 - Letter from Marie DeStefano to "A.L.", dated August 19, 1981.

P 2 - Letter from Martin Seigle, dated August 20, 1981.

P 3 - Letter from David J. Rock to "A.L.", dated August 27, 1981.

FOR THE RESPONDENT:

R 1 - Letter from Elena J. Scambio to "A.L.", dated March 30, 1981.

R 2 - Letter from "A.L." to Kathleen Meyer, dated April 24, 1981.

R 3 - Program of Studies for 1981-82 prepared by the Guidance Department of Scotch Plains-Fanwood High School.

R 4 - Mathematics-Science Cirriculum.

R 5 - Application for an independent study project.

R 6 - The requirements for the ninth grade Earth Science course.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4144-80
AGENCY DKT. NO. 307-6/80A

IN THE MATTER OF:

EAST BRUNSWICK EDUCATION ASSOCIATION,
Petitioner
v.
EAST BRUNSWICK BOARD OF EDUCATION,
Respondent.

Record Closed: August 7, 1981
Received by Agency: 10-5-81

Decided: October 2, 1981
Mailed to Parties: 10-7-81

APPEARANCES:

For Petitioner: **Nancy Iris Oxfeld,** Esq., (Rothbard, Harris & Oxfeld, attorneys)

For Respondent: **David B. Rubin,** Esq., (Rubin, Lerner & Rubin, attorneys)

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

The petitioning East Brunswick Education Association (Association) alleges that as a result of actions on April 16, 1980, one of its member guidance counselors is entitled, by reason of tenure and seniority rights, to the position of high school principal. The Board denies that such right exists.

When the pleadings were filed before the Commissioner of Education during June 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. At a prehearing conference conducted in Trenton, New Jersey, on September 29, 1980, the parties gave Notice of Cross-Motions for Summary Decision. The matter is ripe for a determination in the form of the Pleadings, Motions, Briefs in support of the respective Motions and a Stipulation of Facts.

STIPULATED FACTS:

The following, set forth in a duly executed Stipulation of Facts, are hereby ADOPTED as the facts relevant to the dispute:

Prior to April 1980, all guidance counselors employed by respondent were employed on a twelve-month basis commencing on July 1 of one year and ending on June 30 of the next year. On April 16, 1980, respondent voted to extend the contracts of twelve-month elementary guidance counselors from June 30, 1980 to August 30, 1980, to eliminate twelve-month elementary guidance counselors' positions effective September 1, 1980, and to create ten-month elementary guidance counselor positions replacing the twelve-month elementary guidance counselor position.

Anthony Navickas has been continually employed by respondent from 1956 until the present time. He was initially employed by respondent in 1956 as a Social Science Teacher. In the 1957-58 school year, he was employed a math/science teacher. During the 1958-59 and 1959-60 school years, he was employed as a Core Teacher and Teacher Counselor. In 1960-61, he was employed as Acting Vice Principal-High School. In 1961-62, he was employed as Vice Principal-High School. In 1963-69 he was employed as Acting Superintendent and High School Principal. In 1970, Mr. Navickas voluntarily gave up his position as High School Principal to become a Junior High School Social Studies Teacher. He was employed as a Junior High School Social Studies Teacher from 1970 until 1974 and as a twelve-month guidance counselor from 1974 to 1980. He is currently employed as a ten-month elementary guidance counselor.

On April 21, 1980, Anthony Navickas wrote to Brenda Witt, Assistant Superintendent of Personnel of respondent, stating that because his position as a twelve-month elementary guidance counselor had been eliminated, he wished to exercise his bumping rights for a secondary twelve-month guidance counselor position and for the

position of Principal. On April 23, 1980, Mr. Navickas was notified by Brenda Witt that he had no right to "bump up" to the position of Principal. When the job of High School Principal became vacant in the fall of 1980, Anthony Navickas applied for the job and was interviewed by a screening committee, as were all other applicants. This process did not result in his being hired for the job.

DISCUSSION AND CONCLUSIONS:

Petitioner asserts that Navickas, because of his prior service from 1963 to 1969 as High School Principal, was entitled, when his twelve-month elementary guidance position was abolished, to lay claim to the High School Principal position by reason of seniority.

A board of education for purposes of economy, reduction of numbers of pupils or administrative reorganization is authorized by N.J.S.A. 18A:28-9 to abolish positions, thus effecting a reduction in force. The Legislature has directed that, when reductions in force occur, "dismissals resulting from any such reduction . . . shall be made on the basis of seniority according to standards to be established by the Commissioner with approval of the state board." N.J.S.A. 18A:28-10.

The State Board of Education first promulgated seniority standards on June 24, 1955. Those standards, since recodified and amended, found in N.J.A.C. 6:3-1.10, in part provide as follows:

> (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. . . .
>
> (g) Whenever a person shall move from or revert to a category, all periods of employment shall be credited toward his seniority in any or all categories in which he previously held employment.
>
> (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. . . [Emphasis supplied.]
>
> (i) If he shall have insufficient seniority in the category to which he shall revert, he shall, in like manner, revert to the next category in which he held employment immediately prior to his employment in the category to which he shall have reverted, and shall be placed and remain upon the preferred eligible list of the next preceding category, and so forth, until he shall have been employed or placed upon all the preferred eligible lists of the categories in which he formerly held employment in the school district.
>
> (j) In the event of his employment in some category to which he shall revert, he shall remain upon all the preferred eligible lists of the categories from which he shall have reverted, and shall be entitled to employment in any one or more such categories whenever a vacancy occurs to which his seniority entitles him.
>
> (k) The following shall be deemed to be specific categories but not necessarily numbered in order of precedence:
>
> . . . .
>
> 30. Additional categories of specific certificates issued by the State Board of Examiners and listed in the State Board rules dealing with Teacher Certification.

In the instant matter, Navickas was employed from 1974 through June 1980 as a twelve-month elementary guidance counselor. The practical effect of the Board's extension of his 1979-80 contract through July and August 1980 was to continue to employ him for a twelve-month period through the 1980-81 school year. Petitioner asserts that the Board's approach of extending one-year contracts into an ensuing year is at best, questionable. Its action, however, creates no showing of prejudice to any employees so affected. Nor does it in any way alter the determination set forth in this case, post. The longer range effect of the Board's April 16, 1980 action was to reduce Navickas' employment as an elementary guidance counselor in the 1981-82 school year from twelve to ten months. In doing so, the Board properly followed the guidelines set forth by the Commissioner wherein he stated in Mildred Wexler v. Bd. of Ed. of the Borough of Hawthorne, 1976 S.L.D. 309 at 313: "the proper way to effectuate such a change would have been to abolish the full-time position and establish in its place the part-time position to which petitioner was entitled by reason of her seniority rights."

Petitioner's "particular employment," as referred to by N.J.A.C. 6:3-1.10(b), which was abolished by the Board's April 16 action, was that of a twelve-month elementary guidance counselor. That same rule of the State Board of Education specifies that when ones "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. . . ." Since the Board on April 16 simultaneously established ten-month elementary guidance positions, petitioner had claim by reason of seniority to employment in the same category in one of those ten-month guidance positions. This ten-month position is not considered in the operations of schools to be a part-time or less thatn full-time position. Since such was available and since petitioner lays no claim in this action to any twelve-month guidance position which may exist in the district, I **CONCLUDE** that the Board's action appointing him to the tenmonth position was a proper exercise of its discretionary authority.

At no time was petitioner dismissed from employment with the Board. At no time did a position in the same category of elementary guidance counselor cease to exist. Accordingly, I further **CONCLUDE** that there was no need for petitioner to revert to a prior category of employment, since a position remained in the same category in which he had last been employed. That category, pursuant to N.J.A.C. 6:3-10.(k)30, was inextricably established by the specific certificate issued to Navickas, permitting him to engage in student personnel services work (N.J.A.C. 6:11-12.13).

The Association's assertion that Navickas could, within the contextual setting presented herein, revert to a prior category and claim entitlement to employment therein is groundless. The further assertion that he was entitled to leapfrog his most recent prior category of employment (social studies teacher) and claim employment as a principal is similarly without legal basis or precedent in case law. As was stated in Richard Gincel v. Bd. of Ed. of Edison, 1980 S.L.D. _____ (decided August 11, 1980):

> 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:
>
> > . . .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). . . .

> ...We are not at liberty to assume or apply an unreavealed intention of either the promulgators of statutes or administrative agencies. Had it been their intention to except from the applications of these statutes or rules an employee who voluntarily requested or accepted reassignment to a position subordinate to the one previously held, the promulgating body would or should have so stated.
>
> As was said 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); . . .
> [Slip Opinion at p.7]

Petitioners assert that Navickas was entitled, when his twelve-month position was abolished, "to apply pursuant to law for a job in any other category in which he held seniority. . . ." A careful reading of N.J.A.C. 6:3-1.10 reveals no basis for such contention. Accordingly, that assertion is rejected.

Petitioner's reliance on Gincel, supra, is similarly misplaced. Gincel is importantly distinguishable from the instant matter in that his position of vice principal was in fact abolished and no vice principalship was established in its stead. Thus, unlike Navickas, Gincel reverted to his immediately prior category of principal. The Association's reliance on Mary Ann Popovich v. Bd. of Ed. of Wharton, 1975 S.L.D. 737, is also misplaced. Therein, Popovich, unlike Navickas, was reduced from a full-time ten-month music teacher to a less than full-time music teacher, while another music teacher with less seniority was allowed to remain at full-time. By contrast, herein, no twelve-month elementary guidance position to which Navickas laid any claim continues to exist. Accordingly, I **CONCLUDE** that Popovich, supra, and Gincel, supra, are inapposite to the factual context herein.

The Association also refers in its Brief to Adele Vexler v. Bd. of Ed. of Red Bank, 1980 S.L.D. _____ (decided March 18, 1980). Therein, the Commissioner determined that refusal by a school psychologist of part-time employment after her full-time position was abolished did not free the Red Bank Board of its obligation to place

Vexler on a preferred eligibility list. Vexler, however, offers no solace to petitioner herein. Navickas, by the Board's action, was reduced from a twelve-month to a ten-month position. During the ten months, however, he was employed full-time. This contrasts sharply to the employment Vexler refused, which was part-time employment.

That the Board may appoint a former twelve-month tenured employee to a ten-month position in the same category of employment, even though the ten-month position has a lower salary expectation, has been established in case law. In this regard, see the opinion of the State Board of Education in Jeannette A. Williams v. Bd. of Ed. of Plainfield, 1980 S.L.D. _____ (decided January 9, 1980), aff'd. 176 N.J. Super. 154 (App. Div. 1980). Therein, the State Board held that a twelve-month high school principal, by reason of holding a certificate to serve as principal at any grade level, was subject to reassignment at her board's discretion to a ten-month elementary principalship. Noting that Williams' salary had not been reduced in that reassignment, the State Board said:

> Moreover, to require a board of education to pay all transferred tenured personnel in accordance with future salary schedules which might be adopted for their respective earlier positions would cause endless confusion in negotiations and administration of employee contracts.
>
> Court decisions have also indicated that tenure rights do not include future salary expectations. In Greenway v. Camden Board of Education, 129 N.J.L. 47 (Sup. Ct. 1942), a tenured high school teacher was transferred to the junior high school. He contended that his transfer constituted a reduction in salary because the maximum salary prescribed for the former job exceeded that fixed for the junior high or intermediate school. The annual salary paid to the teacher, however, was the same after as before the transfer. Upholding the action of the board of education and rejecting the teacher's claim that he had vested rights in the high school salary increments, the Supreme Court said (129 N.J.L. at pg. 47):
>
> > The failure to receive an increase of salary does not constitute a reduction.
> >
> > [Slip Opinion at pp. 10, 11]
>
> In our view, salary expectancies at any given moment do not determine rank; nothing in the tenure statutes states or implies that two otherwise comparable positions must have identical salary expectancies before an incumbent may be transferred from one to the other. Compensation is treated separately in the tenure laws. So long as it is not reduced, a tenured employee has not suffered a loss of tenure rights merely because he is transferred to a job which has a comparable rank, albeit a lesser salary expectancy.

[Slip Opinion at pp. 13, 14]

Petitioner offers no proof that he has entitlement by reason of greater senority to any twelve-month guidance position which may continue to exist in the Board's secondary school. Nor does the Stipulation of Facts, initiated by petitioner, confirm that such positions exist. Accordingly, the entitlement of petitioner to any such position is not addressed herein as an issue.

I **CONCLUDE** that Navickas has no entitlement under education law to appointment as a high school principal.

DETERMINATION:

In consideration of the conclusions set forth above, it is **DETERMINED** that the petitioning Association has not met its burden of proof of showing that Navickas is entitled by reason of his tenure and seniority rights to the relief sought in the form of an order directing that he be appointed to the post of High School Principal with retroactive benefits. Accordingly, it is **ORDERED** that the relief sought be **DENIED** and that the Petition of Appeal be and 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 4144-80

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

October 2, 1981
DATE

Eric G. Errickson
ERIC G. ERRICKSON, ALJ

Receipt Acknowledged:

October 5, 1981
DATE

Seymour Glass
DEPARTMENT OF EDUCATION

Mailed To Parties:

10-7-81
DATE

Ronald I. Parker III
OFFICE OF ADMINISTRATIVE LAW

bm

EAST BRUNSWICK EDUCATION ASSOCIATION,	:	
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 the Association pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Association excepts to the conclusion by the Honorable Eric G. Errickson, ALJ that Navickas is not entitled by reason of tenure and seniority rights to the position of high school principal because of the change in his guidance position from a twelve-month to a ten-month position. The Association relies on Gincel, supra, and Popovich, supra. The Commissioner finds no merit in the Association's exceptions.

An examination of the record herein, including the stipulation of facts and the arguments of the parties, convinces the Commissioner that Judge Errickson properly weighed and evaluated the facts therein and the cases cited by the parties. In the opinion of the Commissioner, Judge Errickson properly determined that Popovich and Gincel (affirmed State Board of Education November 1, 1980) cited herein are inapposite to the matter presently controverted.

Navickas' tenure in the system is not questioned and his seniority rights rest with employment in the same category to which he has earned entitlement. N.J.A.C. 6:3-1.10 In the present instance, the Board's action of April 16, 1980 created ten-month guidance positions. Navickas' appointment by the Board thereto was a valid exercise of its discretionary authority. The Commissioner so holds.

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.

November 13, 1981 COMMISSIONER OF EDUCATION

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1077-81
AGENCY DKT. NO. 36-2/81A

IN THE MATTER OF:

Marilyn Kuehn
v.
Board of Education of the Township of Teaneck

Record Closed: October 5, 1981
Received by Agency: 10-14-81

Decided: October 9, 1981
Mailed to Parties: 10-20-81

APPEARANCES:

Harold N. Springstead, Esq., for Petitioner

Sidney A. Sayovitz, Esq., for Respondent

BEFORE **ROBERT P. GLICKMAN**, ALJ:

Petitioner, Marilyn Kuehn, who was denied a salary increment for the 1980-81 school year because of excessive absences contends that the Board action was fatally defective because it did not supply her with written reasons within ten days of its action as prescribed by N.J.S.A. 18A:29-14. Petitioner also asserts that the Board policy which mandates the withholding of a salary and adjustment increment when a teacher has been absent more than 90 days during a school year is arbitrary, capricious and unreasonable.

Respondent replies that the petition should be dismissed as being untimely filed in violation of the 90-day requirement of N.J.A.C. 6:24-1.2.

On February 9, 1981, a petition of appeal was filed with the Commissioner of Education. On March 9, 1981, 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 a prehearing conference on April 29, 1981, the following issues were identified:

1. Was the withholding of petitioner's salary guide and adjustment increment for the 1980-81 school year by respondent arbitrary, capricious or unreasonable or in violation of N.J.S.A. 18A:29-14?

2. What relief is petitioner entitled to?

3. Should the petition be dismissed as being untimely filed in violation of the 90-day requirement of N.J.A.C. 6:24-1.2?

4. Was respondent's failure to give petitioner written notice within ten days of the Board's action as prescribed by N.J.S.A. 18A:29-14 a fatal defect which would result in the restitution of the increment withholding?

The following stipulations were entered into at the prehearing conference, and this Court adopts them as part of its FINDINGS OF FACT:

1. On June 11, 1980 the respondent passed a resolution to withhold petitioner's salary guide and adjustment increment.

2. A petition of appeal was filed with the Commissioner of Education on February 9, 1981.

3. No written notice from the Board was sent to petitioner within ten days of June 11, 1980.

4. On November 15, 1980, petitioner received her paycheck which indicated the withholding of her increment.

A hearing was held at the Office of Administrative Law, Newark, New Jersey on September 24, 1981. The witnesses who testified and the exhibits marked into evidence are set forth in the appendix attached hereto. The record was closed on October 5, 1981, when certain post-hearing documents were submitted.

SHOULD THE PETITION BE DISMISSED AS BEING UNTIMELY FILED IN VIOLATION OF THE 90-DAY REQUIREMENT OF N.J.A.C. 6:24-1.2?

In order to answer this question, it must be ascertained when the 90 days starts to run. It is uncontroverted that Marilyn Kuehn, a school teacher with the Teaneck Board of Education since 1969, became sick during the 1979-80 school year and left school on November 14, 1979 for the remainder of that school year. She had a condition known as autoimmune hemolitic anemia which eventually required a spleenectomy (R-2). On April 28, 1980, Aubrey Scher, Superintendent of Schools for respondent, wrote a letter to Ms. Kuehn (R-4) which indicated:

> ... You must expect, in accordance with practice, to remain at the same salary for the 1980-81 school year. Any staff member absent more than 90 school days is not eligible for increment or adjustment... .

On June 11, 1980 the Board voted to withhold petitioner's salary and adjustment increment for the 1980-81 school year because petitioner was absent over 90 days (R-5). Other than the April 28, 1980 letter from the Superintendent of Schools, no other communication was sent to petitioner by the Board. No written notice was given petitioner prior to the June 11, 1980 meeting; the minutes of that meeting were not sent to petitioner, nor was petitioner given written notice of the Board action of June 11, 1980 together with the reasons therefor.

Respondent contends that petitioner was in receipt of notice of the Board's action of June 11, 1980 in September 1980. To buttress the Board's position, Irwin Pollner testified that he had a conversation with petitioner some time prior to school opening on September 3, 1980. Mr. Pollner, who happens to be President of the Teaneck Teachers' Association, believes this conversation took place in September 1980. According to Mr. Pollner, petitioner called him to inquire what benefits, if any, she would be entitled to once her sick days ran out. Mr. Pollner indicated that she would be entitled to disability insurance benefits through Reliance Insurance Company.[1] At the time of this conversation, Mr. Pollner thinks he discussed the Board's policy that no teacher would receive an increment who was absent more than 90 days. Although Mr. Pollner was unsure of the date of the conversation and was unsure of exactly what was said, he believes that it was clear to petitioner that her increment was withheld. Upon questioning by the court, Mr. Pollner admitted that he did not tell her that the Board met on June 11, 1980 and voted to withhold her increment. No facts were given to the court by Mr. Pollner which would in any way indicate why it was clear that Ms. Kuehn knew her increment had been withheld.

---

1 The reliability of Mr. Pollner's testimony as to this conversation taking place in September is questionable in light of the information supplied in a post-hearing letter ordered by the court from the attorneys for the Board (marked into evidence as C-1), which indicates petitioner's sick leave benefits were exhausted on January 4, 1980. Additionally, Ms. Kuehn received a disability check on January 21, 1980. This information buttresses petitioner's testimony who contended that her conversation with Mr. Pollner took place prior to the June 11, 1981 Board action. There is no logical reason for petitioner to have a discussion with Mr. Pollner in September about disability benefits, when she had been receiving disability benefit payments for approximately nine months since January 1980.

In contrast to Mr. Pollner's testimony, petitioner testified that she spoke to him in the early spring of the year and not in September, when her sick days had run out. This conversation, according to petitioner, took place prior to the June 11, 1981 meeting. Petitioner, for the first time, knew that her increment had been withheld when she received her November 15, 1981 paycheck. This court concludes that petitioner was a truthful and forthright witness who was sure when her conversation took place with Mr. Pollner. Her credible and believable testimony is to be contrasted with Mr. Pollner's testimony, which was both uncertain as to the date when his conversation with Ms. Kuehn took place and the substance of said conversation.

Concluding that petitioner's version of the sequence of events is more credible, this court determines that the date which would trigger the operation of the 90-day rule under N.J.A.C. 6:24-1.2 is November 15, 1981, the date when petitioner received her paycheck. Since the petition of appeal was filed with the Commissioner on February 9, 1981, this court CONCLUDES that the petition was timely filed and is not barred by the operation of the 90-day rule pursuant to N.J.A.C. 6:24-1.2.

WAS RESPONDENT'S FAILURE TO GIVE PETITIONER WRITTEN NOTICE WITHIN TEN DAYS OF THE BOARD'S ACTION, AS PRESCRIBED BY N.J.S.A 18A:29-14, A FATAL DEFECT WHICH WOULD RESULT IN THE RESTITUTION OF PETITIONER'S SALARY AND ADJUSTMENT INCREMENT?

It is undisputed that the only notice petitioner had of the proposed Board action to withhold her salary and adjustment increment was the letter she received on April 28, 1980 (R-4). She received no other communication from the Board. The minutes of the June 11, 1980 meeting were not sent to her. She was not present at the June 11, 1980 meeting. Thus, it is uncontroverted that the Board violated the requirements of N.J.S.A. 18A:29-14 which states:

> ... Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a recorded roll call majority vote of the full membership of the board of education. It shall be the duty of the board of education, within 10 days, to give written notice of such action, together with the reasons therefor, to the member concerned.... (Emphasis added.)

The Board's failure to comply with the statute in the instant case constitutes more than a technical defect. This deficiency taints the entire process by which petitioner had her increment withheld. In Gill v. Bd. of Ed. of the City of Clifton, 1976 S.L.D. 661, aff'd by the State Board of Education 1976 S.L.D. 666, the Commissioner held that a written notification to a petitioner, after a formal vote by the board to withhold an increment, without stating the reasons for that action, was insufficient under N.J.S.A. 18A:29-14. The Gill decision stated that a local board is required to follow the precise mandate set forth in the statute. The instant case is dissimilar to the companion case of Nicholas DeRisi v. Board of Education of the Township of Teaneck, 1981 S.L.D. _____ (decided September 22, 1981). In DeRisi, it was clear that petitioner had knowledge both before and after the board action why his increment was being withheld. Mr. DeRisi had a meeting with the Superintendent on August 13, 1980, at which time he acknowledged that his increment was being withheld and indicated that he wanted to do a good job so that his increment would not be withheld in the future.

Accordingly, since the Board gave neither notice nor written reasons within ten days of its June 11, 1980 decision to withhold petitioner's increment, the action of respondent is invalid and shall be set aside.

DO EXCESSIVE ABSENCES CONSTITUTE GOOD CAUSE UNDER N.J.S.A. 18A:29-14?

Although unnecessary for the resolution of this controversy, it may be instructive to discuss whether or not the Board's policy of withholding a salary and adjustment increment from those teachers who were absent more than 90 days is proper under N.J.S.A. 18A:29-14. An unpublished decision of the Appellate Division, Trautwein v. Bd. of Ed. of the Borough of Bound Brook (N.J. App. Div., April 8, 1980, A-2773-78)

(unreported), certif. den., 84 N.J 469 (1980), is the principal case concerning the withholding of increments due to excessive absenteeism. Ms. Trautwein, the respondent, clearly was an efficient teacher, having received ratings of "excellent" to "good" when evaluated by her superiors. She had been absent for either personal or family illness, however, on an average of 20.6 days per year, during the years 1964 to 1976. The local school board, therefore, withheld her salary increment for the 1976-77 school year, arguing in the Appellate Division that its action was justified because the respondent's excessive absenteeism constituted good cause under N.J.S.A. 18A:29-14. The court agreed with the board, stating that there is no "disagreement with the general proposition that a teacher's excessive absences may constitute good cause for [a] local board's withholding of a salary increment." Trautwein, at 9. The crucial question in determining the reasonableness of a board's action in withholding an increment is whether the teacher's absences are properly characterized as being excessive. Id., at 10. A mere difference of opinion between a local board of education and an Administrative Law Judge as to what is excessive is not enough to warrant the overturning of the board's decision. Rather, a teacher must demonstrate that the decision as to excessiveness was arbitrary, capricious or unreasonable or evidenced an abuse of the board's legislatively delegated discretion. See also Angelucci and Nehemiah v. West Orange Bd. of Ed., OAL Dkt. No. EDU 5461-79 (July 17, 1980), adopted, Commissioner of Education (September 15, 1980), aff'd, State Board of Education (February 4, 1981). The rationale behind the Trautwein and Angelucci decisions is that the continued absence of a teacher from the classroom has a deleterious effect on the pupils.

Based on what has just been enunciated, it is **CONCLUDED** and **ORDERED** that the Board's action of June 11, 1980 be set aside as being in noncompliance with N.J.S.A. 18A:29-14. It is further **CONCLUDED** and **ORDERED** that petitioner be restored to her proper position on the salary guide and be properly compensated for all moneys lost as a result of the Board's improper action on June 11, 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** this Initial Decision with **FRED G. BURKE** for consideration.

October 9, 1981
DATE

Robert P. Glickman
ROBERT P. GLICKMAN, ALJ

Receipt Acknowledged:

October 14, 1981
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

10-20-81
DATE

Ronald I. Parker
FOR OFFICE OF ADMINISTRATIVE LAW

ahk

APPENDIX

Witnesses

Alden Spencer Denham, Jr., Administrative Assistant to Superintendent of Schools

Irwin Pollner, President Teaneck Teachers' Association

Marilyn Kuehn, Petitioner

Exhibits

R-1	Letter dated January 30, 1980 from A. Spencer Denham to Marilyn Kuehn
R-2	Letter dated April 25, 1980 from Athos Simotas, M.D. in reference to Marilyn Kuehn
R-3	Memo dated May 1, 1980 from Marilyn Kuehn to Mr. Denham
R-4	Letter dated April 28, 1980 from Superintendent of Schools to Marilyn Kuehn
R-5	Minutes of the Board of Education meeting held on June 11, 1980
P-1	Memo dated November 24, 1980 from A. Spencer Denham to Sal Rainone re Marilyn Kuehn
C-1	Letter dated October 2, 1981 from Sidney Sayovitz, Esq., to court

MARILYN KUEHN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK, 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.

Respondent excepts to the conclusions by the Honorable Robert P. Glickman, ALJ that the Board's failure to give petitioner written notice within ten days of its action to withhold her increment as prescribed by N.J.S.A. 18A:29-14 warrants restitution of petitioner's salary and adjustment increment. Petitioner's reply exceptions refute those of the Board and affirm the initial decision by Judge Glickman. The Commissioner finds merit in the Board's exceptions.

An inspection of the record, the testimony of witnesses, arguments of law and the exceptions filed by the parties herein convinces the Commissioner that Judge Glickman erred in setting aside the action of the Board at its June 11, 1980 meeting to withhold petitioner's salary and adjustment increment. The Commissioner notes that although petitioner did not receive word from the Board of its action on June 11, 1980, she had previously by letter of April 28, 1980 received word from the Superintendent that:

> "***Any staff member absent more than ninety school days is not eligible for increment or adjustment." (R-4)

As was said by the Commissioner in Janet Huth v. Board of Education of the Borough of Morris Plains, Morris County, decided July 28, 1980:

> "***While the Commissioner deplores the Board's failure to strictly adhere to the procedural format as prescribed by statute, he nevertheless agrees with the hearing

> examiner's conclusion that petitioner knew, or should have known, of the Board action in regard to withholding of her increment and the reasons for said action.***"
>
> (Slip Opinion at p. 12)

In the Commissioner's opinion the same can be said in the present case.

The Commissioner observes the marked similarity between the matter presently controverted and Board of Education of the Northern Highlands Regional High School District v. James Martin as decided by the Superior Court, Appellate Division. (1979 S.L.D. 852) In that case, as in the present one, prior to the final action of the Board denying petitioner's increment, the teacher had been so informed by the Superintendent of the school district. In Northern Highlands, the Commissioner set aside the board's action for failure of strict compliance with N.J.S.A. 18A:29-14.

In reversing the Commissioner the Court said:

> "***We conclude that the Commissioner's determination was hyper-technical and that the substance of the statutory requirement is satisfied when the school board acts by public recorded roll call vote prior to the commencement of the school year involved and the individual affected is informed of the reasons for the action, whether before or after the public roll call vote. We regard the intent of the statutory requirement of notice within ten days as being to assure that the individual is apprised of the reasons for the action no later than ten days after the official action. Under all the attendant circumstances, the notice of reasons in March suffices."

For the foregoing reasons the action of the Court herein reversing the Board is accordingly set aside. The Petition is dismissed.

The Commissioner so holds.

COMMISSIONER OF EDUCATION

November 25, 1981

Pending State Board

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7135-80
(Remanded EDU 3071-80)
AGENCY DKT. NO. 203-4/80A

IN THE MATTER OF:

BEVERLY MICCICHE,
Petitioner
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF MOUNT HOLLY, BURLINGTON COUNTY,
Respondent.

Record Closed: August 31, 1981
Received by Agency: 10-16-81

Decided: October 8, 1981
Mailed to Parties: 10-22-81

APPEARANCES:

John E. Collins, Esq., (Selikoff & Cohen, P.A) for Petitioner

Stephen J. Mushinski, Esq., (Parker, McCay & Criscuolo) for Respondent

BEFORE **AUGUST E. THOMAS,** ALJ:

This matter was filed in the office of the Commissioner of Education and later 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 August 14, 1980, it was determined that a decision would be rendered solely on the issue of justiciability or ripeness.

The salient facts are as follows:

1. Petitioner was granted a maternity leave covering the three months of her absence in the spring of 1978, as well as the entire 1978-79 school year.

2. She gave birth by caesarean section on March 27, 1978.

3. She submitted a note by her doctor, stating that she was "disabled" for three months following the birth of her child.

Petitioner, concluding that the Board was anticipating a Reduction in Force (RIF) in 1981-82 because of declining enrollment, sought an opinion establishing her seniority in the district. The Board notified petitioner that her countable time amounted to five years, seven months, with no credit being given for the spring of 1978 which petitioner claims must be counted because of her disability. Petitioner asserts that she should be credited with six years seniority, not five years, seven months, as established by the Board.

The undersigned Administrative Law Judge (ALJ) rendered a decision on September 30, 1980, finding that there had been no RIF which would trigger the establishment of a seniority list pursuant to N.J.S.A. 18A:28-9 et seq. The ALJ concluded that it was merely speculative that the Board would conduct a RIF for the 1981-82 school year; consequently, he determined the matter was not yet ripe for adjudication.

The Commissioner remanded the matter on November 13, 1980, for a finding of seniority stating as follows:

> The Commissioner is constrained to emphasize that under the set of circumstances herein there was no mandate to the Board to respond affirmatively to a request for seniority determination. No reduction in force had taken place invoking the statutes requiring such a seniority determination. N.J.S.A. 18A:28-9 through 28-13. The Commissioner deems it proper that the Board need not have made any such determination speculatively.

> The fact remains that in the present matter a determination by the Board was made; it is clearly in the record and petitioner argues the accuracy of that decision.
>
> For that reason the Commissioner determines that the matter herein constitutes a contested matter ripe for adjudication.

The matter thereafter proceeded to hearing, where a factual record was developed and documents were admitted in evidence. However, it is my determination that this matter need not be decided based on this record for the following reasons:

First, as stated before, there has been no RIF; therefore, the seniority statutes have not been triggered.

Second, there is the possibility of termination of teaching staff members at the end of the school year, which may affect the RIF and the establishment of a seniority list. Consequently, any seniority list would be premature and subject to change.

Third, a speculative decision such as this would establish a precedent wherein any teacher in the State could file an appeal seeking a declaration of "seniority" because of a belief that there might be a RIF. Such a decision would have to be rendered with the assumption of prospective facts which the OAL has no authority to make.

Fourth, this is not a contested matter as envisioned by N.J.A.C. 1:1-1.5; and

Fifth, the action of the Board, as recognized by the Commissioner's remand, was rendered "speculatively" and it did not have to be rendered.

Regarding the fourth reason, a contested case must be "preeminently adjudicatory and judicial in nature and not informational . . . ." Further, "(t)he matter must not be susceptible of informal resolution on the administrative level . . . ." N.J.A.C. 1.1-5.4(a) requires that "the agency shall make a prompt settlement attempt . . . unless such attempts would be inappropriate or unproductive."

Here, the Board's action is ultra vires, pursuant to N.J.S.A. 18A:28-11. That statute demands that the Board determine the seniority of persons affected by a RIF. It begins, "In the case of any such reduction the board of education shall determine the seniority of the persons affected." When the Board is unable to prepare such a list when

facing a RIF, it may seek a non-binding advisory opinion of a panel established by the Commissioner (N.J.S.A. 18A:28-11).

In the present case, 1) there has been no RIF, and 2) the Board has not sought an advisory opinion. Consequently, its own seniority opinion is not only non-binding and void, but ultra vires, and is hereby set aside (N.J.S.A. 18A:28-11).

Any determination of a prospective seniority status by the ALJ, likewise, would not be binding on the Commissioner or the Board, since it would be speculative, based on assumed facts, and subject to litigation when and if the matter ever becomes a contested case.

Consequently, this appeal is not considered preeminently adjudicatory and judicial in nature; rather, it merely requests information which is not binding on the Commissioner or the Board. Further, the matter is susceptible to resolution in the form of a non-binding advisory opinion by the Commissioner [N.J.A.C. 1:15.4(a)].

Accordingly, the Board is **ORDERED** to seek an advisory opinion, as provided by N.J.S.A. 18A:28-11, at the time it determines it will conduct a RIF. At that time, this matter may be ripe for adjudication if petitioner is affected by the RIF.

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.

October 8, 1981
DATE

August E. Thomas
AUGUST E. THOMAS, ALJ

Receipt Acknowledged:

10/16/81
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

10-22-81
DATE

Ronald I. Parker
OFFICE OF ADMINISTRATIVE LAW

bm

BEVERLY MICCICHE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MOUNT HOLLY, BURLINGTON COUNTY,	:	DECISION ON REMAND
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 decision by the Honorable August E. Thomas, ALJ that the Board's action is ultra vires pursuant to N.J.S.A. 18A:28-11. The Board's exceptions disagree in part with the initial decision contending that because the Petition of Appeal was untimely no decision should have been formulated. The Board goes on, however, to agree with the balance of the Court's decision. The Commissioner finds no merit in its exceptions. The Board cannot have it both ways. The Commissioner finds merit in petitioner's pleadings.

The Commissioner notes with approval petitioner's argument that the Board may not now contend that her pleadings are out of time whereon the Board has already passed judgment on her seniority entitlement by determining that it amounted to five years and seven months.

The Commissioner has examined the record herein, the pleadings of the parties and their exceptions to the initial decision. The Commissioner also takes cognizance of his remand of this matter on November 13, 1980 wherein he stated:

> "***The Commissioner deems it proper that the Board need not have made any such determination speculatively.
>
> "The fact remains that in the present matter a determination by the Board was made; it is clearly in the record and petitioner argues the accuracy of that decision.

> "For that reason the Commissioner determines that the matter herein constitutes a contested matter ripe for adjudication.***"

Petitioner contends that she should be credited with six years' seniority, not five years seven months, as established by the Board. The Commissioner cannot agree with the reasoning of the Court wherein is said:

> "***A speculative decision such as this would establish a precedent wherein any teacher in the State could file an appeal seeking a declaration of 'seniority' because of a belief that there might be a RIF. Such a decision would have to be rendered with the assumption of prospective facts which the OAL has no authority to make."

In the opinion of the Commissioner such speculative decision should not ordinarily be made and such a decision need not be rendered. However, in the present matter the decision of the Board was reached and petitioner's seniority in the district was determined and remains clearly on the record as five years and seven months.

Petitioner's contention of her disablement for three months following the birth of her child supported by a statement from her doctor stands unrefuted on the record. In the opinion of the Commissioner such time of disablement must be included in seniority determination. N.J.A.C. 6:3-1.10(b) Petitioner's seniority entitlement should therefore be six years.

Accordingly, the findings of the Court herein are set aside. The relief requested by petitioner is granted.

The Commissioner so holds.

COMMISSIONER OF EDUCATION

November 30, 1981

Pending State Board

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3334-80
AGENCY DKT. NO. 218 4/80A

IN THE MATTER OF:

**THE TENURE HEARING OF CLAIRE DE KRAFFT,
SCHOOL DISTRICT OF THE TOWNSHIP OF
CHERRY HILL, CAMDEN COUNTY**

Record Closed: September 2, 1981
Received by Agency: 10-20-81

Decided: October 19, 1981
Mailed to Parties: 10-22-81

APPEARANCES:

Kenneth D. Roth, Esq., (Davis & Roth, Attorneys) for the Petitioner, School District of the Township of Cherry Hill

Steven R. Cohen, Esq., (Selikoff & Cohen, Attorneys) for the Respondent, Claire de Krafft

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

Written charges against Claire deKrafft, a teacher with tenure status, were made on March 10, 1980, and certified to the Commissioner of Education by resolution of the Board of Education of the Township of Cherry Hill (hereinafter referred to as "Board"). The respondent denied the charges and 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.

I FIND that the undisputed facts are:

(1) Claire deKrafft was first employed by the Board during the 1971-72 school year as a music teacher at the Beck School.

(2) Teachers are entitled to ten vacation and two personal days in each school year (1T 15). The average teacher takes approximately eight days off per year for illness and personal matters (1 T 20).

(3) Any teacher who cannot come in or who will be late is expected to call between 6:00 and 7:30 a.m., thereby giving the school officials sufficient time to arrange for a substitute teacher or coverage until the teacher arrives (1 T 33, 106, 2 T 41, 2 T 159).

(4) Because the respondent frequently failed to notify the school that she would be either out that day or late, it was sometimes necessary for school officials to check her classroom in order to determine whether she had arrived on any given day (1 T 36-7).

(5) Ms. Peacock, the secretary to the principal at Beck School, sometimes called the respondent in order to wake her (1 T 38). On one occasion, she went to the respondent's home with the assistant principal, Mr. Saler, when the respondent failed to answer her telephone (1 T 39, 1 T 144-5). On that occasion, after ringing the doorbell for a while, they woke up the respondent (1 T 38-9).

(6) Respondent told Ms. Peacock that she was having problems getting up because of her medication (1 T 53).

(7) During the 1971-72 school year, the respondent was out sixteen days (P-1). In the November 1971 Evaluation Report, it was noted that Ms. deKrafft was out eight days within the first forty-seven school days and that she failed to keep an up-to-date emergency lesson plan (P 10, 1 T 83-5). In the January 28, 1972 Evaluation Report, it was stated that the respondent was late five times in January (P 11, 1 T 89-91). In the March 29, 1972 Evaluation Report, respondent was recommended for a 1972-73 contract, since her teaching performance was good (P 12, 1 T 100). During this school year, Ms. deKrafft received a memorandum

regarding her failure to have up-to-date emergency lesson plans (P 13), a memorandum regarding her latenesses without proper notice (P 14) and two memoranda regarding late reports (P 20, P 21).

(8) During the 1972-73 school year, the respondent was out seventeen days (P 2). In the November 1972 Evaluation Report, it was noted that the respondent's work was satisfactory, but that she arrived late for team meetings (P-5, 1 T 111-3). In the Febraury 1973 Evaluation Report, it was stated that the respondent's work was satisfactory, except that she was late submitting a report, notwithstanding several notices, and that she was out sixteen work days (P 16, 1 T 116-7). In the March 1973 Evaluation Report, it was recommended that the respondent be given a contract for the next school year based on her good performance as a teacher and on the hope that she would correct the problems relating to late reports and absences (P 18, 1 T 122-3).

(9) During the 1973-74 school year, respondent was out 24.5 days (P 3). During that school year, she received two memoranda regarding the number of times she was late (P 19, P 30). Edward Saler, the assistant principal of Beck School, testified that the respondent's absences were having an adverse effect on the students and were the reason for changing the date for two concerts (1 T 126-8).

(10) Ms. deKrafft received tenure at the start of the 1974-75 school year based on the determination that she was a good teacher, notwithstanding her record of absences and tardiness (1 T 152-4).

(11) During the 1974-75 school year, respondent was out 45.5 days (P 4). In the December 1974 Evaluation Report, five areas for improvements were set forth, including the need to submit emergency lesson plans (P 26). Respondent also received a memorandum regarding her lateness (P 32) and a memorandum regarding an absense (P 31). In the February 3, 1975 Evaluation Report, it was noted that there was improvement and that the respondent had submitted acceptable emergency lesson plans (J 2). Ms. deKrafft received a satisfactory rating in the final evaluation report, dated April 23, 1975 (R 5).

(12) On December 12, 1974, respondent asked to be transferred to another school (P 27, 1 T 193-4).

(13) On May 30, 1975, the respondent was hospitalized for chronic fatigue, nausea and depression (R 11).

(14) During the 1975-76 school year, the respondent was out 51.5 days (P 5). In the June 1, 1976 Evaluation Report, it was stated that the respondent was a good teacher, but that her excessive absenteeism, because of well documented illnesses, had caused interruptions in the music program (P 29, 1 T 201).

(15) During the 1975-76 school year, Mr. Miller, the principal at Beck School, received complaints from the students regarding the respondent's absences (1 T 173) and brought the matter of the respondent's performance to the attention of the Superintendent of Schools (1 T 208).

(16) During the 1975-76 school year, a rumor started at Beck School that the respondent had cancer. The respondent told Ms. Peacock that she had cancer, but did not mention the fact that she was receiving treatment for depression (1 T 41, 59, 63). In January 1976, the respondent told Mr. Miller that she had problems getting up because of her medication and told him that she had cancer (1 T 183, 2 T 20) when they discussed the possibility of an abbreviated work schedule (P 25, 2 T 18). Mr. Miller became more understanding after the respondent told him she had cancer (1 T 184). The respondent told Joan Katz, Supervisor of Secondary Education, that she had cancer (4 T 132).

(17) During the 1975-76 school year, at the suggestion of Ronald Sweizicki, a teacher, a collection was taken for an unidentified teacher who was sick and in financial difficulty because of her absences and medical bills (1 T 64-5, 6 T 33). Although Ms. deKrafft's name was not used, it was commonly understood that the collection was for her (1 T 45, 1 T 64-5, 6 T 33-34). Respondent never told Mr. Sweizicki that she had cancer (6 T 34). Over $200 was collected and Ms. Peacock gave the money to the respondent and told her it was for her medical expenses (1 T 44-45, 1 T 64-5).

(18) Respondent was transferred to the Cherry Hill High School East as of the start of the 1976-77 school year.

(19) During the 1976-77 school year, respondent was out 42.5 days (P 6, 1 T 23). In January 1977, respondent received a satisfactory rating in an evaluation report (R 19), and another evaluation report which stated that the respondent's students lacked enthusiasm and were not properly prepared for a concert (P 39). During the school year, a number of memoranda were sent by Bernard Shapiro, Principal of the High School, to the Superintendent or Assistant Superintendent regarding respondent's extended absences, often without proper notice, and its negative effect on the students (P 36, P 37, P 41). The problems created by the absences and latenesses, often without proper notice, were brought to the respondent's attention on several occasions (P 40, P 42, P 43, P 55). Respondent promised to improve (2 T 142).

(20) Respondent was hospitalized on February 17, 1977 for depression (R 11).

(21) At a meeting on May 11, 1977, Mr. Shapiro suggested to the respondent, in the presence of Mr. Glen Nec, a union representative, that she consider a medical disability pension (P 44, 2 T 69).

(22) At the request of the petitioner, Ms. deKrafft was given medical and psychiatric examinations during July 1977 and it was determined that the respondent was mentally and physically capable of performing her job responsibilities and that she did not have cancer (P 68, P 69).

(23) In his September 15, 1977 affidavit, Tracy Miller stated that "Ms. Claire deKrafft's attendance record caused serious harm to the music program and the students at Beck, particularly during the 1974 through 1976 school years. Program consistency was difficult if not impossible to maintain during her absences. On numerous occasions Ms. deKrafft failed to leave lesson plans for substitute teachers, causing her music class to become study halls with a substitute teacher serving as a supervisor" (P 34).

(24) In his September 1977 affidavit, Mr. Shapiro indicated that the high school hired an additional teacher to help with the music program because of the absences and latenesses of the respondent (P 45). After the new teacher came in, respondent was assigned to give individual or small group lessons (2 T 57, 60).

(25) In 1977, William Shine, Superintendent of Schools, filed charges of inefficiency against the respondent with the Board, based on respondent's six-year history of absences and latenesses and her alleged misrepresentation that she had cancer (J 4, R 6).

(26) The ninety-day period for correcting the alleged inefficiencies started on November 15, 1977, and expired on February 15, 1978 (P 48).

(27) In his February 2, 1978 report, Mr. Shapiro stated that during part of the ninety-day period, November 15, 1977 to February 2, 1978, respondent was out ten days and was late on four occasions (P 49).

(28) The Board decided not to certify charges to the Commissioner of Education. The respondent was notified that the Board was still concerned about her poor attendance and latenesses, but considered her performance during the ninety-day period an indication of a change in attitute (P 50).

(29) Mr. Shapiro did not agree with the Board's decision and felt the respondent had not shown sufficient improvement during the ninety-day period (2 T 84-5).

(30) Mr. Shapiro stated that the failure of respondent to give adequate notice of her absences hindered the school's ability to get a substitute teacher (2 T 72).

(31) During the 1977-78 school year, the respondent was out a total of sixteen days (P 7, 1 T 22). In the December 1977 evaluation report, respondent was complimented on the development of a Rock Music Program (P 63, 4 T 45-7).

(32) During the 1978-79 school year, respondent was out thirty-five days (P 8, 1 T 22). In the March 16, 1979 Evaluation Report, it was noted that the respondent had a good rapport with her students, but that her absenteeism "hinders quality instruction and disrupts learning continuity" (J 3). During the school year, she received a memorandum dealing with her lateness without notice (P 51) and a memorandum regarding her failure to have emergency lesson plans (P 60).

(33) By memorandum dated January 25, 1979, Mr. Shapiro recommended to Dr. William Shine that formal charges be brought against the respondent (P 52).

(34) At the request of the petitioner, Ms. deKrafft was given medical and physical examinations in July 1979 and it was determined that she was mentally and physically capable of performing her job responsibilities (P 70, P 71).

(35) Dr. Shine and Ms. Katz met with the respondent in October 1979 regarding her performance. Respondent informed them that she was well and could perform her job responsibilities (4 T 80-1). Ms. deKrafft said she was depressed when she told people she had cancer (4 T 81).

(36) Respondent's record of absenteeism and latenesses did not improve (4 T 81) and on March 10, 1980, charges against the respondent were filed with the Board by Superintendent Shine (J 5). Respondent was suspended without pay as of April 14, 1980.

(37) During the 1979-80 school year, prior to her suspension, the respondent was out eighteen days (P 9). Also prior to her suspension, respondent received three memoranda regarding her absenses, often without notice (P 57, P 58, P 75, 2 T 127), four memoranda regarding her latenesses, frequently without proper notice (P 57, P 72, P 73, P 76), and a memorandum regarding her failure to have an emergency lesson plan (P 61).

(38) Dr. Howard F. Shivers, Jr. testified that prior to May 30, 1975, he thought the respondent had no serious illnesses (3 T 72). Ms. deKrafft

periodically had migraine headaches and the medicine prescribed for migraines can cause drowsiness (3 T 108, 6 T 52).

(39) Dr. Shivers stated that on May 30, 1975, the respondent was hospitalized and the diagnosis was neurotic depressive reaction in a schizoid personality structure (3 T 75). After her release, Ms. deKrafft was placed on anti-depressant medication and referred to a clinical psychiatrist, Dr. Friedman (3 T 78).

(40 Dr. Shivers described the symptoms of depression as an inability to eat, sleepiness, sadness and distraction. The respondent's depression was caused by a combination of emotional and physical problems (3 T 82). Ms. deKrafft had a bad childhood which left her with emotional problems (3 T 83).

(41) In February 1976, Dr. Shivers referred the respondent to Dr. Schmiegie for her depression and Dr. Schmiegie changed her medication (3 T 81-82).

(42) Dr. Shivers was aware that a rumor existed in respondent's school that she had cancer. Dr. Shivers stated that, at the time, the respondent was upset and confused because of the depression and could not objectively respond to the rumor (3 T 88-9).

(43) On February 17, 1977, the respondent was sent to the hospital. Her condition was diagnosed as gastroenteritis and depression (3 T 86-7).

(44) Dr. Shivers stated that as of June 1977 respondent was doing well as to her depression, and that she was able to function as a teacher (R 11, 3 T 91-3, 136-7). Respondent continued to improve and, in his opinion, Ms. deKrafft is now in a controlled state and can function normally (3 T 141). Dr. Shivers considers the probability of regression very small (3 T 141). Respondent will have to continue to take anti-depressant medication (3 T 142).

(45) Dr. Sylvia Friedman, a psychiatrist, stated that the respondent started therapy on June 19, 1975, and that she continued to see Ms. deKrafft on a regular basis until January 1977 (R 14, 4 T 8).

(46) Respondent started to improve and, as of April 1976, Dr. Friedman stated that the respondent could function in an acceptable manner in the classroom; however, she might have some problems relating to supervisors (4 T 16-17). According to Dr. Friedman, if respondent received a direct order, she would comply (4 T 18-19).

(47) As to the period after January 1977, Dr. Friedman, in her report (R 14 p. 2), stated:

> She, [respondent] continued to improve. She gradually tapered off and by the beginning of October 1977 was quite comfortable with herself, with work, and with her interpersonal relationships. She was no longer depressed. She appeared in good health and she had changed many of her destructive behavior patterns.

(48) According to Dr. Friedman, the respondent did not get "depression" on May 30, 1975, and her condition developed gradually over a period of time (4 T 30).

(49) Dr. Friedman stated that the respondent never told her about the cancer rumor; however, the doctor felt that, at that time, the respondent would have problems correcting the rumor (4 T 29).

(50) Since 1975, the respondent has taken a number of different types of anti-depressant medication and one side-effect of such medication is drowsiness (6 T 51, 59).

(51) Dr. Allen Geiwitz, a pharmacist with a expertism in psychopharmacology (6 T 45), reviewed the list of drugs that the respondent has taken since 1975 (R 18) and stated that since early 1978, the respondent has stabilized and her anti-depressant medication has been reduced, and that she was placed on a maintenance dosage in 1980-81 (6 T 56).

CHARGES 1, 2, 3, and 6

Charge 1 alleges chronic and excessive absenteeism by the respondent. Charge 2 alleges that on numerous occasions, respondent failed to notify the school officals that she would be absent. Charge 3 alleges that on numerous occasions, the respondent was tardy and failed to notify the school officals in advance. Charge 6 alleges that the respondent failed to follow the Board's procedure as to absenteeism and tardiness. In each of these charges, the Board alleges that the respondent's action is conduct unbecoming a teacher and that the conduct represents either incapacity or insubordination.

The facts in this case clearly show that the respondent was late or out an excessive number of times and frequently did not give the school officials advance notice. The school administrators testified that the respondent's poor attendance disrupted the normal educational process and denied her students the regular continuity of instruction. The respondent argues that her absenteeism and tardiness were due to her depression and medication. Ms. deKrafft represents that she is now physically and mentally capable of fulfilling her responsibilities as a teacher.

Prior to May 30, 1975, respondent's first hospitalization for depression, respondent's attendance records show an above average number of absences and latenesses. During this time, she was given satisfactory ratings in her evaluations, since her classroom performance was good and this outweighed the problems created by the absenteeism and latenesses. Dr. Friedman testified that for at least part of the time she was in the initial stages of depression.

The facts show that from May 30, 1975 through mid-1977, respondent was suffering from depression, taking substantial amounts of medicine and receiving regular psychiatric treatment. The number of respondent's absences and latenesses, often without notice, during this period of time was very high. At the same time, the respondent was given generally satisfactory ratings in her evaluations, since her classroom performance was still good.

As of January 1977, the respondent no longer received regular psychiatric treatment and Dr. Friedman stated that she was doing well and was no longer depressed. In July 1977, Dr. Shivers reduced the amount of medication for depression. At that time, in his opinion, the respondent could function in an acceptable manner.

After the inefficiency charges were filed on September 21, 1977, the respondent was able to reduce substantially the number of her absences and latenesses during the ninety-day period and for the remainder of the 1977-78 school year.

The number of the respondent's absences doubled in the 1978-79 school year. For this period of time, both Dr. Friedman and Dr. Shivers stated that the respondent was doing well as to her depression (R 4).

From the beginning of the 1979-80 school year to the time of her suspension, April 14, 1980, the respondent was out eighteen days (P 9) and was late on four occasions, frequently without any notice. During that time period, both Dr. Friedman and Dr. Shivers stated that the respondent continued to do well (R 11).

Based on these facts, I **CONCLUDE** that although there is evidence to support the respondent's position that her depression did not plateau until sometime after her suspension, it is also clear that she had substantially improved by mid-1977. Ms. deKrafft demonstrated that she could improve her attendance record in 1977-78 school year, and no medical reason was given to justify the increase in absenteeism and tardiness in the next school year. Therefore, I **CONCLUDE** that Ms. deKrafft has not shown that her absences and latenesses, frequently without notice, were due solely to her state of depression or her medication, nor did she show that she took any affirmative action to correct the situation. There is no evidence that she asked Dr. Shivers to change the timing of the dosage or that she attempted to get a wake-up telephone service. Finally, I **CONCLUDE** that the petitioner has shown that the action of the respondent is conduct unbecoming a teacher and reflects incapacity to perform the responsibilities of her position.

CHARGE 4

Charge 4 alleges that Claire deKrafft is guilty of insubordination and conduct unbecoming a teacher for her failure, despite repeated requests, to provide emergency lesson plans to be used in her absence by a substitute teacher .

On numerous occasions during the entire period of respondent's employment with the Board, she was critized for not having an emergency lesson plan or for not having

an adequate emergency lesson plan. Without such a plan, a substitute teacher does not know what she should do during the classroom period and, therefore, the class period becomes nothing more than a study hall period.

The facts show that when the respondent was in school, during the entire period she worked for the Board, her performance was good. Therefore, I **CONCLUDE** that there is medical justification for her not having prepared emergency lesson plans. Ms. deKrafft knew her attendance record was not good and she should have recognized the importance of having an adequate emergency lesson plan available at all times.

Therefore, I **CONCLUDE** that the petitioner has shown by a preponderance of evidence that Claire deKrafft is guilty of conduct unbecoming a teacher because of her frequent failure to have acceptable emergency class plans available for a substitute teacher.

Charges 5 and 7

Charges 5 and 7 allege that the respondent intentionally misrepresented that she had cancer and that her misrepresentation is conduct unbecoming a teacher and evidences her incapacity to fulfill her teaching duties.

Sometime during the 1976-77 school year, a rumor started at Beck School that the respondent had cancer. Both Dr. Shivers and Dr. Freidman stated that, at the time, the respondent was suffering from depression, and was not capable of dealing with such a rumor. During the same school year, the respondent told a number of people that she had cancer. Respondent seemed unwilling to tell people she was suffering from depression and may have thought she had cancer at the time. Although this was a misrepresentation on her part, I **CONCLUDE** that it was not intentional and occurred while she was in a state of depression.

As to the fact that the respondent accepted the $200, Ms. Peacock testified that she told Ms. deKrafft the money was for her medical bills. The facts clearly show that Ms. deKrafft did have medical expenses at the time for the treatment she was receiving for depression, and that her income was limited because of the large number of absences without pay.

Therefore, I **CONCLUDE** that the petitioner has not shown by a preponderance of evidence that Claire deKrafft intentionally misrepresented that she had cancer, and therefore these charges of conduct unbecoming a teacher or incapacity are dismissed.

Having determined that the respondent is guilty of unbecoming conduct and incapacity as to Charges 1, 2, 3, 4 and 6, the remaining issue is whether the respondent should be dismissed.

While I sympathize with the respondent and realize that she has had a serious mental problem, I must also recognize that schools exist to educate the pupils.

I cannot in this case ignore the fact that the respondent was given an opportunity to correct her patterns of absenteeism and tardiness in September 1977 and that she was able to do so in the 1977-78 school year. Respondent also promised to improve during her meeting with Dr. Shine in October 1979. Based on the facts, I **CONCLUDE** that there has not been a showing that a substantial change in the respondent's mental health has occurred since her suspension, and Ms. deKrafft has not shown that, if she were reinstated, the pattern of absences and latenesses would not be repeated. Therefore, I **CONCLUDE** that the Board's determination to dismiss the respondent be **AFFIRMED** and that the petition of Claire deKrafft 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 3334-80

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

October 19, 1981
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

10/20/81
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

10-22-81
DATE

Ronald I. Parker
OFFICE OF ADMINISTRATIVE LAW

bm

ADDENDUM

EXHIBITS ADMITTED INTO EVIDENCE:

J1 Memorandum from Claire deKrafft to Tracy Miller, dated December 19, 1974.

J2 Interim Evaluation Report for Claire deKrafft, dated February 3, 1975.

J3 Evaluation Report for Claire deKrafft, dated March 26, 1979.

J4 Letter from William Shine to James Walsh, dated November 15, 1977.

J5 Charges brought against Claire deKrafft, dated March 10, 1980.

EXHIBITS FOR PETITIONER:

P1 Record of Absences for the school year 1971-72.

P2 Record of Absences for the school year 1972-73.

P3 Record of Absences for the school year 1973-74.

P4 Record of Absences for the school year 1974-75.

P5 Record of Absences for the school year 1975-76.

P6 Record of Absences for the school year 1976-77.

P7 Record of Absences for the school year 1977-78.

P8 Record of Absences for the school year 1978-79.

P9 Record of Absences for the school year 1979-80.

P10 Interim Evaluation Report for Claire deKrafft, for 1971.

P11 Interim Evaluation Report for Claire deKrafft, dated January 28, 1972.

P12 Final Evaluation Report for Claire deKrafft, dated March 29, 1972.

P13 Letter from Edward Saler to Claire deKrafft, dated May 2, 1972.

P14 Memorandum from Edward Saler to Claire deKrafft, dated May 25, 1972.

P15 Interim Evaluation Report for Claire deKrafft, dated November 20, 1972.

P16 Interim Evaluation Report for Claire deKrafft, dated February 15, 1973.

P17 Memorandum from Edward Saler to Claire deKrafft, dated March 1, 1973.

P18 Final Evaluation Report for Claire deKrafft, dated March 29, 1973.

P19 Memorandum from Edward Saler to Claire deKrafft, dated September 17, 1973.

P20 Memorandum from Tracy Miller to Claire deKrafft, dated February 10, 1972.

P21 Memorandum from Tracy Miller to Claire deKrafft, dated March 6, 1972.

P22 Memorandum from Tracy Miller to Claire deKrafft, dated February 14, 1974.

P23 Marked for identification only

P24 Memorandum from Adam Pfeffer to Claire deKrafft, dated November 4, 1974.

P25 Memorandum from Tracy Miller to Claire deKrafft, dated January 9, 1976.

P26 Interim Evaluation Report for Claire deKrafft, dated December 17, 1974.

P27 Memorandum from Tracy Miller to Claire deKrafft, dated December 12, 1974.

P28 Marked for identification only.

P29 Final Evaluation Report for Claire deKrafft, dated May 28, 1976.

P30 Memorandum from Tracy Miller to William Laub, dated December 4, 1973.

P31 Memorandum from Adam Pfeffer to Claire deKrafft, dated September 11, 1974.

P32 Memorandum from Tracy Miller to William Laub, dated April 14, 1975.

P33 Memorandum from Tracy Miller to Bob Burdetti, dated October 31, 1975.

P34 Affidavit of Tracy Miller, dated September 15, 1977.

P35 Marked for identification only.

P36 Memorandum from Bernard Shapiro to Robert Burdetti, dated October 1, 1976.

P37 Memorandum from Bernard Shapiro to Robert Burdetti, dated December 9, 1976.

P38 Marked for identification only.

P39 Evaluation Report for Claire deKrafft, dated January 26, 1977.

P40 Memorandum from Bernard Shapiro to Claire deKrafft, dated January 28, 1977.

P41 Memorandum from Bernard Shapiro to Robert Burdetti, dated February 8, 1977.

P42 Memorandum from Bernard Shapiro to Claire deKrafft, dated April 5, 1977.

P43 Memorandum from Bernard Shapiro to Claire deKrafft, dated May 10, 1977.

P44 Memorandum from Bernard Shapiro to William Shine, dated May 11, 1977.

P45 Affidavit of Bernard Shapiro, dated September 15, 1977.

P46 Memorandum from Bernard Shapiro to Claire deKrafft, dated September 20, 1977.

P47 Memorandum from Bernard Shapiro to William Shine, dated September 20, 1977.

P48 Memorandum from William Laub to Bernard Shapiro, dated January 28, 1978.

P49 Memorandum from Bernard Shapiro to William Laub, dated February 2, 1978.

P50 Letter from William Laub to Claire deKrafft, dated February 22, 1978.

P51 Memorandum from Bernard Shapiro to Claire deKrafft, dated December 18, 1978.

P52 Memorandum from Bernard Shapiro to William Shrine, dated January 25, 1979.

P53 Memorandum from Leonard Terranova to Barbara Solly, dated November 9, 1976.

P54 Memorandum from Barbara Solly to Bernard Shapiro, May 9, 1977.

P55 Memorandum from Barbara Solly to Claire deKrafft, dated June 6, 1977.

P56 Memorandum from Barbara Solly to Bernard Shapiro, dated January 30, 1978.

P57 Memorandum from Barbara Solly to Anthony Cost, dated October 4, 1979.

P58 Memorandum from Barbara Solly to Anthony Cost, dated December 10, 1979.

P59 Memorandum from Barbara Solly to Claire deKrafft, dated January 23, 1978.

P60 Memorandum from Barbara Solly to Claire deKrafft, dated September 24,

P61 Memorandum from Barbara Solly to Claire deKrafft, dated October 5, 1979.

P62 Marked for identification only.

P63 Evaluation Report for Claire deKrafft, dated December 8, 1977.

P64 Memorandum from Barbara Solly to Claire deKrafft, dated May 1, 1978.

P65 Memorandum from Barbara Solly to Claire deKrafft, dated May 22, 1978.

P66 Memorandum from Barbara Solly to Claire deKrafft, dated May 11, 1977.

P67 Memorandum from Barbara Solly to Claire deKrafft, dated June 6, 1978.

P68 Medical Report of Dr. Ira L. Fox, dated July 19, 1977.

P69 Medical Report of Dr. Richard A. Deighan, Jr., dated July 29, 1977.

P70 Medical Report of Dr. Richard A. Deighan, Jr., dated August 24, 1979.

P71 Medical Report of Dr. Ira L. Fox, dated July 24, 1979.

P72 Memorandum from Anthony Cost to Claire deKrafft, dated December 12, 1979.

P73 Memorandum from Anthony Cost to Claire deKrafft, dated January 23, 1980.

P74 Memorandum from Anthony Cost to Joan Katz, dated February 25, 1980.

P75 Memorandum from Anthony Cost to Claire deKrafft, dated February 25, 1980.

P76 Memorandum from Anthony Cost to Claire deKrafft, dated February 26, 1980.

P77 Final Evaluation Report for Martha Fletcher, dated June 7, [1977].

FOR THE RESPONDENT:

R1 Memorandum from Claire deKrafft to Tracy Miller

R2 Eight grade music curriculum prepared by Claire deKrafft.

R3 Final Evaluation Report for Claire deKrafft, dated March 26, 1974.

R4 Teacher Application of Claire deKrafft, dated August 3, 1971.

R5 Tenure Evaluation Report for Claire deKrafft, dated April 23, 1975.

R6 Letter from William Shine to James Walsh, dated September 21, 1977.

R7 Curriculum for Music of Yesterday and Today.

R8 Curriculum for Evolution of Rock Music.

R9 Curriculum for American Musical Shows.

R10 Vitae of Dr. Howard F. Shivers, Jr.

R11 Report of Dr. Howard F. Shivers, dated March 23, 1981.

R12 Substitute Plans prepared by Claire deKrafft.

R13 Resume of Dr. Sylvia S. Friedman.

R14 Report of Dr. Sylvia S. Friedman, dated May 22, 1980.

R15 Report of Dr. Sylvia S. Friedman, dated March 24, 1981.

year before. During the 90-day period itself, respondent was absent 9 days. Respondent's average absence over the period from September 1971 through March 1980 was over 34 days per 180-day school year.

Respondent points to the depressive effect on her of a traumatic childhood and her struggle for recovery therefrom as the reason for her many absences. Respondent, on the one hand, argues that her recovery up to 1977 was minimal, but now is sufficient to warrant her continuance as a teacher in the Cherry Hill School District. The Commissioner cannot agree. Nor can the Commissioner accept as reason for excessive absences by a teacher the trauma of a childhood suffered by that teacher. While the Commissioner expresses his regrets that any person's life be so touched, he cannot accept such circumstances as an amelioration of absenteeism and tardiness on the part of teachers. As the Commissioner said in Clinton F. Smith et al. v. Board of Education of the Borough of Paramus, 1968 S.L.D. 62 wherein he stated:

> "***[T]he principle enunicated by the Court in Bates v. Board of Education, 72 P. 907 (California Supreme Court 1903), and quoted with approval in McGrath v. Burkhard, 280 P. 2d 864 (Calif. App. 1955), bears repeating here: 'The public schools were not created, nor are they supported, for the benefit of the teachers therein***but for the benefit of the pupils and resulting benefit to their parents and the community at large.'***"
> (at 67)

The undisputed tragedy of a traumatic childhood for a teacher was not caused by the Board nor can it be resolved at taxpayers' expense or by the loss of continuity of instruction for pupils in a school district. The Commissioner so holds.

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

Accordingly, the Commissioner determines that respondent be dismissed from her tenured position with the Cherry Hill Board of Education forthwith.

COMMISSIONER OF EDUCATION

December 4, 1981

Pending State Board

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 324-10/75
AGENCY DKT. NO. —

IN THE MATTER OF:

FRANCES DULLEA,
Petitioner
v.
BOARD OF EDUCATION OF THE BOROUGH OF NORTHVALE, BERGEN COUNTY,
Respondent.

Record Closed: September 10, 1981
Received by Agency: 10-27-81

Decided: October 26, 1981
Mailed to Parties: 10-30-81

APPEARANCES:

Sheldon H. Pincus, Esq., (Bucceri & Pincus, attorneys) and **Gerald M. Goldberg**, Esq., (Goldberg and Simon, attorneys) for Petitioner

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

BEFORE **ERIC ERRICKSON**, ALJ:

Petitioner, a tenured teaching staff member employed by the Northvale Board of Education, hereinafter "Northvale," alleges that her termination of employment at the end of the 1974-75 academic year was in violation of her tenure and seniority rights. She

sought relief in the form of an order of the Commissioner of Education directing Northvale to reinstate her to a teaching position with lost salary. Northvale admits that petitioner was tenured, but denies that she had seniority rights to any position other than that of special education teacher, which teaching position for economy reasons was abolished, effective at the end of the 1974-75 school year.

PROCEDURAL RECITATION

The matter, although filed in timely fashion, was long delayed by contention over procedures and places of depositions, which procedural disputes culminated in an order of the Commissioner, dated January 11, 1977. That order, incorporated herein by reference, denied both petitioner's application to sequester witnesses at depositions and respondent's Cross-Motion for Order Prohibiting the Taking of Depositions. The matter was later considered by the Commissioner to be ripe for summary decision in the form of the pleadings, Cross-Motion for Summary Judgment, Briefs and exhibits.

A summary decision, incorporated herein by reference for informational purposes only, was issued in favor of the Board on July 19, 1981. Essentially, its holding was that petitioner had worked for Northvale only as a teacher of the handicapped and, pursuant to N.J.S.A. 18A:28-10,13 and N.J.A.C. 6:3-1.10, had acquired seniority only in the category of teacher of the handicapped, and not in the category of elementary school teacher. Accordingly, the Commissioner held as follows:

> Petitioner's assertion of entitlement to displace a regular elementary classroom teacher with fewer years of service in the Board's employ is without sound legal basis. Her sole claim to reemployment rises from N.J.S.A. 18A:28-13 and N.J.A.C. 6:3-1.10 which require that the Board first place her on its preferred eligibility list for the category of teacher of the handicapped and thereafter notify her of any vacancy which may occur in that category. Petitioner has failed to show that, aside from her seniority entitlement as a teacher of the handicapped, she has earned seniority entitlement in any other category of employment to which she may revert. Accordingly, her prayers for relief may not be granted. Summary Judgment is entered in favor of respondent.

On November 14, 1978, however, the Commissioner issued an order which, in pertinent part stated:

> Petitioner having moved that the Commissioner review his own determination taking into consideration additional facts which were not made known by the attorneys of record when they set forth the facts which they represented to be all of the relevant facts concerning petitoner's employment in the Northvale Schools; and
>
> The Commissioner having reviewed both petitioner's affidavit dated August 28, 1978 and the affidavit of the Superintendent dated October 4, 1978; and
>
> The Commissioner having perceived therein alleged relevant facts divergent from those facts represented in 1977 by counsel to have prevailed in petitioner's employment during 1966; and
>
> The Commissioner having concluded that the determination of those relevant facts is necessary to a justiciable decision of the issues presented in the above-entitled matter; now therefore
>
> IT IS ORDERED that petitioner's Motion for Reconsideration be and is granted. . . .

Thereafter, on January 9, 1979, a second prehearing conference was held at which provision was made for discoveries and a plenary hearing. On July 2, 1979, the matter was transferred as a contested case to the Office of Administrative Law, pursuant to N.J.S.A. 52:14-1 et seq. A procedural order dealing with continuing disputes over discoveries was issued by the undersigned on January 23, 1980. Upon completion of discoveries, a plenary hearing was conducted at Lodi, New Jersey, on June 23, 1981. Briefing was completed thereafter and the record declared complete on September 10, 1981.

TESTIMONY OF WITNESSES

Petitioner testified that when she applied for employment as a Title I remedial reading teacher in 1966, she was interviewed by Northvale's Superintendent, who advised her that the Northern Valley Regional District (Northern Valley), as the Title I grant recipient for seven of its component districts, was the administering agent by whom she would be paid. She testified that subsequent to the interview, she and other Title I teachers were required to meet for orientation with Northern Valley's Title I coordinator, that she was assigned as a Title I remedial reading teacher at two Northvale schools, that

she taught until June 1966 a total of twenty hours during a four-day work week, that she was observed by Northvale's nurse and principals, that she submitted a final year-end report to Northern Valley, Title I Coordinator, and that the only certificate she then held was an elementary teacher's certificate (J-4). She testified further that she was paid only for the time she conducted classes, that she had no other benefits or emoluments and that she was not enrolled in the Teacher Pension Annuity Fund (TPAF). She also testified that she made no daily lesson plans, but received books and instructions from Northvale's classroom teachers on a daily basis, directing what instruction was to be given the pupils who were sent from their regular classroom for remediation. She testified that she ordered supplies on Northvale forms, but that she administered no tests and assigned no grades to pupils.

Petitioner testified that when she was offered a position at Northvale during the summer of 1966 as one of a team of two teachers of an educationally mentally retarded (EMR) class, she accepted the position effective September 1 and procured a provisional certificate, which later was replaced by a permanent teacher of the handicapped certificate during January 1970 (J-5). She testified that on approximately 40 days during the 1974-75 school year, when she was assigned to substitute, with full salary and benefits, for absent teachers in other elementary classes, Northvale's other EMR teacher took charge of petitioner's EMR class. That she and others were from time to time assigned to substitute for absent teachers during 1974-75 was corroborated by the Northvale principal.

The Northvale principal also testified that his search of Northvale's records revealed that petitioner was employed by Northern Valley as a Title I teacher prior to June 30, 1966, and was paid by Northern Valley, which administered Title I programs for the elementary schools in each of its seven component municipalities. He testified further that, since Northvale participates in the "Region 3" group which coordinates the establishment of EMR classes, some of petitioner's EMR pupils were tuition pupils from nearby school districts.

FINDINGS OF FACT

On the basis of a preponderance of the credible evidence within the record, I **FIND** the following to be the relevant facts necessary to a determination:

1. Petitioner was assigned to work in two Northvale schools as a part-time Title I reading teacher from March 1966 through June 1966, a period of four months (J-1, 1a).

2. Petitioner was paid by Northern Regional during that period on an hourly basis and had no attendant fringe benefits or other emoluments (J-2, 3).

3. Petitioner was employed by Northvale under contract, with full benefits and enrollment in TRAF, as an EMR teacher from September 1966 through June 1975. During the 1974-75 school year, petitioner was from time to time assigned to substitute for absent elementary teachers a total of forty days.

4. Effective September 1975, the EMR teaching position which petitioner held was abolished and her services were terminated.

5. Petitioner at all times since August 1965 has held an elementary school teacher certificate (J-4). Prior to August 18, 1966, petitioner was issued a provisional certificate as a teacher of the mentally retarded by the New Jersey State Board of Examiners (Commissioner's Exhibit C-1). Thereafter, until the issuance of her permanent certificate as a teacher of the handicapped during January 1970, that provisional certificate was validated annually by the Bergen County Superintendent of Schools.

DISCUSSION

Petitioner asserts that her part-time work as a Title I teacher from March through June 1966 and/or the 40 days she was assigned to classes of absent elementary teachers during 1974-75 entitles her to add her 9 years of seniority as an EMR teacher to her Title I service, thereby establishing her seniority right to an elementary teaching position beginning September 1975.

The pertinent statutes and rules of the State Board of Education applicable to seniority when there is a reduction in force are set forth as follows:

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

. . . Such reduction 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:28-13:

The commissioner in establishing such standards shall classify insofar as practical the fields or categories of administrative, supervisory, 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:

(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. Seniority status shall not be affected by occasional absences and leaves of absence.

(c) Employment in the district prior to the adoption 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:

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. . . .

The Legislature in 1942, pursuant to N.J.S.A. 18A:28-10, first directed the Commissioner, with approval of the Board of Education to promulgate categories of teaching staff members. Recognizing the growing complexities of school systems of the State, the Legislature directed the establishment of seniority standards for administrative, supervisory, teaching and other educational services. When promulgated, those standards provided that teaching staff members would attain seniority with boards of education only in those categories of their employment, regardless of the number of certificates held. N.J.A.C. 6:3-1.10(b) and (h).

Since a teacher's service in a discontinued position is added to prior service in that district when counting seniority, it is essential to establish whether petitioner was employed by Northvale or by Northern Valley from March through June 1966. Petitioner asserts that she was employed by Northvale and that it was only a matter of convenience that she received her salary from Northern Regional. Petitioner errs in that assertion.

When determining both tenure and seniority, the employment by the district in which such status is claimed is an essential element. Absent employment in a district, tenure and seniority cannot accrue in that district. N.J.S.A. 18A:28-5 et seq.; N.J.A.C. 6:3-1.10(b) et seq.

It has been held, however, that under certain agreements provided for under New Jersey education law, a teaching staff member may be employed by more than one district and gain tenure and seniority in more than one district. Thus a school psychologist employed by a de facto jointure commission was held to have acquired tenure in the four districts of a de facto jointure. See: Faulcon Bisson v. Bds. of Ed. of Alpha, Greenwich, Lopatcong and Pohatcong, 1978 S.L.D. 187.

In a more recent case where no de facto jointure was found to exist, members of a child study team assigned to part-time duties in other districts were found to have acquired tenure only in the employing regional district in which they also performed duties on a part-time basis. Jean Castanien, et al. v. Bethlehem Bd. of Ed., et al., 1981 S.L.D. _____ (decided February 18, 1981) Therein, the following conclusions and determination were reached:

> [T] he 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 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] t 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.

The facts of the instant matter bear strong resemblance to those in Castanien, supra. I CONCLUDE that petitioner was not employed by Northvale, but by Northern Valley for the four-month period in question. There is no proof in the record that Northvale ever acted on her employment or approved the terms of her employment as a Title I teacher from March through June 1966. Petitioner was paid not by respondent, Northvale, but by Northern Valley, which determined her hourly rate of pay, the number of hours she worked on a part-time basis, and that she would receive no fringe benefits or other emoluments. Petitioner was oriented by and reported to the Title I coordinator, who was an employee of Northern Valley.

This factual basis does not establish that she was employed by Northvale, despite the fact that petitioner worked with pupils in the Northvale schools for those four months from March through June 1966. Absent an employment relationship with

Northvale for those four months, I further **CONCLUDE** that petitioner cannot claim those four months as time countable toward tenure or seniority at Northvale in the category of elementary school teacher. Accordingly, I also **CONCLUDE** that as of June 30, 1975, the only years petitioner could, by law, count toward seniority at Northvale were the eight years she had worked as a teacher of the handicapped. It was only under the authority of her teacher of the handicapped certificates, not the authority conferred by her elementary teaching certificate, that she could legally continue to teach and be paid for teaching for those eight years. N.J.S.A. 18A:28-4. Accordingly, it must be concluded that petitioner's employment at Northvale was in the category of a teacher of the handicapped, not that of elementary teacher.

The fact that petitioner, on certain days, was assigned to cover classes for absent teachers indicates only that Northvale, as an economy measure, assigned her on those days as a substitute. Petitioner's further argument that those days entitled her to seniority in the elementary teacher category cannot stand up before the holdings of the courts in Nicoletta Biancardi v. Waldwick Bd. of Ed. 1976 S.L.D. 1106 (N.J. Super., App. Div. 1976) and Joan Driscoll v. Clifton Bd. of Ed. 1977 S.L.D. 1281 (N.J. Supreme Ct. 1977). Accordingly, that argument addressing substitute assignments, as advanced by petitioner, is also rejected.

Similarly rejected as inapplicable to the facts herein are the arguments of petitioner that Spiewak, et al. v. Rutherford Bd. of Ed., New Jersey Superior Court, Appellate Division Dkt. A 4853-79-T2, June 22, 1981, and other cited cases are controlling. Spiewak, unlike petitioner herein, was an employee of the district in which tenure and seniority were claimed. By contrast, petitioner has been found not to have been employed by Northvale for the controverted four-month period. Since this is so, an analysis of whether she would have served in a tenured position if she had been an employee of Northvale would serve no useful purpose.

DETERMINATION

Having reached the above stated conclusion, I **DETERMINE** that petitioner has failed in her burden to prove, by a preponderance of credible evidence, that she was entitled to assignment by Northvale in the 1975-76 school year to an elementary teaching position. Accordingly, it is **ORDERED** that her request for relief be **DENIED**.

OAL DKT. NO. EDU 0324-10/75

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.

October 26, 1981
DATE

Eric G. Errickson
ERIC G. ERRICKSON, ALJ

Receipt Acknowledged:

October 27, 1981
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

10-30-81
DATE

Ronald I. Parkes
OFFICE OF ADMINISTRATIVE LAW

ij

OAL DKT. NO. EDU 0324-10/75

DOCUMENTS IN EVIDENCE:

J-1 Hartwig to Perna, 8/18/78

J-2 Dullea Payroll History, Northern Valley, March to December 1966

J-3 Dullea Pay Stubs, March and May 1966

J-4 Dullea's Elementary Teacher Certificate, issued 8/16/65

J-5 Dullea's Teacher of Handicapped Certificate, issued 1/70

FRANCES DULLEA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF NORTHVALE, 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 excepts to the initial decision by the Honorable Eric Errickson, ALJ contending that, because Northern Valley served only as a funnel of Title I funds, the period of Title I employment must be counted as service in the Northvale District. The Commissioner cannot agree. Petitioner's employment at Northvale was authorized through her certificate as teacher of the handicapped, not her certificate as elementary school teacher. Her eight years of teaching in Northvale were in the category of teacher of the handicapped wherein rests her only seniority. When her position was abolished, her entitlement was to be placed on a preferred waiting list as a teacher of the handicapped. N.J.A.C. 6:3-1.10 Her employment as a substitute teacher cannot be counted toward seniority in the category of elementary teacher. Biancardi, supra The Commissioner so holds.

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

December 10, 1981

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6496-80
AGENCY DKT. NO. 478-9/80A

IN THE MATTER OF:

NORTH PLAINFIELD EDUCATION ASSOCIATION ON BEHALF OF ARLENE KOUMJIAN AND MICHEL SPRATFORD,
Petitioners
v.
BOARD OF EDUCATION OF THE BOROUGH OF NORTH PLAINFIELD,
Respondent.

Record Closed: September 23, 1981
Received by Agency: 11-4-81

Decided: November 2, 1981
Mailed to Parties: 11-6-81

APPEARANCES:

Sanford R. Oxfeld, Esq., (Rothbard, Harris & Oxfeld, attorneys) for Petitioners

Sanford C. Vogel, Esq., (Reid, Vogel & Gast, attorneys) for Respondent

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

The North Plainfield Education Association (Association) claims that the North Plainfield Board of Education (Board) failed to credit properly prior years' service of two of its members, Arlene Koumjian and Michel Spratford (members), for salary purposes for 1980-81.

The Commissioner of Education 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. Subsequent to a prehearing conference conducted in the matter, the Board moved to dismiss the petition on the grounds of res judicata and collateral estoppel-N.J.A.C. 6:24-1.2, the 90-day rule which specifies the time within which to file a petition-and the asserted failure of the Association to exhaust available remedies through the local grievance procedure. The Association opposes the Board's motion and seeks summary decision in its favor on the merits. The motions were briefed by the parties and oral argument was heard.

The facts of the matter are these:

Koumjian and Spratford have been employed as teachers by the Board for sufficient periods of time to have acquired tenure. During 1978-79, Koumjian was paid at the seventh step of the applicable salary guide, while Spratford was paid at the eighth step of the applicable salary guide. Both teachers asked for, and were granted by the Board, sabbatical leaves of absences for the second semester of the 1978-79 year. During their sabbaticals, Koumjian studied at New York University and the New School for Social Research, while Spratford studied at Rutgers University. Both were paid, during the sabbatical, 75 percent of the salary to which they would be entitled if they were not on sabbatical, pursuant to the negotiated Agreement between the Board and the Association. Upon their return to teaching duties for the 1979-80 year, their respective salaries were established at the same step of the then-applicable salary guide at which their salaries for 1978-79 were established. Both petitioners were not granted service credit for the 1978-79 academic year because they were on sabbatical leave for one of the two semesters within that year.

Petitioners filed a grievance during November 1979 in regard to their respective placements on the salary guide. Both claimed that the Board had violated the terms of the Agreement by not granting them one year's salary credit for 1978-79 for 1979-80 salary purposes. The grievance ultimately proceeded to arbitration which resulted in an adverse ruling to petitioners' claim that the Board had violated the Agreement. The arbitrator entered an award on July 22, 1980, which states:

> The Board of Education did not improperly place the two Grievants [Koumjian and Spratford] on the 1979-1980 salary guide. Grievance denied. [In the Matter of the Arbitration Award between North Plainfield Board of Education and North Plainfield Education Association, Case No. 18 39 0036 80D]

No application was made for correction or modification of the award within three months, N.J.S.A. 2A:24-1 et seq.

On September 29, 1980, the Association filed the instant petition, on behalf of Koumjian and Spratford, with the Commissioner. The Association, seeking salary placement for 1980-81 at the next higher step of the applicable guide for each member, pleads in regard to Koumjian:

> 5. At the beginning of the 1980-81 school year, petitioner Koumjian was placed on the 8th Step of the salary scale.
>
> 6. Petitioner Koumjian should have been placed, upon her return to teaching in North Plainfield, on the 8th Step in the 1979-80 school year, and she currently should be at the 9th Step for the 1980-81 school year.

And it pleads in regard to Spratford:

> 5. As petitioner Spratford was at the 8th Step for the 1978-79 school year, he should have been moved to the 9th Step of the salary guide for the 1979-80 school year, and accordingly should now be placed on the 10th Step for the 1980-81 school year.

This concludes a recitation of the essential facts of the matter. The Board's motion shall be considered first. The Board moves for dismissal of the petition (1) through the application of the doctrines of res judicata and collateral estoppel, (2) upon the asserted failure of the Association to file the petition in a timely fashion, under N.J.A.C. 6:24-1.2, and (3) upon the failure of the Association to invoke its available remedy through the grievance procedure at the local level.

First, the standards necessary for res judicata to operate as a bar to future claims were discussed in Constant v. Pacific Nat'l Ins. Co., 84 N.J. Super. 211, 216 (Law Div. 1964), where the court stated:

> [1] The doctrine of res judicata is plain and intelligible and amounts simply to this, that a cause of action once finally determined without appeal, between the parties, on the merits, by a competent tribunal, cannot afterwards be litigated by a new proceeding either before the same or any other tribunal. [Citation omitted]
>
> [2] Where the matter is res judicata, there must be a concurrence of four conditions: (1) identity in the thing sued for; (2) identity of the cause of action, (3) identity of persons and of parties to the action; and (4) identity of the quality in the persons for or against whom the claim is made. [See also,

> Desmond v. Kromer, 96 N.J. Super. 96 (Law Div. 1967); City of Hackensack v. Winner 162 N.J. Super. 1 (App. Div. 1978), mod. and aff'd, 82 N.J. 1 (1980)]

The Board relies on prior decisions of the Commissioner where res judicata and collateral estoppel have been applied to urge application of the doctrines here and cites Grossman v. Elizabeth Bd. of Ed., 1980 S.L.D. _____ (September 19, 1980), and Lenk v. Monmouth Reg'l Bd. of Ed., 1980 S.L.D. _____ (March 17, 1980).

In the instant case, the cause of action argued, though not specifically pleaded or set forth in the prehearing order, is bottomed upon N.J.S.A. 18A:29-8, which provides:

> Any member holding office, position or employment in any school district of this state, shall be entitled annually to an employment increment until he shall have reached the maximum salary provided in the appropriate training level column in the preceding section.

Although the present case involves the same parties as the arbitration proceeding, the latter was an action on the terms of the Agreement, while the cause of action argued here is upon statute. In Bd. of Education Bernards Tp. v. Bernards Tp. Ed. Assn., 79 N.J. 311 (1979), an increment withholding matter taken under N.J.S.A. 18A:29-14, the Court ruled that even though the withholding of an increment, "directly affect[s] the work and welfare" of teachers, the action to withhold an increment is a managerial prerogative of the board and cannot be bargained away, Id. p.321. The Court ruled that appeals under N.J.S.A. 18A:29-14 are to be taken to the Commissioner by legislative mandate, Id. pp. 322-324.

By analogy, a claim predicated upon N.J.S.A. 18A:29-8, when that statute is read together with N.J.S.A. 18A:29-14, would require the Commissioner to adjudicate such dispute. Thus an arbitrator concerned solely with the permissible terms and conditions of an Agreement would have no authority to decide a case bottomed upon N.J.S.A. 18A:29-8.

Consequently, I conclude that under the prior arbitration proceeding, the doctrine of res judicata does not apply to the question of law presented in the instant matter. The doctrine of collateral estoppel, as to fact issues, similarly has no application because new and different fact issues are not raised here compared to the facts of the arbitration proceeding. The facts essentially are not in dispute.

Next, N.J.A.C. 6:24-1.2 provides that "[t]o initiate a proceeding before the commissioner . . . a petitioner shall file . . . the petition . . . within 90 days after receipt of the notice by the petitioner of the order, ruling or other action concerning which the hearing is requested." Here, the cause of action pleaded on behalf of Koumjian and Spratford, already set forth above, is read to allege that the event which is the approximate cause of their improper salary step placement for 1980-81 is the improper salary step placement to which they were allegedly subjected in 1979-80. The date the members are here seen to have received notice of the 1979-80 Board action (placement on the same step of the salary guide as they were on in 1978-79) is no later than on or about September 15, 1979, the approximate date of the first pay period. Because the cause of action pleaded for 1980-81 relates back to 1979-80, the date of the event, then, which triggers the essence of a cause of action for 1979-80 and future years, is approximately September 15, 1979. Ninety days from September 15, 1979, is approximately December 15, 1979. The instant petition was filed September 29, 1980, more than nine months after the expiration of the 90-day limit under N.J.A.C. 6:24-1.2.

In a footnote in Bd. of Education Bernards Tp., Justice Pashman observed:

> Under N.J.S.A. 18A:29-14, the Commissioner has been delegated the responsibility to promulgate rules and regulations concerning the manner in which an aggrieved teacher may appeal adverse Board determinations. Pursuant to this grant of authority, such rules have been adopted. See N.J.A.C. 6:24-4.1; N.J.A.C. 6:24-1.1 to 6:24-1.19. These rules require a teacher to file a petition with the Commissioner within 90 days of his receipt of notice of the Board's decision to withhold an increment. N.J.A.C. 6:24-1.2. A teacher who proceeds to advisory arbitration is not relieved from compliance with this 90-day filing requirement. However, in order that the goals underlying our decision to permit this type of arbitration be achieved, the Commissioner must wait until the arbitration is completed and an advisory decision rendered before conducting a hearing on the merits of the teacher's petition. [79 N.J. 326, 327]

Thus even if a matter, properly reserved for the Commissioner's adjudication by legislative mandate, proceeds through advisory arbitration, such proceeding does not negative the requirement of N.J.A.C. 6:24-1.2. Here, there is no reason presented as to why the 90-day rule should be relaxed other than that the claim for 1980-81 is independent of that for 1979-80. I find no merit in this claim. The claim for 1980-81 is wholly dependent upon the claim for 1979-80; if the latter were to be declared valid, the former would be valid and vice versa.

Third, the Board's argument that the Association's claim has not been resolved through the grievance procedure, thus ostensibly resulting in arbitration, has already been addressed. Because the claim is bottomed upon the application by N.J.S.A. 18A:29-8, the matter is within the purview of the Commissioner's authority at N.J.S.A. 18A:6-9.

Having found, however, that the instant matter was filed more than nine months beyond the expiration of the 90-day period under N.J.A.C. 6:24-1.2, and having found no basis upon which to conclude that just cause exists to relax the rule requirement, I **CONCLUDE** that the Board's motion to dismiss must be granted for the Association's failure to have filed in a timely fashion.

Having so decided, I **ORDER** that the Association's motion for summary decision on the merits be **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 6496-80

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

November 2, 1981
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

November 4, 1981
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

11-6-81
DATE

Ronald I. Parker
OFFICE OF ADMINISTRATIVE LAW

bm

NORTH PLAINFIELD EDUCATION ASSOCIATION, on behalf of ARLENE KOUMJIAN AND MICHEL SPRATFORD,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF NORTH PLAINFIELD, 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.

Petitioners except to the conclusion by the Honorable Daniel B. McKeown, ALJ that the Petition herein was not filed in a timely fashion. Petitioners argue that, because only prospective relief is sought, the time period for the computation of N.J.A.C. 6:24-1.2 must begin with the date when new damages are claimed. The Board's reply exceptions refute those of petitioners and argue that the failure of petitioners to timely file an appeal to the Commissioner pursuant to N.J.A.C. 6:24-1.2 is not excused by petitioners' first seeking to arbitrate the matter. The Commissioner finds merit in the arguments of the Board.

Petitioners chose the arbitration forum and only after losing therein did they choose to turn to the Commissioner. Petitioners may not have a second bite of the apple. The Commissioner so holds.

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

December 15, 1981

Pending State Board (Not Printed)

(App. Div. 1983)

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7139-80
AGENCY DKT. NO. 366-7/80A

IN THE MATTER OF:

WINIFRED STILL,
Petitioner
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF WEYMOUTH, ATLANTIC COUNTY,
Respondent.

Record Closed: September 22, 1981
Received by Agency: 10-29-81

Decided: October 27, 1981
Mailed to Parties: 11-4-81

APPEARANCES:

Steven R. Cohen, Esq., (Selikoff & Cohen, P.A.) for the Petitioner

Gerald F. Miksis, Esq., (William Goddard Lashman) for the Respondent

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

Petitioner, a non-tenured teaching staff member formerly employed by the Board of Education of the Township of Weymouth (Board), appeals from an action of the Board not to reemploy her after three consecutive academic years. Petitioner seeks reinstatement to her former position, together with back salary and other emoluments.

Subsequent to the pleadings having been joined before the Commissioner of Education, 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. Thereafter, on July 7, 1981, a hearing was conducted at the Northfield Municipal Court, Northfield, New Jersey. The parties submitted post-hearing memoranda and the matter was closed on September 22, 1981.

STATEMENT OF FACTS

Petitioner, Winifred Still, was employed by the respondent, Weymouth Township Board of Education, as a compensatory education and music teacher throughout the academic years 1977-78, 1978-79 and 1979-80. In April 1980, Dr. Milton A. McClure, the Board's Administrative Principal, recommended to the Board that it issue petitioner a contract of employment for the 1980-81 school year. The Board, however, by letter on or about April 30, 1980, notified petitioner of its decision not to offer her a contract of employment for the 1980-81 school year. By letter, dated May 1, 1980, petitioner requested that the Board furnish her with a written statement of its reasons for its decision. By letter dated May 8, 1980, the Board furnished petitioner with a written statement of reasons behind its decision not to offer her a contract. Said statement indicated that the Board based its decision upon alleged deficiencies in classroom discipline in the music class taught by petitioner.

Petitioner requested an informal appearance before the Board to discuss its action of nonrenewal by letter, dated May 15, 1980. Such an appearance was scheduled for June 16, 1980, and was held with petitioner appearing before the Board with her chosen representative, Harry Knoblauch, for the purpose of refuting the allegations contained in the statement of reasons referred to above. The notice to the Board of this meeting indicated that it was important that all Board members be present; however, Donna Schneider, a Board member who voted against petitioner both prior and subsequent to this appearance, was not present (T47:17 to 48:4).

At the aforementioned appearance, the Board, upon the direction of its legal counsel, declined to answer certain inquiries formulated by petitioner, in an effort to allow her to respond to the May 8, 1980 Statement of Reasons.

The Board thereafter notified petitioner that its decision to deny her reemployment remained unchanged, and petitioner was not offered a contract for 1980-81.

A Petition of Appeal was filed by Ms. Still on or about July 25, 1980, alleging that the Board's stated reason for determining not to reemploy petitioner was pretextual, arbitrary, capricious, and ultra vires and that the Board's refusal to answer petitioner's inquiries prevented her from meaningfully responding to the allegations and thus from effectively persuading the Board to reverse its decision not to reemploy her.

By way of further facts, the Board's statement of reasons to petitioner for its nonrenewal of her contract is set forth, in part, as follows:

> In response to your request for a written statement of reasons for your non-reemployment by the Weymouth Township Board of Education, please be advised that the reason is your deficiencies in classroom discipline in the music class which you teach.

The proofs in this matter show that petitioner had been observed and evaluated on at least eight separate occasions by the Board's administrative principal, pursuant to N.J.S.A. 19A:27-3.1, N.J.A.C. 6:3-1.19. These evaluations rated petitioner "excellent" in the area of discipline, with the exception of one evaluation early in her employment which set forth a rating of "good."

TESTIMONY OF THE WITNESSES

A summary recitation of four Board members who testified that they voted not to renew petitioner's employment contract for the 1980-81 school year follows:

Donna Schneider testified, among other things, that she had reviewed the administrative principal's evaluations of petitioner, but had discounted his assessment of petitioner's performance because, in her opinion, the administrative principal was not a good evaluator. She testified that the basis of her vote not to renew petitioner's contract was her observation of the pupils' graduation ceremony in June 1979, which she claimed was unruly and unsatisfactory. Ms. Schneider stated that petitioner's identity was not made known to her at the graduation ceremony, nor could she recall that she had observed petitioner actually participating in the musical exercises of the pupils. Ms. Schneider

stated that she originally voted against the renewal of petitioner's employment contract and that she was not present at petitioner's appearance before the Board on June 8, 1980; moreover, she subsequently reaffirmed her vote not to renew.

Mr. Glen Graiser testified that he also discounted the administrative principal's evaluation of petitioner's performance. He opined that the administrative principal could not properly evaluate the teaching staff members under his supervision; therefore, the administrative principal's evaluations did not truly reflect the performance level of each staff member. Mr. Graiser testified that he had not directly observed petitioner's classroom activities; however, he had attended the 1979 graduation ceremony and observed petitioner's performance, with which he was dissatisfied. He testified that the major reason he voted against petitioner's continued employment was based upon a report by Mr. Graiser's eleven-year-old daughter that petitioner's music class lacked discipline.

Mr. Turner testified that he gave little, if any, weight at all to the administrative principal's evaluation of petitioner's performance. He stated that he had observed petitioner's classroom performance by looking through the windows of the classroom door and observed that pupils were not in their seats. He admitted that he had not entered petitioner's classroom for a more direct observation and that his view from the corridor lasted one or two minutes, at the most. Mr. Turner testified further that he was disappointed in the manner in which the pupils participated in various programs under petitioner's supervision.

Mr. Wayne Mason testified that he, too, could not rely upon the administrative principal's evaluations of the teaching staff members. He opined that the administrative principal's evaluations were so insufficient that the Board could not rely upon them as representative of a measure of the teachers' true performance. Mr. Mason stated that he believed that the pupil programs presented under petitioner's supervision lacked quality and organization. Mr. Mason testified further that he was dissatisfied with a grade his son received from petitioner, despite his admission that his son had failed to complete a required project for a satisfactory grade in the music program. Mr. Mason admitted, on the record, that his vote not to renew petitioner's employment contract occurred after his son had received the unsatisfactory grade from petitioner.

Further testimony in this matter revealed that petitioner was responsible for starting a music program in the district where none had existed prior to her employ. The administrative principal's evaluation of petitioner's performance acknowledged the difficulties which arise with the incorporation of a new program for an elementary school. The record is devoid, however, of mention of petitioner's classroom discipline as a problem area for her attention and correction. To the contrary, petitioner's evaluations by the administrative principal indicated that her classroom discipline and control was "good" to "excellent."

FINDINGS OF FACT

Having carefully reviewed and considered all of the testimony and other evidence offered in this matter, and having given fair weight thereto, and having observed the demeanor of the witnesses and assessed their credibility, I **FIND** that:

1. The four Board members who testified in this matter totally disregarded its administrative principal's observations and evaluations of petitioner's performance as a teaching staff member.

2. The testimony of Board member Schneider is not to be credited wherein she stated that she personally observed the 1979 pupil graduation exercises in which petitioner fully participated by playing the piano and conducting the musical activities, yet Ms. Schneider testified that she did not know that petitioner was black.

3. Petitioner was the only black member of the Board's professional staff at the time the Board voted not to reemploy petitioner.

4. Board member Graiser's reasons not to reemploy petitioner were based not upon direct observation of petitioner's classroom performance nor upon the administrative principal's evaluations, but rather upon the hearsay from his eleven-year-old daughter that petitioner's classroom lacked discipline.

5. Board member Turner's reason for voting against petitioner's reemployment was grounded, in part, upon his observation of petitioner through a window of a closed classroom door for one or two minutes. Mr. Turner did not enter petitioner's classroom to observe her performance as a music teacher. Mr. Turner was dissatisfied with the pupils' performance in the various programs under petitioner's supervision.

6. Mr. Mason's reasons for not renewing petitioner's employment contract was based, in part, upon his dissatisfaction with a grade his son received from petitioner as the result of his son's failure to complete a classroom project.

7. The Board's administrative principal performed his mandated statutory and regulatory duty by observing and evaluating petitioner during the course of her employment with the Board.

8. Petitioner's evaluations with regard to classroom discipline was set forth as "good" on one occasion and "excellent" thereafter for the eight (8) mandated observations and evaluations on her record.

CONCLUSIONS

With regard to the Board's rejection of its administrative principal's evaluations of petitioner, it is necessary to look to the statute and regulations controlling such activities. N.J.S.A. 18:27-3.1 states, in part, that:

> Every board of education in this State shall cause each nontenure teaching staff member employed by it to be observed and evaluated in the performance of her or his duties at least three times during each school year. . . . Each evaluation shall be followed by a conference between that teaching staff member and his or her superior or superiors. The purpose of this procedure is to recommend as to reemployment, identify any deficiencies, extend assistance for their correction and improve professional competence.

N.J.A.C. 6:3-1.19 provides, by definition, the procedure for the supervision of instruction, observation and evaluation of nontenured teaching staff members, as mandated by N.J.S.A. 18A:27-3.1, as follows:

6:3-1.1. Supervision of instruction; observation and evaluation of nontenured teaching staff members

(a) For the purpose of this Section, the term "observation" shall be construed to mean a visitation to a classroom by a member of the administrative and supervisory staff of the local school district, who holds an appropriate certificate for the supervision of instruction, for the purpose of observing a nontenured teaching staff member's performance of the instructional process:

1. Each of the three observations required by law shall be conducted for a minimum duration of one class period in a secondary school, and in an elementary school for the duration of one complete subject lesson.

(b) The term "evaluation" shall be construed to mean a written evaluation prepared by the administrative/supervisory staff member who visits the classroom for the purpose of observing a teaching staff member's performance of the instructional process.

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

(d) Each policy for the supervision of instruction shall include, in addition to those observations and evaluations hereinbefore described, a written evaluation of the nontenured teaching staff member's total performance as an employee of the local board of education.

(e) Each of the three observations required by law shall be followed within a reasonable period of time, but no instance more than 15 days, by a conference between the administrative/supervisory staff member who has made the observation and written evaluation, and the nontenured teaching staff member. Both parties to such a conference will sign the written evaluation report and retain a copy for his/her written disclaimer of such evaluation within ten days following the conference and such disclaimer shall be attached to each party's copy of the evaluation report.

> (f) The purposes of this procedure for the observation and evaluation of nontenured teacbing staff members shall be to identify deficiencies, extend assistance for the correction of such deficiencies, improve professional competence, provide a basis for recommendations regarding reemployment, and improve the quality of instruction received by the pupils served by the public schools.

Thus it is clear, pursuant to statute and N.J.A.C. 6:3-1.19(c), that the Board herein controls, by adopted policy, the procedure by which petitioner was to be evaluated. This procedure may only be carried out by "a member of the administrative and supervisory staff of the local school district, who holds an appropriate certificate for the supervision of instruction." N.J.A.C. 6:3-1.19(a) and (b). Either the Board had adopted the standards of procedure by which nontenured teaching staff members were to be evaluated or, in the alternative, it was in violation of the statute and the regulations of the State Board of Education. Once those standards were adopted by the Board and made known to its administrative principal, it was his responsibility as the holder of "an appropriate certificate for the supervision of instruction" to observe and evaluate petitioner in order to "identify deficiencies, extend assistance for the correction of such deficiencies, improve professional competence, provide a basis for recommendation regarding reemployment. . . ." N.J.A.C. 6:3-1.19(f).

The record in this matter is clear that the administrative principal carried out his statutory and regulatory mandates through observation and evaluation of petitioner's performance. It is equally clear that the administrative principal did not find petitioner to be deficient in classroom discipline, as alleged by the Board. To the contrary, the record herein demonstrates that the administrative principal found petitioner's classroom discipline to be excellent.

In the event, and it appears to be so, that the Board is dissatisfied with its evaluation procedure, it is provided the authority to modify, by appropriate resolution, its present policy. Thereupon, the Board must advise the administrative principal of its adopted standards for observation and evaluation of its teaching staff members, and delegate to him the sole authority to perform the function, the procedure having been established by regulations. It may not, however, arbitrarily impose a higher standard of performance for an individual teaching staff member in its employ over those similarly situated.

I **CONCLUDE,** therefore, that the four Board members' rejection of the administrative principal's evaluation of petitioner was an abuse of its own policy, an arbitrary exercise of its discretionary power and, thus, ultra vires. I **CONCLUDE** that, pursuant to statute, regulation and the Board's policy thereto, the administrative principal's evaluations and recommendations with regard to petitioner do not support the Board's reasons for the nonrenewal of her employment contract for the 1980-81 school year.

I further **CONCLUDE** that neither the statutes, regulations nor case law permit a board of education to set a higher standard of performance for an individual teaching staff member over and above that of her/his peers in the evaluation process.

With regard to the notice requirement, N.J.S.A. 18A:27-3.2, mandates that "a statement of reasons . . . shall be given to the teaching staff member in writing. . . ." The Board, in its Brief, states in part that:

> It is admitted that the letter that was presented by the Board of Education was less than artfully drawn. It is further admitted that the detailed enumeration of incidents giving rise to the Board's decision, was not contained in the letter. . . . (Board's Brief at p. 6)

The statutes and regulations cited herein are the direct result of the controversy in the matter of Donaldson v. Bd. of Ed. of the City of North Wildwood, Cape May Cty., 65 N.J. 236 (1974) wherein the Court said that:

> Perhaps the statement of reasons will disclose correctible deficiencies and be of service in guiding his future conduct; perhaps it will disclose that the non-retention 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 1184-85); 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. (65 N.J. at 245).

The Drown case cited in Donaldson, Drown v. Portsmouth School District, 435 F.2d 1182 (1 Cir. 1970) cert. denied 402 U.S. 972, sustained a nontenured teacher's request

for a statement of reasons for the nonrenewal of her contract. Therein, Judge Coffin noted that the failure to give reasons for nonretention would:

> effectively foreclose her from attempting any self improvement, from correcting any false rumors and explaining any false impressions, from exposing any retributive effort infringing on her academic freedom, and from minimizing or otherwise overcoming the reason in her discussions with a potential future employer. (435 F.2d at 1184)

In the instant matter, the Board's stated reasons for petitioner's non-reemployment were her "deficiencies in classroom discipline." A review of the facts herein discloses that the Board members were dissatisfied with the conduct of certain musical performances petitioner was required to carry out with pupils in the school rather than with a lack of classroom discipline. This reason was not disclosed to petitioner in the Board's statement of reasons to her, neither at her informal appearance before the Board nor by the administrative principal in his observations and evaluations of petitioner. The Board in its Brief states:

> There are no requirements that the letter informing the Petitioner of the reason for her termination be as explanatory as possible. Such information was clearly deduced from the discovery and hearing had in this matter and there can be no claim that the Petitioner did not know the reason.

The facts in this matter disclose that petitioner first learned at the hearing of the Board's real reasons for not renewing her contract. The Board's exculpatory explanations in its Brief, with regard to its statement of reasons to petitioner, failed to "disclose correctable deficiencies" to be of "service in guiding [her] future conduct." Donaldson, at 245. The lack of specified deficiencies, coupled with the fact that petitioner's eight evaluations make no mention of any deficiencies, fails to meet the standards set forth by the New Jersey Supreme Court in Donaldson and by the Commissioner of Education in Barbara Hicks v. Bd. of Ed. of the Twp. of Pemberton, Burlington County, 1975 S.L.D. 332.

I **CONCLUDE,** therefore, that the Board's stated reasons to terminate petitioner were arbitrary and unreasonable and failed to meet the standards set forth by our Supreme Court in Donaldson.

I **CONCLUDE** that petitioner has carried her burden of proofs, by a preponderance of the credible evidence, that the Board's reasons given to petitioner for her nonreemployment for the 1980-81 school year were not, in fact, the real reasons for its action.

Accordingly, it is **ORDERED** that petitioner be reinstated to her position of employment with back salary and emoluments as of the date of her termination, mitigated by her earnings in other employment, as if there had been no break in her employment with the Board. Hazel Richardson and Deborah L. Anderson v. Bd. of Ed. of the Twp. of Galloway, Atlantic Cty., OAL Dkt. EDU 405-12/75, EDU 423-12/75 (October 18, 1979) adopted, (Commissioner of Education by silence).

Petitioner's request for additional relief, by way of an award of interest on back salary and counsel fees and costs to bring this proceeding, are hereby **DENIED.** Fred Bartlett, Jr. v. Bd. of Ed. of the Twp. of Wall, 1971 S.L.D. 163, aff'd, State Board of Education, October 6, 1971; Romonowski v. Jersey City Bd. of Ed., 1966 S.L.D. 219.

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 7139-80

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

27 October 1981
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

29 October 1981
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

11-4-81
DATE

Ronald I. Parker Jr.
OFFICE OF ADMINISTRATIVE LAW

ms

WINIFRED STILL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEYMOUTH, ATLANTIC 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 that portion of the findings and determination in the initial decision which holds that the Board's action not to reemploy petitioner for the 1980-81 school year was patently arbitrary, capricious, in bad faith and an abuse of its discretionary authority pursuant to applicable education law.

In arriving at the above determination, however, the Commissioner cannot agree with the conclusion of the administrative law judge herein that the Board was bound to rely solely on the professional performance evaluations of petitioner when it determined not to reemploy her.

The Commissioner has long held

> "***that a board, absent bias or violation of protected rights, may choose to rely, or not to rely, in whole or in part, upon the subjective evaluations and recommendations of its supervisors and administrators.***" Deborah Strauss v. Board of Education of the Borough of Glen Gardner, 1977 S.L.D. 841, 850

> "***While the Commissioner would expect that all boards of education look to their professional employees for recommendations and guidance in matters in which educational judgments are to be made, the board is not compelled to accept the suggestions or advice it receives, for it has the authority to make the ultimate determination.***" William A. Wassmer et al. v. Board of Education of the Borough of Wharton, 1967 S.L.D. 125, 127

Moreover, the Commissioner does not agree that the appropriate relief to be afforded to petitioner is reinstatement to her former teaching position with retroactive pay and other emoluments to which she may have been entitled.

In arriving at this determination the Commissioner relies on the following pertinent language of the State Board of Education in the matter of Robert P. Tucker v. Board of Education of the Borough of Lawnside, Camden County, decided March 4, 1981:

> "***[T]he Board's failure to give petitioner a true statement of reasons for his non-renewal constitutes much more than a mere technical violation of an education statute. The Board's action in this regard undermines the salutary purpose behind N.J.S.A. 18A:27-3.2, which is to provide the teaching staff member with the benefit of learning of any correctible deficiencies or knowing that nonretention was due to factors unrelated to his professional or classroom performance.
>
> "The Commissioner 'has broad powers and responsibilities to supervise public education in the State and effectuate constitutional and legislative policies concerning it.' Piscataway Township Board of Education v. Burke, 158 N.J. Super. 436, 440-441 (App. Div. 1978), dismissed 79 N.J. 473 (1979). 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. (See N.J.S.A. 18A:7A-5(g).) Accordingly, in an exercise of the broader educational discretionary power entrusted to us and to the Commissioner we order that the Board pay petitioner sixty (60) days' pay. See Heather J. Reid v. Board of Education of the Township of Hamilton, Docket No. A-222-79 (unpublished decision issued November 7, 1980). See also N.J.S.A. 18A:4-15.

> "We wish to add that the extraordinary remedy awarded in this matter is not to be interpreted as meaning that a financial remedy is available for every technical violation of education statute or regulation. It is the egregious factual circumstances involved herein which have persuaded us to invoke the foregoing penalty so as to discourage this and other local boards of education from disregarding education law and thereby to improve the educational process."

The Commissioner upon careful review of the factual circumstances of the instant matter finds and determines that the relief granted to petitioner by the State Board of Education in Tucker, supra, is also deemed to be appropriate herein.

The Commissioner therefore sets aside the determination reached by Judge Law which calls for petitioner's reinstatement with back pay to her former teaching position.

In the alternative, the Commissioner directs the Board to expunge all reference to its reasons for petitioner's non-reemployment from her personnel file. It is further directed that the Board in lieu of reinstatement of petitioner in its employ, pay her 60 days' salary that she would have otherwise received if the Board had offered her a teaching contract for the 1980-81 school year. The Commissioner so holds.

Accordingly, except as noted in the above determination by the Commissioner, the findings and determination set forth in the initial decision of this matter are adopted by the Commissioner as his own.

COMMISSIONER OF EDUCATION

December 14, 1981

Pending State Board

MICHAEL DREHER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

For the Petitioner, Rothbard, Harris & Oxfeld
(Barry A. Aisenstock, Esq., of Counsel)

For the Respondent, Louis Serterides, Esq.

Petitioner charges that he held tenure as principal in an elementary school operated by the Board of Education of the City of Jersey City, hereinafter "Board," when he was involuntarily transferred to an assistant principalship in another elementary school in defiance of provisions of N.J.S.A. 18A:28-6. He seeks relief through restoration to the position of principal, payment of all properly due monies and emoluments, Board investigation of the improper input of minority community segments in the decision-making process in regard to retention of administrative personnel and Board investigation of improper evaluations and their consequential removal from his file.

The Board denies that its action in removing petitioner from his principalship constitutes a violation of the tenure statutes.

A conference on the controverted matter was held in the office of the Assistant Commissioner of Education in Charge of Controversies and Disputes on March 21, 1979 at which the following issues were drawn:

1. Did petitioner have tenure as principal at the time of his transfer to a lesser position?

2. Was petitioner validly evaluated?

3. Did the Board support petitioner in the administration of his position?

Plenary hearing was held in the Hudson County Courthouse, Jersey City, on July 25 and September 24, 1979. Previously petitioner had submitted a motion for partial summary judgment on the question of his claim to tenure under N.J.S.A. 18A:28-6. The hearing officer affirmed that briefs had been

filed by petitioner and respondent and that the motion would be part of the record of proceedings and would be decided in due course.

Petitioner testified that he had been employed by the Board since September 1963, first as a "fully-appointed" teacher, then as assistant principal for five years, as principal for two years and as assistant principal for the 1978-79 school year.

A letter dated June 10, 1976 was introduced as evidence (P-1) stating essentially that petitioner was appointed principal of Public School Number 34, effective September 1, 1976. A second letter dated April 28, 1978 was also introduced as evidence. (P-2) The Superintendent of Schools therein notified petitioner that he would not receive tenure as principal. A third letter (P-3) was introduced from the Assistant Superintendent in which he gave enthusiastic endorsement to the granting of tenure to petitioner and two other principals. P-4 established that the Assistant Superintendent notified the Superintendent of his continued support of petitioner for tenure. P-5 is notification from the Superintendent to petitioner that at its meeting of May 11, 1978 the Board did not accord him tenure. P-6 is notice to petitioner from the Superintendent of his reassignment by the Board at its August 28, 1978 meeting to the position of assistant principal effective September 5, 1978.

During direct testimony (Tr. I-14 et seq.) it was adduced that community forces protested petitioner's appointment to the principalship of P.S. 34, preferring instead an assistant principal (P-8; P-9) and that P.S. 34 was in "extremely poor condition," in need of major renovations and in need of significant improvement "in the area of cleaning of the building." (Tr. I-16)

Petitioner testified that one custodian in this school was uncooperative. He testified that her animosity was due in part to her position as vice president of the Parents' Council. (Tr. I-30)

Petitioner also testified that he was evaluated three times in his two years as principal of P.S. 34 by the Assistant Superintendent. (Tr. I-58) None of the evaluations was preceded by a formal observation.

Petitioner testified that the Assistant Superintendent asked him, as well as other principals, to assist him in convincing the Board to promote him to deputy superintendent to fill a vacancy created by a retirement. (Tr. I-93)

A Board member testified that the Superintendent had recommended to the Board through normal personnel procedures that petitioner not be reemployed as principal of P.S. 34 for 1978-79. When the Board member asked why petitioner and one other

principal were being "reduced" (to assistant principal), the explanation was given that their evaluations were satisfactory "but they happened to be the two lowest and they had two principals too many at that time. They had to reduce two." (Tr. II-3 et seq.)

An assistant principal in the employ of the Board testified that during the interim time he served as a principal he was invited to a luncheon given by the Assistant Superintendent to further his efforts to obtain the deputy superintendent's post. The assistant principal refused to characterize these efforts as a "campaign" or in violation of any code of professional ethics. (Tr. II-9 et seq.)

The Superintendent testified that he reviewed all evaluations of personnel whose reappointment would accord them tenure. He noted that petitioner's evaluator, the Assistant Superintendent, expressed "reservations" as to petitioner's suitability to continue as principal. He said he made his recommendation to the Board denying petitioner tenure "based upon the analysis of the scores of nontenured principals as well as on the discussions held with [the Assistant Superintendent] prior to February or March***." (Tr. II-35)

A member of the Parents' Council who had engaged in a demonstration at P.S. 34 at the opening of school in September 1976 testified that the demonstrators were protesting "a lot of things" including the overall condition of the entire physical plant, the fact that their children were not being "taught well" and the fact that the principalship of P.S. 34 had not been given to the individual they had supported. (Tr. II-47 et seq.)

On cross-examination the Superintendent testified that he had explained to the protesting groups that their choice for principal of P.S. 34 was not on the eligibility list compiled under arrangements set up by contractual agreement with professional personnel. (Tr. II-56)

The hearing examiner has reviewed the testimony of petitioner and witnesses and the documents submitted as evidence. He has likewise examined relevant decisions of the Commissioner and the various tribunals having jurisdiction in these matters.

Petitioner's claim that because he served as principal for more than two years (September 1, 1976 to September 5, 1978) he is entitled to tenure under N.J.S.A. 18A:28-6 is, in the opinion of the hearing officer, groundless.

The statute states, in pertinent part:

> "Any such teaching staff member under tenure *** who is *** promoted with his

> consent to another position *** shall not obtain tenure in the new position until after:
>
> > ***(b) employment for two academic years in the new position together with employment in the new position at the beginning of the next succeeding academic year***."
> >
> > (Emphasis supplied.)

Testimony during the plenary hearing indicates that the Superintendent notified petitioner by letter dated April 28, 1978 that he would not be recommended for reemployment as principal for the 1978-79 school year. The Board confirmed this on May 11, 1978 by adopting a resolution whcih did not offer petitioner employment as principal in the forthcoming year.

Therefore, regardless of whether petitioner's employment as principal of P.S. 34 encompassed the two years specifically required in the statute, petitioner was never offered reemployment in the position "at the beginning of the next succeeding academic year" and the strict requirements of N.J.S.A. 18A:28-6 were not met.

Petitioner's brief in support of a motion for partial summary judgment states that he was principal of P.S. 34 for a total of two years and four days and that, by exceeding the period of two years by even a few days, he was entitled to tenure and nonremovability except for cause.

The hearing examiner concludes that the Board's action in not removing petitioner from his post within two calendar years does not negate the Board's decision to terminate petitioner's employment as a principal and transfer him to assistant principal, a position in which he was tenured before promotion. Petitioner did not have tenure as principal in the intendment of N.J.S.A. 18A:28-6. Nor did the Board's action in transferring him to assistant principal "effective September 5, 1978" on its face become a four-day extension of contract covering his principalship. There was no positive offer of reemployment as principal made to petitioner at any time after he was notified on April 28, 1978 that he would not be so recommended. Absent such positive action, no contract embodying such was implied or issued.

The hearing officer recommends that petitioner's motion for summary judgment on his claim for tenure be dismissed by the Commissioner.

There are two collateral issues to be disposed of in relation to the above recommendation: the manner in which the Board complied with N.J.S.A. 18A:27-10 and the legality of petitioner's unilateral transfer to a lesser position.

Every board of education has been required under N.J.S.A. 18A:27-10 to give each nontenure teaching staff member written notice on or before April 30 when reemployment will not be offered.

The narrow legal issue in the instant case centers on the Superintendent's letter of April 28, 1978 (P-2) and the Board's action on May 11, 1978 not to reemploy petitioner as a principal (Tr.I-8) and the statutory requirements of N.J.S.A. 18A:27-10 et seq. It is clear from evidence adduced at the hearing that the Board did not meet the precise conditions in making its determination on May 11, 1978, some eleven days after the mandatory April 30 deadline.

As the Commissioner said in Patricia Bitzer v. Board of Education of the Town of Boonton, 1976 S.L.D. 376, aff'd State Board of Education 381, "***The mandate is clear. It is not satisfied by a letter from the Superintendent, otherwise timely, which states inter alia '***we do not intend to recommend you.'***" (at 379)

Therefore the hearing examiner concludes that N.J.S.A. 18A:27-11 is controlling since it provides that:

> "Should any board of education fail to give to any nontenure teaching staff member *** a notice that such employment will not be offered, all within the time and in the manner provided by this act, then said board of education shall be deemed to have offered to that teaching staff member continued employment for the next succeeding school year upon the same terms and conditions but with such increases in salary as may be required by law or policies of the board of education."

Thus petitioner is entitled to the benefits of a successor contract which contains "***such increases in salary as may be required by law or policies of the board of education." Such entitlement does not include tenure and is conditioned by any termination clause contained in the typical contract awarded principals by the Board. (Sarah Armstrong v. Board of Education of the Township of East Brunswick, 1975 S.L.D. 112, aff'd in part/reversed in regard to salary entitlements State Board of Education 117, aff'd N.J. Superior Court, Appellate Division, 1976 S.L.D. 1104) Therefore the hearing examiner concludes that petitioner is entitled to the salary and attendant emoluments he would have received had he been retained as principal, mitigated by the salary and other benefits he was actually paid as an assistant principal for a period corresponding to the termination clause in his last contract as principal, if one existed. If no termination clause did exist, the Board should fulfill the requirements of N.J.S.A. 18A:27-11 for the entire 1978-79 year with mitigation proportional to that above.

The question of involuntary transfer to a lower paying position in which petitioner had residual tenure remains. This issue is addressed directly in N.J.S.A. 18A:28-6 which states in part:

> "***[I]n the event the employment in such new position is terminated before tenure is obtained therein, if he then has tenure in the district or under said board of education, such teaching staff member shall be returned to his former position at the salary which he would have received had the transfer or promotion not occurred together with any increase to which he would have been entitled during the period of such transfer or promotion."

The hearing officer notes for the record that having determined that petitioner was not reemployed as principal by action of the Board and had no valid claim to such a position, his transfer effective September 5, 1978 to his former position as a tenured assistant principal was a proper and legally mandated act of the Board. The formula for the calculation of his salary as assistant principal for 1978-79 is prescribed in N.J.S.A. 18A:28-6 and is not in contention here.

In Helen V. Boor v. Board of Education of the City of Newark, Essex County, 1979 S.L.D. ___ (decided August 31, 1979), it was said:

> "***The Commissioner observes that the Board, in its determination to transfer personnel from one assignment to another, is not required to secure the affected person's agreement.***" (at ____)

Having concluded that petitioner did not have tenure as principal at the time he was involuntarily transferred to a tenured assistant principalship, even though his 1978-79 contract had not been validly terminated, the hearing examiner concludes that the remaining two issues drawn from the Petition of Appeal are moot.

It has been well established that the Commissioner does not decide moot issues. See Carolyn Henry v. Board of Education of the City of Wildwood, 1975 S.L.D. 1. In Moss Estate, Inc. v. Metal and Thermit Corporation, 73 N.J. Super. 56 (Chan. Div. 1962), the Court said,

> "***It is the policy of the courts to refrain from advisory opinions, from deciding moot cases, or generally functioning in the abstract, and 'to decide only concrete

> contested issues conclusively affecting adversary parties in interest.' Borchard Declaratory Judgments (2d ed. 1941), pp. 34-35***." (at 67)

Therefore the hearing examiner recommends that the Commissioner not pursue the questions involving the Board's evaluation of principals' procedures or whether or not the Board properly supported petitioner in the frustrating job of administering P.S. 34 in light of the controversial community relations problems extant, since there is not relief available to petitioner even if Commissioner found in his favor.

This concludes the hearing examiner's report.

* * * *

The Commissioner has reviewed the entire record of the matter herein controverted including the report of his hearing examiner. The Commissioner observes that exceptions to the hearing examiner's report were filed by both parties.

Petitioner initially excepts to the hearing examiner's finding that, since petitioner had not acquired a tenured status as principal, the remaining issues pertaining to his allegations that he was improperly evaluated and that the Board failed to support him in the administration of his position were moot. Petitioner argues in favor of a reverse finding, namely, that the remaining two issues would be moot only if a finding that he acquired a tenure status were reached by the hearing examiner.

Petitioner points out in his exceptions that the testimony adduced from certain witnesses at the time of the hearing supports his contention with respect to the viability of the two remaining issues. However, petitioner complains that the hearing officer's refusal to admit highly relevant evidence in support of the issues in question effectively denies him the opportunity to have the entire matter litigated before the Commissioner as a matter of due process and fundamental fairness.

The Board in its exceptions points out that, although the hearing examiner rightfully found and determined that petitioner had not acquired a tenured status and thereby declared the remaining two issues moot, nevertheless, petitioner was permitted to burden the record with irrelevant testimony in regard to those issues. The Board rejects those exceptions of petitioner which support his contention that community interference, the physical condition of the schools and his relationship to other administrators were the primary factors in causing the Board not to reappoint him as principal in the Jersey City School District.

The Board maintains that, in light of its financial status at the time, while the Superintendent's recommendation not

to reappoint petitioner as principal was based on fiscal considerations, it was primarily based on petitioner's marginal performance. The Board, however, was guided by both of these considerations when it reached its determination. It is the Board's position that the Superintendent's testimony clearly reveals that his recommendation for non-reappointment was based upon petitioner's performance as observed and evaluated by his superior and that, on the basis of these evaluations, the Superintendent exercised his professional judgment not to recommend petitioner. The Board steadfastly maintains that the Superintendent did, in fact, disregard petitioner's final evaluation prepared by his superior, inasmuch as the circumstances under which that evaluation was performed indicated to him that it lacked professional objectivity.

Finally, the Board rejects petitioner's contention that his failure to be reappointed to his position as principal was due specifically to deference shown by the Board in supporting other administrators as opposed to the lack of support he received from the Board. In this regard the Board maintains that it was petitioner's own actions which clearly demonstrated that he was seeking preferential treatment not accorded to other administrators in functioning under the normal everyday pressures which are indigenous to an urban school setting.

Upon review of the exceptions filed by the parties, the Commissioner observes that these exceptions do not take issue with the hearing examiner's finding and determination that petitioner had not acquired a tenure status pursuant to N.J.S.A. 18A:28-5. The Commissioner concurs with the hearing examiner's finding and determination and adopts them as his own.

In arriving at this determination, the Commissioner has requested and received the following factual information stipulated by the parties:

1. Petitioner was a ten-month employee of the Board.

2. During September 1978 (1978-79 school year) petitioner was paid at the rate of vice principal. (C-1)

In view of the above stipulation the Commissioner finds and determines that petitioner's service as principal does not meet the precise requirements of N.J.S.A. 18A:28-6 to afford him tenure protection in that position.

The Commissioner further finds and determines that the Board was remiss in failing to strictly adhere to N.J.S.A. 18A:27-10 et seq. by its untimely notification to petitioner of its determination not to reemploy him as principal. The Commissioner does not condone such action by the Board and cautions the Board to be guided in the future by statutory prescription.

In conclusion, the Commissioner finds and determines that, while the Board's actions herein were procedurally defective, they are not fatally flawed to the extent to warrant a reversal by the Commissioner or the monetary relief requested by petitioner and recommended by the hearing examiner.

Accordingly, the Board's actions complained of herein will not be set aside and the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

December 22, 1981

Pending State Board

SUBJECT INDEX TO COMMISSIONER'S DECISIONS - 1981

CONSTANCE ANDERSON, :

PETITIONER-APPELLEE, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE CITY OF SUMMIT, UNION COUNTY, : DECISION

RESPONDENT-APPELLANT. :

_____:

Decided by the Commissioner of Education, April 30, 1980

Decided by the State Board of Education, December 3, 1980

For the Petitioner-Appellee, Drummond & Owren (Gilbert E. Owren, Esq., of Counsel)

For the Respondent-Appellant, McCarter & English (Dean J. Paranicas, Esq., of Counsel)

The State Board of Education denies Motion for Reconsideration of its December 3, 1980 State Board of Education decision. However, through the consent of parties the State Board amends its December 3, 1980 decision (page 3, last paragraph) to read "The Commissioner's decision herein is reversed and count one of the petition is dismissed."

Robert J. Wolfenbarger opposed in the matter.

February 4, 1981

Pending New Jersey Supreme Court

BARBARA ANGELUCCI ET AL., :

PETITIONERS-APPELLANTS, :

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, September 15, 1980

For the Petitioners-Appellants, 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.

February 4,1981

GLADYS ASLANIAN, :

PETITIONER-APPELLANT, :

V. : SUPERIOR COURT

BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, : APPELLATE DIVISION

RESPONDENT-RESPONDENT. :

_____ :

Decided by the Commissioner of Education, October 15, 1979 and January 4, 1980

Decided by the State Board of Education, July 2, 1980

Argued March 17, 1981 -- Decided March 27, 1981

Before Judges Matthews, Morton I. Greenberg and J.H. Coleman.

On appeal from the New Jersey State Board of Education.

Louis P. Bucceri argued the cause for Appellant (Goldberg & Simon, attorneys; Theodore M. Simon, of counsel, and Mr. Bucceri, on the brief).

Joseph T. Skelly argued the cause for respondent Borough of Fort Lee (John C. McGlade, on the brief).

John J. Degnan, Attorney General, filed a Statement in lieu of brief on behalf of the State Board of Education (Mary Ann Burgess, Attorney General, of counsel and on the statement).

PER CURIAM

Petitioner appeals from the decision of the State Board of Education (State Board) holding, contrary to the Commissioner's decision, that petitioner's part-time (4/5) employment for the past six school years and 3/5 position for eight years prior to that as the district's testing teacher, gave petitioner tenure only as a part-time teacher; when the testing teacher position was abolished she did not have seniority rights over two other full-time teachers of art even though petitioner was certified in that field.

Petitioner was initially employed by the local board as a full-time art teacher for the 1955-1956 school year but she resigned at the end of that year. Petitioner was certificated as

a teacher of art in the elementary and secondary schools since 1957. Petitioner was reemployed by the board for the 1964-1965 school year but not as an art teacher. She was hired as a teacher to administer tests in the school district three days a week. She continued on this part-time (3/5) basis between 1964-1965 and 1971-1972. For the 1972-1973 school year she was again hired as a teacher of testing but worked four days a week. This 4/5 position continued from 1972-1973 through 1977-1978.

On June 22, 1978 the local board passed two resolutions which affected petitioner. The first resolution abolished the 4/5 testing teacher position "for reasons and necessity of accomplishing budgetary savings for reasons of economy" to take effect for the 1978-1979 school year. The second resolution terminated petitioner's employment by the board since her 4/5 testing teacher position had been abolished and she was found not to have seniority entitling her to continued employment with the board in another category. Consequently, she was placed on a preferred eligible list for reemployment based on her seniority for any vacancy which might occur in the school district for which she was qualified and for which she had seniority.

Prior to the board's formal action abolishing petitioner's part-time position, the board requested a non-binding advisory opinion from the Commissioner. The board planned a reduction in force and the elimination of a position. It wanted to know which of three teachers (one of whom was petitioner) had the least seniority and entitlement to retain a position with the local board. When the Commissioner failed to issue an advisory opinion the board took action on its own.

Petitioner thereafter filed a verified petition with the Commissioner seeking to reverse the local board's determination. She asserted that she had seniority rights over two other full-time art teachers and she asked the Commissioner to direct the board to reinstate her. The board filed an answer asserting that petitioner had tenure only as a part-time teacher within the scope of her certification and therefore she had no seniority rights over full-time tenured teachers with the same certification.

The Commissioner found in petitioner's favor. He agreed with the board's assertion that a person who acquires tenure in a part-time position which requires a certificate has no right to claim a full-time position in the same or different area of certification. However, the Commissioner did not agree with the board that the total employment time of a person who has acquired part-time tenure could not be considered comparatively with the employment time of full-time employees insofar as seniority rights were concerned.

The Commissioner held that even though petitioner was assigned to function as a testing teacher, a position for which

no special certificate was required and the title of which was not recognized by the State Board with respect to teacher certification rules, petitioner was nevertheless certificated to teach art and consequently her total employment with the board was served in a professional capacity "for which a certificate is required." He reasoned that, under those circumstances, her experience as a testing teacher has to be considered experience under her certificate to teach art since any person possessing a certificate to teach any subject may be assigned duties as a testing teacher even though no special certificate is required for such an assignment. He determined that since petitioner ***[commenced employment with the Board]*** in the 1964-1965 academic year her total seniority amounted to 9.6 years. As that was greater than either of the two full-time art teachers' years of employment (four years, eight and one-half months and five years respectively) petitioner was entitled to employment.

The Commissioner ordered the board to reinstate her to her position as a teaching staff member and to assign her duties within the scope of her certificate as well as any back pay and other emoluments withheld from her.

The board appealed the decision to the State Board. The State Board's legal committee issued its report recommending that the Commissioner's decision be reversed. Although the legal committee agreed with the Commissioner that a person who acquired part-time tenure had no claim to a full-time position, it noted that seniority rights could not give that individual greater tenure than he or she would have achieved under the statute. Consequently, the legal committee concluded that petitioner could have seniority only over other teachers who had 4/5 or less of full-time positions. Her part-time position being abolished and no other part-time positions in her category being available, there was nothing to which petitioner's tenure could attach. Noting that the duties of part-time positions often differ from those of full-time faculty, the legal committee concluded that the Legislature could not have intended part-time staff members to have the same status as full-time personnel to permit the part-timers to obtain seniority over full-time people. The legal committee also noted that in directing the local board to reemploy the petitioner the Commissioner had in essence ordered the board to reestablish a part-time position which it had abolished in contravention of the local board's authority to organize its school system in the manner it sees fit.

Petitioner filed exceptions to the legal committee's report. The State Board rendered its decision which was essentially a verbatim adoption of the legal committee's report.

We affirm substantially for the reasons expressed in the opinion of the State Board of Education.

BERGENFIELD EDUCATION ASSOCIATION, :

PETITIONERS-APPELLEES, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD, BERGEN COUNTY, : DECISION

RESPONDENT-APPELLANT. :

:

Decided by the Commissioner of Education, December 15, 1980

For the Petitioners-Appellees, Ruhlman & Butrym
(Cassel R. Ruhlman, Jr., Esq., of Counsel)

For the Respondent-Appellant, Greenwood & Sayovitz
(Robert H. Greenwood, Esq., of Counsel)

This case raises issues of state wide implications whose prompt determination will benefit the educational system of our state, therefore, we affirm the remand and relaxation of N.J.A.C. 6:24-1.19.

May 6, 1981

THOMAS BIERMAN,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF GLEN ROCK, BERGEN COUNTY,	:	DECISION
RESPONDENT-CROSS-APPELLANT.	:	

Decided by the Commissioner of Education, July 17, 1980

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

For the Respondent-Cross-Appellant, Carroll, Panepinto, Pachman, Williamson & Paolino (Martin R. Pachman, Esq., of Counsel)

For the Intervenor-Appellant, Norris, McLaughlin & Marcus (M. Karen Thompson, Esq., of Counsel)

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

S. David Brandt and P. Paul Ricci opposed in the matter.

Mateo DeCardenas abstained in the matter.

December 2, 1981

Pending New Jersey Superior Court

IN THE MATTER OF THE TENURE	:	
HEARING OF MARK BLASKO,	:	
SCHOOL DISTRICT OF THE	:	STATE BOARD OF EDUCATION
TOWNSHIP OF CHERRY HILL,	:	DECISION
CAMDEN COUNTY.	:	
	:	

Decided by the Commissioner of Education, August 28, 1980

For the Petitioner-Appellee, Davis & Reberkenny
(William C. Davis, Esq., of Counsel)

For the Respondent-Appellant, Selikoff & Cohen
(Steven R. Cohen, Esq., of Counsel)

The State Board of Education denies request for oral argument and affirms the Commissioner's decision with respect to the finding of conduct unbecoming a teacher. However, the State Board directs that the sanction of withholding two weeks' salary as imposed by the Administrative Law Judge be reinstated and the directive of dismissal be vacated.

Anne Dillman and E. Constance Montgomery opposed in the matter.

Sonia Ruby abstained in the matter.

February 4, 1981

IN THE MATTER OF THE TENURE	:	
HEARING OF MARK BLASKO,	:	
SCHOOL DISTRICT OF THE	:	STATE BOARD OF EDUCATION
TOWNSHIP OF CHERRY HILL,	:	DECISION
CAMDEN COUNTY.	:	
	:	

Decided by the Commissioner of Education, August 28, 1980

For the Petitioner-Appellee, Davis & Reberkenny
(William C. Davis, Esq., of Counsel)

For the Respondent-Appellant, Selikoff & Cohen
(Steven R. Cohen, Esq., of Counsel)

At its February 4, 1981 meeting, the State Board denied oral argument and affirmed the Commissioner's decision with respect to the finding of conduct unbecoming a teacher. The State Board directed that the sanction of withholding two weeks' salary as imposed by the Administrative Law Judge be reinstated, it was further directed that the dismissal of respondent be vacated.

This matter is presently before the State Board by way of motion from petitioner for Clarification and/or Reconsideration, and request for Clarification from respondent, of the February 4, 1981 decision of the State Board.

The State Board, having reviewed the arguments presented in both petitioner's and respondent's motions, finds the following clarification necessary:

Respondent is to be paid his full salary less mitigation, beginning September 1, 1980, with the sanction of withholding two weeks' salary as imposed by the Administrative Law Judge. Motion for Reconsideration is denied.

April 1, 1981

EVELYN BLITZ AND IRVING MARSHALL, :

PETITIONERS-APPELLEES, :

V. :

BOARD OF EDUCATION OF THE CITY OF BRIDGETON, CUMBERLAND COUNTY, :

RESPONDENT-APPELLANT, : STATE BOARD OF EDUCATION

AND : DECISION

DOUGLAS RAINEAR AND PETER SAULIN, JR., :

INTERVENORS-CROSS-APPELLANTS. :

_____ :

Decided by the Commissioner of Education, July 21, 1980 and December 24, 1980

For the Petitioner-Appellees, Selikoff & Cohen (Joel S. Selikoff, Esq., of Counsel)

For the Respondent-Appellant, Casarow, Casarow & Kienzle (A. Paul Kienzle, Jr., Esq., of Counsel)

For the Intervenors-Cross-Appellants, Ruhlman & Butrym (Cassel R. Ruhlman, Jr., Esq., of Counsel)

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

February 4, 1981

RICHARD BOEHLER,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT-APPELLEE.	:	

Decided by the Commissioner of Education, October 24, 1980

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

For the Resondent-Appellee, Rubin, Lerner & Rubin (Frank J. Rubin, Esq., of Counsel)

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

S. David Brandt and Ruth Mancuso opposed in the matter.

April 1, 1981

GLADYS BRUNER,	:	
PETITIONER-APPELLEE,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF UPPER FREEHOLD REGIONAL, MONMOUTH COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, September 22, 1980

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

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

We are of the opinion that the decision of the Commissioner of Education in this matter is correct, that petitioner was an eleven month employee is evidenced by the three documents discussed by the Commissioner. Namely, her contract for the period in question, her salary acceptance form signed by her and the form signed by her and an officer of the Education Association. All refer to petitioner as having a contract based on an eleven month year.

The specific references to petitioner's salary being based upon eleven months per year override the more general terms of the Master Contract. It is our opinion that the terms of the Master Contract are for general application for district contracts unless an individual contracts for different and more specific terms which are suited to her and the district's needs. See N.J.S.A. 18A:27-6(4).

Accordingly, the Commissioner correctly determined that the months of salary due to petitioner must be computed by dividing petitioner's salary by eleven. The decision of the Commissioner of Education is affirmed.

February 4, 1981

"C.G.", PARENT OF "B.G.",	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE UNION COUNTY REGIONAL HIGH SCHOOL DISTRICT #1, UNION COUNTY,	:	DECISION
RESPONDENT-APPELLEE.	:	
	:	

Decided by the Commissioner of Education, October 14, 1980

Decided by the State Board of Education, January 22, 1981 and February 4, 1981

For the Petitioner-Appellant, Neal Berger, Esq.

For the Respondent-Appellee, Johnstone, Skok, Loughlin & Lane (Franz J. Skok, Esq., of Counsel)

The State Board of Education affirms the Commissioner's decision and finds this case as being within time.

April 1, 1981

BASIL M. CASTNER, :

PETITIONER-APPELLANT, :

V. : SUPERIOR COURT

BOARD OF EDUCATION OF THE TOWNSHIP OF PLUMSTED, : APPELLATE DIVISION

RESPONDENT-RESPONDENT. :

:

Decided by the Commissioner of Education, June 11, 1979.

Decided by the State Board of Education, December 5, 1979.

Argued: November 24, 1980 - Decided March 9, 1981.

Before Judges Bischoff, Milmed and Francis

On appeal from a final determination of the State Board of Education.

James M. Blaney argued the cause for appellant (Starkey, Kelly, Cunningham, Blaney & Ward, attorneys).

Henry G. Tutek argued the cause for respondent (Kessler, Tutek, Futey & Gladfelter, attorneys; David D. Gladfelter, on the brief).

Ruhlman & Butrym filed a brief on behalf of amicus curiae New Jersey Education Association (Richard A. Friedman and Cassel R. Ruhlman, Jr. on the brief).

David W. Carroll filed a brief on behalf of amicus curiae New Jersey School Boards Association (Paula M. Mullaly, on the brief).

John J. Degnan, Attorney General of New Jersey filed a statement in lieu of brief on behalf of New Jersey State Board of Education (M. Kathleen Duncan, Deputy Attorney General, of counsel and on the statement).

PER CURIAM

The question presented by this appeal is whether the statute of limitations applicable to contract claims, N.J.S.A. 2A:14-1, applies to a teacher's claim for back pay based upon the statutory military service credit (N.J.S.A. 18A:29-11). The Commissioner of Education held the statute of limitations inapplicable to such a claim and awarded petitioner back pay.

The State Board of Education, however, rejected the Commissioner's decision and held the claim barred by N.J.S.A. 2A:14-1.

The essential facts are undisputed. In June 1977 petitioner, Castner, then a principal in the Plumsted Township school district, filed three petitions with the Commissioner of Education requesting consideration of controversies relating to petitioner's placement on the salary guide, the board's withholding of petitioner's adjustment increment and the board's failure to reimburse petitioner for back military pay from 1958 through 1969. (Apparently Castner became a principal in 1969 and asserted no claim for the period commencing after that date.) Only the third petition, relating to military service pay, is at issue on this appeal.

No hearing was held before the Commissioner, the parties agreeing to submit the matter as on summary judgment based upon the pleadings, other documents and briefs. The Commissioner rejected the local board's statute of limitations defense, reasoning that the military service credit "is the result of legislative fiat [N.J.S.A. 18A:29-11] and not a contractual status." Accordingly, the Commissioner awarded Castner $3,400, representing the additional amount Castner would have received during the eleven school years between 1958 and 1969 had he been properly credited with his military service. The State Board disagreed, ruling that notwithstanding the statutory source of the military service credit, "the substance of the claim is still a suit by a public employee to recover compensation -- a matter cognizable in a court of law" and hence within the strictures of N.J.S.A. 2A:14-1. Since Castner had not asserted his claim until 1977, eight years after the last alleged underpayment in 1969 and eighteen years after the cause of action first accrued, the State Board held that the claim was filed beyond the six-year period mandated by the statute. It is from this ruling that Castner appeals.

The applicable statute of limitations, N.J.S.A. 2A:14-1, reads in pertinent part as follows:

> Every action at law for trespass to real property, for any tortious injury to real or personal property, for taking, detaining, or converting personal property, for replevin of goods or chattels, for any tortious injury to the rights of another not stated in sections 2A:14-2 and 2A:14-3 of this Title, or for recovery upon a contractual claim or liability, express or implied, not under seal, or upon an account other than one which concerns the trade or merchandise between merchant and merchant, their factors, agents and servants, shall be commenced within 6 years next after the cause of any such action shall have accrued. [Emphasis added.]

The question is whether the State Board correctly viewed the unpaid credit as a "contractual claim" or whether it should be deemed a statutory benefit independent of contract and therefore not subject to traditional defenses such as the statute of limitations.

The military service credit is conferred by N.J.S.A. 18A:29-11:

> 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 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.
>
> 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 absence. [Emphasis added.]

It is undisputed that Castner had the requisite military service.

The mechanics of the military service credit were surveyed in Wall Tp. Ed. Assn. v. Bd. of Ed. of Tp. of Wall, 149 N.J. Super. 126 (App. Div. 1977):

> ...[T]he credit for military service entitles a teacher to a status equal to that of a teacher who has had employment credit for the same period of time up to a maximum of four years. This credit is not limited to the benefits of his status on the salary

> guide but extends also to any other benefits granted to other teachers because of longevity experience in the teaching field. We find nothing in the statute suggesting a contrary construction. As a consequence, when a teacher with military service is advanced on the salary guide because of the statutory credit, he remains in that position for equal treatment with those on the same step because of teaching experience. The statute is clear and unambiguous in its intent. [Id. at 130-131]

In holding that petitioner's claim was no different from any cause of action grounded in contract, the State Board principally relied upon Miller v. Bd. of Chosen Freeholders, Hudson County, 10 N.J. 398 (1952), a case which Castner and amicus curiae New Jersey Education Association (N.J.E.A.) claim is either distinguishable or obsolete. In that case the widows of two former county prison guards filed suit for salary allegedly due their spouses under a statute fixing salary increments for county jail employees. The county asserted the defense, among others, of the statute of limitations, noting that the complaint was filed more than six years after the last date of employment of each employee. The Appellate Division disagreed, holding that "the plaintiffs' claims were based upon a statutory direction and therefore not barred by the asserted statute of limitation." 10 N.J. at 403. The statute as it then existed was phrased differently, reading in pertinent part as follows:

> All actions in the nature of...debt, founded upon a lending or contract without a specialty..., actions in the nature of actions upon the case... shall be commenced within six years next after the cause of any such action has accrued....[10 N.J. at 405; italics deleted.]

The Supreme Court reversed, reasoning that an implied contractual relationship exists between a public employer and its employees, which contract must be deemed to incorporate any pertinent statutory terms. Id. at 408-409, 413. It summarized its holding as follows:

> ...Where the services have been performed, and the public servant is an employee, a civil action lies for recovery of the reasonable value of the services rendered, and the action is in the nature of an action upon the case at common law, namely assumpsit, principally indebitatus assumpsit, the action in form and substance resorted to for such relief in this State for more than a

> century. And where the circumstances permit, i.e., when debt as well as assumpsit would lie at common law, the action is in the nature of debt founded upon a contract without a specialty. (The significance of the term 'without a specialty' as used in R.S. 2:24-1, supra, is that it imported absence of a writing obligatory in its technical sense, rather than in its loose sense as, for example, a duty imposed by statute. See discussion of R.S. 2:24-5, post). 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. [Id. at 409; citation omitted.]

Thus the law appears to be that a statutory source of a cause of action does not necessarily take the suit outside the statute of limitations. State v. Atlantic City Electric Co., 23 N.J. 259 (1957). If the statute merely dictates certain terms of an independent, existing contractual relationship, express or implied, the bar applies. If the statute, however, creates a liability where none existed, either at common law or by virtue of a contract between the parties, that liability may be enforced without regard to the statute of limitations.

Castner seeks to avoid the conclusion suggested by Miller by reasoning that N.J.S.A. 18A:29-11 is a statutory directive enacted to achieve a special aim, viz., rewarding veterans, and thus is immune from the limitations bar. He further argues that the statute does not set one's basic salary nor does it provide compensation according to services rendered. We disagree. N.J.S.A. 18A:29-11 is a legislatively decreed measure of compensation for qualifying veterans, which comes into operation only after an employment contract has been entered into. A teacher has no claim to the credit until he begins rendering services, and whether he receives the credit in any subsequent year depends upon whether he has continued to perform as an employee. As in Miller, supra, the substantive right stems from the rendition of service pursuant to a teaching contract, and in the absence thereof the benefits conferred by N.J.S.A. 18A:29-11 are meaningless, since the provisions have nothing to

relate to. The statutory credit is, in effect, an implied term of the teaching contract, in that it determines one's step on the salary scale throughout one's career. Cf. Kloss v. Township of Parsippany-Troy Hills, 170 N.J. Super. 153, 159 (App. Div. 1979), holding that N.J.S.A. 40A:9-5, allowing public employees service credits for prior public employment, was an implied term of the negotiated employment contract. Hence the credit is directly related to compensation and thus, under Miller, enforcement of it is a contractual claim subject to N.J.S.A 2A:14-1. Castner and N.J.E.A. seek to avoid Miller by noting the difference between the statutory language of R.S. 2:24-1, "actions in the nature of...debt, founded upon a lending or contract without a specialty," and as it is now under N.J.S.A. 2A:14-1, "action at law...for recovery upon a contractual claim or liability, express or implied, not under seal...." The legislative revision was largely an attempt to modernize the language of the former statute; and within the context of this appeal, we hold that both versions relate to the type of contractual claim under appeal.

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).

We decline to consider petitioner's additional arguments that (1) the local board is estopped to assert the statute of limitations by reason of its failure to notify him of the existence of the military service credit statute; and (2) the statutory bar is inapplicable due to the "continuing nature" of the wrong committed. Neither argument was raised below, thus depriving this Court of a factual record and adversarial argument upon which we might base our review. Nieder v. Royal Indemnity Ins. Co., 62 N.J. 229, 234 (1973).

Affirmed.

MADELINE CHILDS,	:	
PETITIONER-APPELLEE,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, September 29, 1980

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

For the Respondent-Appellant, Howard Schwartz, Esq.

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

April 1, 1981

Pending New Jersey Superior Court

IN THE MATTER OF THE TENURE	:	
HEARING OF LOUIS CIRANGLE,	:	SUPERIOR COURT
SCHOOL DISTRICT OF THE	:	APPELLATE DIVISION
BOROUGH OF MAYWOOD, BERGEN	:	
COUNTY, NEW JERSEY.	:	
	:	

Decided by the Commissioner of Education, February 11, 1980

Decided by the State Board of Education, May 7, 1980

Argued January 20, 1981 -- Decided January 30, 1981

Before Judges Matthews, Morton I. Greenberg & Ashbey

On appeal from the final decision of the State Board of Education

Howard Stern argued the cause for appellant Cirangle (Stern, Steiger, Croland & Bornstein, attorneys; Bruce J. Ackerman, on the brief).

Marvin H. Gladstone argued the cause for respondent Maywood Board of Education (Gladstone, Hart & Rathe, attorneys).

John J. Degnan, Attorney General, filed a statement in lieu of brief on behalf of the State Board of Education (Jaynee LaVecchia, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

Until his dismissal on February 11, 1980, Louis Cirangle was a tenured Superintendent of Schools and Business Administrator of the Maywood, Bergen County, School District. On May 3, 1978, charges were filed against him with the Maywood Board of Education under the procedures established in N.J.S.A. 18A:6-11, alleging, in 13 charges, misappropriation and misuse of public funds, fraud, material alteration of documents, insubordination and other conduct unbecoming a school administrator and employee.

Proceedings on the tenure charges were stayed pending resolution of an action instituted by Cirangle seeking an order voiding certain of the charges on the ground that they were

certified at a nonpublic session of the board in violation of the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq. That action was resolved in Cirangle v. Maywood Board of Education, 164 N.J. Super. 595 (Law Div. 1979), which held that Cirangle was not entitled to a public hearing on the charges under the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq.

The charges were then forwarded to the Commissioner of Education, pursuant to N.J.S.A. 18A:6-10 et seq. A hearing was held on May 8, 9, 10, and 30, and July 23, 1979 before a hearing officer. That officer dismissed charges 2, 4 and 12. However, he upheld charge one, finding that Cirangle paid $25 from public monies to an optometrist for personal services in violation of board policy requiring that such examinations must first be approved by the board. Regarding charge three, the hearing officer found that Cirangle altered the optometrist's bill and should have known that doing so violated good business practice, although the alteration was not done with intent to deceive the board but rather to explain the reason for the bill. Charges 5 through 11 were also upheld, with the hearing officer finding that Cirangle obligated the board to pay for a $420 saxaphone for his daughter and a clarinet for his son. Finally, the officer found that there was no reason to doubt Cirangle's assertion that he intended to donate the television set in his office to the school, but that obligating the board for $38 for its repair without prior authorization showed poor judgment (charge 13). He concluded that a penalty short of dismissal was warranted, because: (1) although Cirangle "took to himself at the board's expense pecuniary benefits beyond those to which he was entitled," the hearing officer was "unable...to discern within this record fraudulent intent"; (2) when the expenditures were questioned, Cirangle made partial restitution and left the saxaphone with the board for use by students, and (3) Cirangle was "not charged with unbecoming conduct or inefficiency in providing leadership in curricular matters."

The Commissioner of Education found that the charges proved warranted Cirangle's dismissal. The State Board of Education affirmed the Commissioner's decision.

Cirangle first contends that charges 11 through 13 were not certified within 45 days as required by N.J.S.A. 18A:6-13 and therefore should have been dismissed. We disagree.

N.J.S.A. 18A:6-11, before its amendment in 1975, provided:

> If written charge is made against any employee of a board of education under tenure

> during good behavior and efficiency, it shall be filed with the secretary of the board and the board shall determine by majority vote of its full membership whether or not such charge and the evidence in support of such charge would be sufficient, if true in fact, to warrant a dismissal or a reduction in salary, in which event it shall forward such written charge to the commissioner, together with certificate of such determination.

N.J.S.A. 18A:6-13 required that the board certify the charges "...within 45 days after receipt of the written charge, or within 45 days after the expiration of the time for correction of the inefficiency, if the charge is of inefficiency, [else] the charge shall be deemed to be dismissed and no further proceeding or action shall be taken thereon."

N.J.S.A. 18A:6-11 was amended by L. 1975, c. 304, §1 to provide:

> Any charge made against any employee of a board of education under tenure during good behavior and efficiency shall be filed with the secretary of the board in writing, and a written statement of evidence under oath to support such charge shall be presented to the board. The board of education shall forthwith provide such employee with a copy of the charge, a copy of the statement of the evidence and an opportunity to submit a written statement of position and a written statement of evidence under oath with respect thereto. After consideration of the charge, statement of position and statements of evidence presented to it, the board shall determine by majority vote of its full membership whether there is probable cause to credit the evidence in support of the charge and whether such charge, if credited, is sufficient to warrant a dismissal or reduction of salary. The board of education shall forthwith notify the employee against whom the charge has been made of its determination, personally or by certified mail directed to his last known address. In the event the board finds that such probable cause exists and that the charge, if credited, is sufficient to warrant a dismissal or reduction of salary, then it shall forward such written charge to the commis-

> sioner for a hearing pursuant to N.J.S. 18A:6-16, together with a certificate of such determination. Provided, however, that if the charge is inefficiency, prior to making its determination as to certification, the board shall provide the employee with written notice of the alleged inefficiency, specifying the nature thereto, and allow at least 90 days in which to correct and overcome the inefficiency. The consideration and actions of the board as to any charge shall not take place at a public meeting.

The purpose of the amendment, as provided in the legislative statement attached to the bill, was:

> ...to improve procedures for filing charges against tenured employees and determining whether such charges should be forwarded to the commissioner for a hearing. It requires the board to give the accused a copy of the written charge, a statement of the evidence submitted and an opportunity to respond. On the basis of this information the board must decide whether they will forward the charge to the commissioner.
>
> [Senate Education Committee, Statement to Senate No. 671]

In In the Matter of the Tenure Hearing of Marilyn Feitel, School District of the City of Newark, Essex County, 1977 S.L.D. 451, aff'd State Board of Education, 1977 S.L.D. 458, the Commissioner determined that L. 1975, c. 304 §1 expands the limited function of the board regarding tenure charges which prior to the amendment was merely to review the charge to see whether, if true, it would warrant dismissal or reduction in salary: the board now must serve a copy of the charge upon the affected employee, notify him of the opportunity to respond, and consider the charge and the statements in support of and in opposition to the charge to determine whether probable cause exists to credit the evidence in support of the charge; if probable cause does exist, then the board determines whether the charge, if true, would be sufficient to warrant dismissal or reduction in salary. Feitel, 1977 S.L.D. at 454-455. The Commissioner found consequently that the 45 day period provided by N.J.S.A. 18A:6-18 begins to run when the employee files his statement or when the allotted time for the employee to file the statement expires. Feitel, above, at 455-456. The Commissioner also determined that fifteen days was a reasonable period of time for the employee to respond. Id. at 455. Cf. In the Matter of

the Tenure Hearing of Joseph Murphy, School District of Manalapan-Englishtown, Monmouth County, which modified the ruling in Feitel by leaving it to the board to determine what is a reasonable time for the employee to respond to charges.

Although we are not bound by the Commissioner's interpretation of the statute, see Mayflower Securities v. Bureau of Securities, 64 N.J. 85, 93 (1973), we believe that the Commissioner correctly interpreted that the 45-day period in N.J.S.A. 18A:6-13 begins to run after the employee has responded to charges or after a reasonable period provided for him to respond to charges has passed. While the literal text of N.J.S.A. 18A:6-13 directs that the board determine whether to certify a charge "within 45 days after receipt of the written charge," the subsequent amendment of N.J.S.A. 18A:6-11 requiring the board to give the accused a copy of the written charge, a statement of the evidence submitted and an opportunity to respond before determining whether to certify the charge suggests that the Legislature intended the 45-day period to begin to run from the date the question of whether to certify the charge is cognizable by the board. Feitel, 1977 S.L.D. at 456. We believe that a literal interpretation of N.J.S.A. 18A:6-13 would be contrary to the spirit of the amendment to N.J.S.A. 18A:6-11.

Here, charges 11 through 13 were filed with the board on June 30, 1978 and a copy was handed to Cirangle on the same date. Cirangle responded by submitting a sworn, written statement on July 14, 1978, and the board certified charges 11 through 13 within 45 days thereafter, on August 21, 1978. We find, therefore, that the Commissioner correctly refused to dismiss charges 11 through 13 under N.J.S.A. 18A:6-13.

Cirangle also contends that the Commissioner misused his discretion in ordering the penalty of dismissal after the hearing officer had recommended only a salary reduction of $1,500 per year, retroactive to June 6, 1978. Cirangle argues that since the hearing officer found he was guilty of exercising poor judgment but not of intent to defraud, imposition of the penalty of dismissal was arbitrary, capricious, and unreasonable.

N.J.S.A. 18A:6-10 provides in pertinent part that no person under tenure shall be dismissed "during good behavior and efficiency" except "for inefficiency, incapacity, unbecoming conduct, or other just cause." Cirangle's argument implies that "just cause" for dismissal encompasses only intentional conduct and not mere negligence. Just cause for dismissal has never been so narrowly interpreted, however. Rather, dismissal may be predicated upon any dereliction of duty touching upon one's "fitness to discharge the duties and functions of one's office or position." In re Tenure Hearing of Grossman, 127 N.J. Super. 13, 29 (App. Div. 1974), certif. den. 65 N.J. 292 (1974); School

District of Wildwood v. State Board of Education, 116 N.J.L. 572, 573 (Sup. Ct. 1936). See also, Laba v. Newark Board of Education, 23 N.J. 364, 385 (1957). Unfitness for a position in a school system may be evidenced by a series of incidents, or by one incident if sufficiently flagrant. In re Fulcomer, 93 N.J. Super. 404, 421 (App. Div. 1967); Redcay v. State Board of Education, 130 N.J.L. 369, 371 (Sup. Ct. 1943), aff'd 131 N.J.L. 326 (E. & A. 1944). Here, Cirangle misused public funds in order to purchase a clarinet for his son and a $420 saxaphone for his daughter and, without prior authorization from the board, obligated it to pay $25 for an optometrist's services for himself and $38 for repair of his personal television set. In our judgment, such conduct is unbecoming a superintendent of schools and constitutes just cause for dismissal. We concluded, accordingly, that the Commissioner did not misuse his discretion in ordering the sanction of dismissal. New Jersey Guild of Hearing Aid Dispensers v. Long, 75 N.J. 544, 562-563 (1978).

Affirmed.

[Cert. den. 87 N.J. 347 (1981)]

CIRO D'AMBROSIO,	:	
PETITIONER-APPELLANT,	:	
V.	:	SUPERIOR COURT
BOARD OF EDUCATION OF THE WARREN HILLS REGIONAL SCHOOL DISTRICT, WARREN COUNTY,	:	APPELLATE DIVISION
RESPONDENT-RESPONDENT.	:	
	:	

Decided by the Commissioner, March 24, 1980

Decided by the State Board, October 1, 1980

Argued: October 5, 1981 - Decided October 22, 1981

Before Judges Bischoff and King

Stephen E. Klausner argued the cause for appellant (Klausner & Hunter, attorneys; Jane Z. Lifset, on the brief).

David A. Wallace argued the cause for respondent (Aron, Till & Salsberg, attorneys).

James J. Zazzali, Attorney General of New Jersey, filed a statement in lieu of brief on behalf of the State Board of Education (M. Kathleen Duncan, Deputy Attorney General, of counsel and on the statement)

PER CURIAM

Petitioner-appellant, a non-tenured public school teacher, claims a wrongful refusal to renew his teaching contract for a third year because of his national origin, Italian. He further claims a retaliatory firing because he was successful in persuading the School Board to renege on its refusal to rehire him for the prior year, 1978-1979.

The Commissioner assigned the case to the Office of Administrative Law as a contested matter pursuant to N.J.S.A. 52:14F-1, et seq. Petitioner was ordered by the administrative law judge to file an amended petition containing a more definite contention. Thereafter the amended petition was dismissed by the

judge because "[r]eading the amended petition in a light most favorable to petitioner, and giving petitioner the benefit of every reasonable doubt, the amended petition still contains nothing but bare and generalized allegations unsupported by specific facts."

The Commissioner of Education, out of concern with the paucity of the record, remanded the case for a plenary hearing. The local board appealed to the State Board which unanimously reversed the Commissioner for "the reasons expressed in the Administrative Law Judge's decision." Petitioner appeals from the State Board's decision; we affirm.

Petitioner, of Italian birth, possesses a teaching certificate from the State Department of Education. He has a master's degree in nuclear physics from Rutgers University. The record reveals no other information as to his background, age, employment history, etc. He was employed by the local board for 1977-1978 as a high school physics teacher. His contract was originally not renewed for these reasons.

> Lack of an acceptable performance in the verbal presentation of the subject matter of physics in a manner and degree affording an adequate explanation for the students' comprehension.
>
> Lack of an acceptable degree of performance in English enunciation in classroom presentation of subject materials.

For unspecified reasons the local board reneged on this nonrenewal and he was rehired for the [1978-1979] term to teach physical science at the junior high school level. He was notified in April 1979 of his nonrenewal because

> The reasons your contract was not renewed for 1979/80 are as follows:
>
> (1) Lack of contemporary communication with students.
>
> (2) Inability to establish yourself as the authority figure in class.
>
> (3) Student control is not always satisfactory.
>
> (4) Students are confused as to the expectations of teacher. This confusion existed in both academic and behavior matters.

The record contains seven written classroom evaluations, six average and one below average, for the 1978-1979 term. Two mention petitioner's problem with the English language, several suggest problems in his organization and control of his class.

Petitioner had no right to have his contract renewed. In Re Board of Ed. of City of Englewood, 150 N.J. Super. 265 (App. Div. 1977), certif. den. 75 N.J. 525 (1977). The local Board must, if asked, give nonrenewed nontenured teachers a statement of reasons why a new contract was not offered. Donaldson v. Bd. of Ed. of No. Wildwood, 65 N.J. 236 (1974). Nonretention may not be based on constitutionally impermissible grounds, such as invidious discrimination or the exercise of First Amendment rights. Id. at 242-243. But we have stated "that the bare assertion or generalized allegations of a constitutional right does not create a claim of constitutional dimensions." Winston v. Bd. of Ed. of So. Plainfield, 125 N.J. Super. 131, 144 (App. Div. 1973), aff'd 64 N.J. 582 (1974). In the present case the local board specifically stated the grounds for nonrenewal. The 1978-1979 evaluations document petitioner's performance as mediocre to average. He was given a second chance when the local board rehired him for that term and apparently didn't improve to their satisfaction.

On his administrative appeal, even after amending his affirmative pleading, petitioner came forward with only a bare allegation of discrimination because of national origin and a bare claim of retaliatory nonrenewal. On this record the administrative law judge could properly find that petitioner had not "presented a bona fide claim of constitutional stature" and that he was not "entitled to a full evidentiary hearing." Winston, supra, 125 N.J. Super. at 145. Since the judge's finding was legally sound, we cannot say that the State Board's ruling "that petitioner had failed to sustain the allegations that his nonrenewal was solely for reasons of his ethnic background" was arbitrary, capricious, unreasonable or contrary to law. As the State Board correctly stated, "it is not appropriate for the Commissioner in a nonrenewal case to substitute [his] judgment for that of the local board."

We also are satisfied that petitioner was adequately afforded the right to a full presentation before the State Board. Clearly, the State Board had the opportunity to review the legal and factual record made before the administrative law judge and before the Commissioner. In the context petitioner's right under N.J.S.A. 52:14B-10(c) to be heard was satisfied.

We reject petitioner's argument that the local board had no right to appeal the Commissioner's interlocutory order remanding the matter for a full hearing. The applicable statute clearly states that "any party aggrieved by any determination of the commissioner" may appeal to the State Board. N.J.S.A. 18A:6-27. (Emphasis supplied.)

We also find petitioner's final argument without merit. He contends that the failure of the State Board to act within 45 days requires adoption of the Commissioner's ruling. Even if the State Board is considered "the head of the agency" within N.J.S.A. 52:14B-10(c), the lack of timely action results in an adoption of the decision of the administrative law judge as the "final decision," not the Commissioner's decision. Since the judge's decision was adverse to the petitioner any alleged administrative irregularity was harmless.

Affirmed.

ELAINE DI RICCO, :

PETITIONER-RESPONDENT, :

V. : SUPERIOR COURT

BOARD OF EDUCATION OF THE TOWN OF WEST ORANGE, ESSEX COUNTY, : APPELLATE DIVISION

RESPONDENT-APPELLANT. :

_____:

Decided by the Commissioner of Education, November 15, 1979

Decided by the State Board of Education, June 11, 1980

Submitted January 19, 1981 -- Decided January 28, 1981

Before Judges Seidman and Antell

On appeal from the State Board of Education

Samuel A. Christiano, attorney for appellant (Stephen J. Christiano, on the brief)

Rothbard, Harris & Oxfeld, attorneys for respondent (Sanford R. Oxfeld, of counsel and on the brief)

John J. Degnan, Attorney General of New Jersey, attorney for State Board of Education, filed a statement in lieu of brief (M. Kathleen Duncan, Deputy Attorney General, of counsel and on the statement)

PER CURIAM

The West Orange Board of Education (hereinafter board) appeals from the final determination of the State Board of Education (hereinafter State Board) directing the board to reinstate petitioner, a nurse-health teacher, with full back salary. The board had refused to renew her contract for a fourth year, which would have given her tenure, because of petitioner's "attendance record." During her first year of employment on a part-time basis she had been absent 6 times; the following year she was absent on 12 occasions and in her third year she accumulated 8 absences.

The matter was initially heard by an administrative law judge who found that the board's action in refusing to renew petitioner's contract for excessive absenteeism amounted to an

abuse of its statutory authority. He found that at no time had the board suggested that petitioner was absent for other than valid reasons and that the board had never required petitioner to verify her illnesses by a physician's certificate pursuant to N.J.S.A. 18A:30-4. He further found that her total absences did not exceed her accumulated statutory sick leave entitlement (N.J.S.A. 18A:30-2, 3) of ten days per year.

The Commissioner affirmed the findings and conclusion of the administrative law judge, adopting them as his own. The board appealed the Commissioner's decision to the State Board. The State Board's legal committee recommended that the Commissioner's decision be reversed, pointing to the broad discretion vested in local boards of education when determining whether to grant tenure. The legal committee concluded that the board acted within its discretionary power to award tenure only to persons who, on the basis of past performance, would most probably provide the least interruption to the classroom program. The State Board, however, rejected the recommendation of its legal committee and affirmed the Commissioner's decision for the reasons he had stated therein. The board appeals, contending that it did not exceed its discretionary powers in refusing to renew petitioner's contract on the basis of her attendance record. We agree and reverse.

There can be no doubt that a local board of education has broad discretionary authority in determining which of its employees will be granted tenure. Donaldson v. Bd. of Ed. of No. Wildwood, 65 N.J. 236, 241 (1974). The board has great latitude in determining the fitness of a particular employee for permanent employment. Gilchrist v. Board of Education of Haddonfield, 155 N.J. Super. 358, 367 (App. Div. 1978). Its power to determine who shall be employed and reemployed to teach in the public schools in each successive year had been characterized by the Commissioner of Education as one of the most essential of the board's broad discretionary powers under N.J.S.A. 18A:11-1. Inez Nettles v. Board of Education of the City of Bridgeton, 1976 S.L.D. 555, 560. The only limitation upon this discretionary power is that a local board may not act in a manner which is arbitrary, unreasonable, capricious, without a rational basis or with improper motives. Kopera v. West Orange Board of Education, 60 N.J. Super. 288, 294 (App. Div. 1960). While nonrenewal of an untenured teacher's contract may be grounded on reasons unrelated to unsatisfactory classroom or professional performance, Donaldson v. Bd. of Ed. of No. Wildwood, supra at 241, it may not be grounded in reasons which would violate an express statutory or constitutional policy, Gilchrist v. Board of Education of Haddonfield, supra at 367.

In the present case, the reason advanced by the board for denying petitioner tenure clearly does not violate any constitutional or statutory principles. Although the number of days

of sick leave utilized by petitioner fell within the limits fixed by N.J.S.A 18A:30-2 the board's determination to withhold reappointment by reason thereof was not irrational.

It is within a local board's discretion to seek teaching staff members who, based on past performance, are most likely to provide the least interruption in the classroom educational program. Without question any absence by a teacher from classroom duties interrupts the educational process. The local board is best suited to determine when absences become excessive for the purposes of granting that teacher tenure status. We find nothing in this record to suggest that the board abused its discretionary powers in determining that tenure status should not be accorded petitioner because of her attendance record.

The decision of the State Board is reversed and the petition is dismissed.

STEPHEN DORE AND CHRISTINE SENA,	:	
PETITIONERS-APPELLEES,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BEDMINSTER, SOMERSET COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, May 30, 1980

For the Petitioners-Appellees, Ruhlman & Butrym (Richard A. Friedman, Esq., of Counsel)

For the Respondent-Appellant, Blumberg, Rosenberg, Mullen & Blumberg (William B. Rosenberg, Esq., of Counsel)

Petitioners alleged that the Board's failure to renew their employment contracts was improper because in one school year the petitioners, non-tenured teachers, were given only two evaluations rather than the three required by N.J.S.A. 18A:27-3.1 and N.J.A.C. 6:3-1.19. They also contended that the determination of the Board in each case was unreasonable and in bad faith. The Commissioner affirmed a finding by the Administrative Law Judge that nonrenewal of Petitioner Sena was proper; however, he further held that because of the Board's failure to comply with the evaluation requirements, the Board should pay that petitioner 60 days' salary. With respect to Petitioner Dore, the Commissioner held that the Board did not establish valid reasons for termination, and he ordered that petitioner be reinstated with back pay.

In the case of Sena, the Board has not appealed the award of 60 days' salary of her, therefore the matter is not before us.

With respect to Dore, Petitioner was advised in writing by the Board President that his employment would not be continued

> "***due to insufficient positive evidence of teaching effectiveness; particularly poor teaching methods as evidenced by poor grading procedures, lack of structured classroom and not providing student materials (textbooks, homework assignments), lack of continual assessment of student progress."

The issue to be determined in this matter is simply whether the local board abused its discretion and acted in an arbitrary and capricious manner toward the non-tenured, at-will employee Dore. In view of the discretion to be afforded local boards with respect to their teaching staff members, Petitioner Dore has not shown that Respondent's action was so patently arbitrary and capricious as to require the extraordinary remedy of reinstatement.

We find the record sufficient to uphold the foregoing statement of reasons. We cannot say that the Board was arbitrary or unreasonable in reaching its decision as to Dore, considering the material presented to it, even though there had also been some favorable reports regarding him.

Aside from the foregoing, the State Board cannot condone the failure of the local district to provide at least three adequate evaluations as presently required. By way of mitigation here, we note that the principal had been cautioned to comply with the mandate, and that his unsatisfactory performance has led to the termination of his employment. Nevertheless, we take this opportunity to impress upon all boards of education the essential importance of complete and proper evaluations of the professional staff.

The State Board reverses the Commissioner's decision in Dore, and dismisses the petition.

Attorney Exceptions are noted.

January 22, 1981

Pending New Jersey Superior Court

KATHY DYSON,

PETITIONER-APPELLANT,

V. STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE BOROUGH OF MONTVALE, BERGEN COUNTY, DECISION

RESPONDENT-APPELLEE.

Decided by the Commissioner of Education, July 21, 1980

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

For the Respondent-Appellee, Irving C. Evers, Esq.

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

March 4, 1981

Pending New Jersey Superior Court

"E.E.", BY HIS PARENT,	:	
PETITIONER-APPELLEE,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF METUCHEN, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, November 3, 1980

For the Petitioner-Appellee, Wilentz, Goldman & Spitzer (Gordon Golum, Esq., of Counsel)

For the Respondent-Appellant, Borrus, Goldin & Foley (James E. Stahl, Esq., of Counsel)

The State Board of Education affirms the Commissioner's decision with the modification that respondent shall reimburse petitioner only for tuition cost for E.E. while he attended the Arlington School of the McLean Hospital, Belmont, Massachusetts and the Yale Psychiatric Institute, New Haven, Connecticut. Such reimbursement shall not cover any period after E.E. attained the age of 20.

March 4, 1981

BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
"D.S.", BY HIS PARENTS,	:	DECISION
RESPONDENTS-CROSS APPELLANTS.	:	

Decided by the Commissioner of Education, November 13, 1980

For the Petitioner-Appellant, Rubin, Lerner & Rubin (David B. Rubin, Esq., of Counsel)

For the Respondent-Cross Appellants, Theodore A. Sussan, Esq.

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

June 3, 1981

Pending New Jersey Superior Court

LILLY FEIT,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE, UNION COUNTY,

RESPONDENT-APPELLEE.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, December 8, 1980

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

For the Respondent-Appellee, Green & Dzwilewski
(Allan P. Dzwilewski, Esq., of Counsel)

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

April 1, 1981

Pending New Jersey Superior Court

PAUL FITZPATRICK, ET AL., :

PETITIONERS-CROSS-APPELLANTS, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE TOWNSHIP OF WEEHAWKEN, HUDSON COUNTY, : DECISION

RESPONDENT-APPELLANT. :

Decided by the Commissioner of Education, June 13, 1980

For the Petitioners-Cross-Appellants, Goldberg & Simon (Theodore M. Simon, Esq., of Counsel)

For the Respondent-Appellant, Krieger & Chodash (Brian Flynn, Esq., of Counsel)

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

March 4, 1981

Pending New Jersey Superior Court

JAMES J. FLANAGAN, :

PETITIONER-RESPONDENT, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY, : DECISION

RESPONDENT-APPELLANT. :

_____:

Decided by the Commissioner of Education, November 6, 1980 and January 14, 1981

Decided by the State Board of Education, April 1, 1981

For the Petitioner-Respondent, Kaye & Davison
(Duane O. Davison, Esq., of Counsel)

For the Respondent-Appellant, Murray, Granello & Kenney
(Malachi J. Kenney, Esq., of Counsel)

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

S. David Brandt opposed in the matter.

Mateo DeCardenas abstained in the matter.

December 2, 1981

Pending New Jersey Superior Court

KATHRYN R. FOX,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE WATCHUNG HILLS REGIONAL HIGH SCHOOL DISTRICT, SOMERSET COUNTY,	:	DECISION
RESPONDENT-APPELLEE.	:	
	:	

Decided by the Commissioner of Education, July 11, 1980

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

For the Respondent-Appellee, Buttermore, Mullen & Jeremiah (William S. Jeremiah, Esq., of Counsel)

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

January 22, 1981

PAUL FURLONG,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY,	:	DECISION
RESPONDENT-APPELLEE.	:	

Decided by the Commissioner of Education, December 15, 1980

For the Petitioner-Appellant, Schneider, Cohen, Solomon & DiMarzio (Bruce D. Leder, Esq., of Counsel)

For the Respondent-Appellee, Frederick R. Dunne, Esq.

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

March 4, 1981

IN THE MATTER OF THE TENURE	:	
HEARING OF JOHN GISH, SCHOOL	:	
DISTRICT OF THE BOROUGH OF	:	STATE BOARD OF EDUCATION
PARAMUS, BERGEN COUNTY.	:	DECISION
	:	

Decided by the Commissioner of Education, October 27, 1980

For the Petitioner-Appellee, Winne, Banta, Rizzi & Harrington (Joseph A. Rizzi, Esq., of Counsel)

For the Respondent-Appellant, Rothbard, Harris & Oxfeld (Emil Oxfeld, Esq., of Counsel)

This is an appeal from a decision of the Commissioner dismissing the Respondent after finding him guilty of a number of charges of insubordination and unbecoming conduct.

Among other things the Board charged the Respondent with possession of LSD and marijuana, along with paraphernalia for use in connection therewith. The Administrative Law Judge and the Commissioner both sustained this charge, noting that Respondent's possession of controlled dangerous substances resulted in his arrest, arraignment, pretrial intervention and two-year period of probation. The Commissioner also sustained the administrative findings that Respondent had disregarded an administrator's warning against adverse publicity from his advocating of gay rights; that Respondent had consciously chosen to actively endorse, publicize and advocate a "gay life style" and thereby to make "his private behavior a matter of public debate"; and that by so doing the Respondent had compromised his ability to function effectively within his own classes and as a member of the Paramus High School faculty. This latter finding was further supported by the opinion of the Board's psychiatrist that "respondent's compulsive advocacy of gay rights could be expected to insert itself into respondent's performance as a teacher with potential adverse impact on the development of sexual self-identity of adolescent pupils."

We are unanimous in deciding that Respondent's involvement with controlled dangerous substances sufficed alone to warrant his dismissal from the Paramus School System. In the Matter of the Tenure Hearing of Jeffrey Wolfe, ____ S.L.D. ____, decided by the State Board November 5, 1980. However, in view of the great public importance of another fundamental issue raised by the Commissioner's decision, i.e. whether Respondent's publicly advocating a "gay life style" constituted unbecoming conduct justifying his dismissal, a majority of the State Board believe we should go further and decide that question.

In Acanfora v. Board of Education of Montgomery County, 359 F.Supp. 843 (D.Md. 1973), aff'd 491 F. 2d 498 (4th Cir.), cert. den. 419 U.S. 836 (1974), the Court of Appeals set forth in the following language the law as laid down by the United States Supreme Court for such cases:

> "The Supreme Court has explained the general principles that govern the intricate balance between the rights of a teacher to speak as a citizen on public issues related to the schools and the importance the state properly attaches to the uninterrupted education of its youth. Balancing these interests, the Court has ruled that a teacher's comments on public issues concerning schools that are neither knowingly false nor made in reckless disregard of the truth afford no ground for dismissal when they do not impair the teacher's performance of his duties or interfere with the operation of the schools. Pickering v. Board of Education, 391 U.S. 563, 88 S. Ct. 1731, 20 L.Ed. 2d 811 (1968)." (Emphasis supplied). 491 F. 2d at 500.

In Acanfora a teacher had been transferred from the classroom to a non-teaching position when the Board discovered that he was a homosexual. Shortly after this event, Acanfora granted several press and television interviews, which the Court characterized as "tending to spark controversy" and contained "an element of sensationalism". Speaking about the diffficulties which homosexuals encounter, the plaintiff sought community acceptance, but also stressed that he had not and would not discuss his sexuality with the students. After posing the key questions "whether the speech is likely to incite or produce imminent effects deleterious to the educational process", the District Court determined that the notoriety sought and obtained by Acanfora was likely to incite or produce deleterious effects on the school system (359 F.Supp. at 856-857). Declaring that the right of privacy entails a "duty of privacy", the Court found an obligation on the part of a homosexual teacher to avoid publicity pertaining to his private life, saying:

> "A homosexual teacher is not at liberty to ignore or hold in contempt the sensitivity of the subject to the school community. Indeed, it is the very lack of necessity or appropriateness for the public appearances which contributes substantially to their inflammatory character, and hence, to the likelihood of incitement or production of effects deleterious to the educational process." 359 F. Supp. at 856-857.

The Court of Appeals affirmed the validity of the transfer, but not on the ground relied upon by the District Court; it refused relief to the plaintiff because he had withheld a material fact in his application for employment, i.e. his affiliation with a homosexual organization. On the issue of whether the plaintiff's public statements and actions regarding homosexuality justified his transfer out of the classroom, the Court of Appeals overruled the District Court, stating:

> "In short, the record discloses that press, radio, and television commentators considered homosexuality in general, and Acanfora's plight in particular, to be a matter of public interest about which reasonable people could differ, and Acanfora responded to their inquiries in a rational manner. There is no evidence that the interviews disrupted the school, substantially impaired his capacity as a teacher, or gave the school officials reasonable grounds to forecast that these results would flow from what he said. We hold, therefore, that Acanfora's public statements were protected by the first amendment and that they do not justify either the action taken by the school system or the dismissal of his suit." 491 F. 2d at 500-501.

As we read the decision of the Supreme Court in Pickering and the Court of Appeals in Acanfora, the mere apprehension or fear of disturbance in the operation of the school system is not enough to justify abridgement of a teacher's freedom to speak out regarding his homosexuality. In balancing the right of free speech as against the duty of the school board to run a thorough and efficient educational program, free speech must prevail unless or until there is substantial evidence that the teacher's public words and activities (otherwise lawful) actually result in disruption of the school system or impairment of his capacity as a teacher, or that the school officials have reasonable grounds to forecast such results from the teacher's conduct.

In the matter before us we encounter no evidence that Respondent's speeches and actions outside of school did in actuality interfere with the educational program in his classroom or reduce his effectiveness as a teacher or impair his relations with the faculty. As for the likelihood that such trouble would occur, the District Court in Acanfora found in the affirmative on a similar set of facts. The Court of Appeals, however, held to the contrary. We consider this decision of the Court of Appeals a persuasive precedent, and in our opinion the views expressed by that Court govern the issue here. Furthermore, we find that the opinion of the Board's psychiatrist that Respondent's advocacy of

gay rights could be expected to insert itself into the school situation balanced against the testimony of the other two testifying psychologists is not sufficient to satisfy the aforementioned standard requiring substantial evidence of a reasonable expectation of disruption to the school district's educational program in order to override the First Amendment interests involved and to justify dismissal for conduct unbecoming a teacher. Quinlan v. Board of Education of North Bergen Township, 73 N.J. Super. 40, 50-51 (App. Div. 1961).

Respondent was found to have engaged in conduct unbecoming a teacher for failing to conform to an administrator's directive that petitioner not generate undue publicity in his newly elected position as President of the N.J.G.A.A. Because this order restricted petitioner's right to speak and advocate a controversial but lawful public position outside the classroom, it could not itself be a lawful order. Therefore, its violation could not constitute unbecoming conduct. Charges 1, 2, 3 4, 7, 8, 9, 11 and 12 are dismissed.

Furthermore, we do not believe that the board has adequately proven that Respondent is unfit to return to the classroom. Review of the entire record reveals conflicting evidence with regard to the likelihood that returning Respondent to classroom duties poses potential psychological harm to the students in his charge. There exists one psychiatrist's surmise that it can reasonably be expected that Respondent's advocacy of gay rights might insert itself in the classroom. The Commissioner attached greater significance to the testimony of the board psychiatrist than to the other testifying psychologists on this issue. We, however, do not believe that Respondent should be dismissed on the conjecture of one psychiatrist's opinion especially when that testimony is weighed against the testimony of the two psychologists and against the fact that petitioner has satisfactorily taught in the Paramus School District from 1965 to June 1972 and the uncontroverted evidence that Respondent has never discussed with any Paramus High School pupil his sexual preferences, his views on alternative lifestyles or the rights or problems of gay people in our society. Furthermore, there exists conflicting testimony from the expert witnesses as to whether such leakage of Respondent's views poses potential psychological harm to the children. We feel this "two step" potential for harm situation is distinguishable from the factual situation present in In re Grossman, 127 N.J. Super. 13 (App. Div. 1974), and that it is not sufficient to justify dismissal of Respondent.

Accordingly, we affirm the Commissioner's decision on the sole basis of the Respondent's possession of controlled dangerous substances, which alone warrants his dismissal from the Paramus School System. Insofar as the determinations of the Administrative Law Judge and the Commissioner differed from our view concerning the legal consequences of Respondent's advocacy of gay rights and Respondent's fitness to teach, they are hereby overruled.

Anne S. Dillman and P. Paul Ricci opposed in the matter.

Attorney exceptions are noted.

July 1, 1981

Pending New Jersey Superior Court

SUSAN T. HEADLEY,	:	
PETITIONER-APPELLEE,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF JEFFERSON, MORRIS COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, June 27, 1980

For the Petitioner-Appellee, Saul R. Alexander, Esq.

For the Respondent-Appellant, Murray, Granello & Kenney (James P. Granello, Esq., of Counsel)

For the Amicus Curiae New Jersey School Boards Association, David W. Carroll, Esq. (Paula S. Mullaly, Esq., on the Brief)

The central issue on this appeal is whether a Board of Education must provide sick pay for disability arising from childbirth during an unpaid maternity leave of absence when the Board has a policy of not paying for any sick days during an extended unpaid leave. In Logandro v. Cinnaminson Township Board of Education, 1980 S.L.D. _____, decided June 11, the State Board answered the foregoing question in the negative. We now re-affirm that conclusion for the reasons hereinafter stated.

The Petitioner herein requested in May of 1979 that she be granted a one-year maternity leave of absence to begin in November of that year. She was thereupon advised by the Superintendent of Schools that she had a choice between either an unpaid leave or utilization of her sick days for the period of her disability in connection with the anticipated birth of her child. In July of 1979 Petitioner chose to take the unpaid extended leave which, at the suggestion of the Superintendent, would begin September 1. During the ensuing September, while on her unpaid leave, Petitioner requested the use of her accumulated sick leave during the period of her actual disability. The Board of Education denied this request, in accordance with its policy of not permitting the use of sick days for disabilities arising during extended unpaid leaves.

Despite the fact that the negotiated agreement between the teachers and the Board did not provide for sick pay during leaves of absence, the Administrative Law Judge and the Commissioner ruled that the Petitioner's period of physical disability entitled her to sick leave pursuant to statute (N.J.S.A. 18A:30-1 et seq.), and that the Board's policy of not allowing a staff member to use accumulated sick days during a leave of absence was arbitrary and ultra vires.

This determination is contrary to the ruling in Logandro, supra, where the State Board decision declared in express terms that "the Board may refuse to pay sick leave for any kind of disability arising during an unpaid leave of absence." As in Logandro, there is no showing here that the Board policy regarding sick leave during long term personal leaves without pay was any different for pregnancy than for any other types of disability. The law requires that disability due to pregnancy and childbirth be treated the same as any other disability - it should neither be favored nor discriminated against. Castellano v. Linden Board of Education, 158 N.J. Super. 350 (App. Div. 1978), aff'd 79 N.J. 407 (1979); Cinnaminson Township Board of Education v. Silver, 1976 S.L.D. 738, aff'd State Board 1979 S.L.D. 817 Furthermore, it is undisputed here that Petitioner was given a choice between an unpaid leave of absence for one year or absenting herself for a period of her actual disability. Having selected the unpaid leave, she may not then obtain sick leave contrary to the Board's uniform policy with respect to all disabilities occurring during unpaid leaves of absence.

If the teaching staff considers this policy unreasonable, it should negotiate the matter with the Board of Education just as any other term or condition of employment.

The Respondent Board of Education and the Amicus brief have raised the question of the Commissioner's jurisdiction over this controversy, urging that Petitioner should have pursued her contractual remedies through the grievance procedure. We uphold the Commissioner's finding of jurisdiction under N.J.S.A. 18A:6-9, since this case involves the question whether the school law provisions regarding sick leave render invalid any Board policy or negotiated agreement on sick leave during an extended leave without pay.

In accordance with the foregoing views, the State Board directs that the decision below be reversed and the petition be dismissed.

Attorney Exceptions are noted.

February 4, 1981

SUSAN T. HEADLEY,	:	
APPELLANT,	:	
V.	:	SUPERIOR COURT
BOARD OF EDUCATION OF THE TOWNSHIP OF JEFFERSON, MORRIS COUNTY,	:	APPELLATE DIVISION
RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, June 27, 1980

Decided by the State Board of Education, September 3, 1980

Argued November 4, 1981 -- Decided November 17, 1981

Before Judges Ard and Trautwein

On appeal from final determination of the New Jersey State Board of Education

Irving C. Evers argued the cause for appellant (Saul R. Alexander, attorney).

James P. Granello argued the Cause for respondent Board of Education of the Township of Jefferson (Murray, Granello & Kenney, attorneys; Mr. Granello, of counsel; Charles X. Gormally, on the brief).

A statement in lieu of brief was filed on behalf of the New Jersey State Board of Education by James R. Zazzali, Attorney General, attorney (Jaynee LaVecchia, Deputy Attorney General, of counsel and on the statement).

PER CURIAM

This is an appeal from a final decision by the State Board of Education holding that the local board could properly refuse appellant's request to utilize sick leave for her disability due to childbirth. The disability occurred after the board had approved and appellant commenced an unpaid maternity leave of absence. The board had a policy of not permitting use of any sick leave during an extended unpaid leave of absence.

The only issue presented in the proceedings below was whether the board's denial of the use of accumulated sick days by appellant, while she was on an unpaid maternity leave of absence,

for a two-month period of disablement due to pregnancy was ultra vires. As indicated in her notice of appeal to this court, it is the State Board's determination of that issue which is the subject of the appeal. Any other issue is not properly before us.

Although appellant challenges as discriminatory and invalid the article in the negotiated agreement between appellant's union and the local board dealing with maternity leaves, we decline to consider the issue, it being raised for the first time on appeal and thus not properly before us. In any event, appellant's allegation concerning that provision in the negotiated agreement is but a minor portion of her appellate argument. Appellant is a tenured staff member of the Jefferson Township Board of Education. The thrust of her claim is that the State Board's decision violated the holdings of Castellano v. Linden Board of Education, 79 N.J. 407 (1979) and Farley v. Ocean Tp. Bd. of Ed., 174 N.J. Super. 449 (App. Div. 1980), certif. den. 85 N.J. 140 (1980). Appellant argues that the State Board's action in effect forced her to choose between two rights guaranteed her by those cases: her right to use her sick leave for the period of her disability due to childbirth and her right to a maternity leave for the purpose of child rearing.

In many respects the case before us is substantially similar to the circumstances present in both Castellano and Farley. The contract provision in this case provides for a mandatory period of leave of absence due to pregnancy. The appellant in this case sought to take advantage of the maternity leave of absence but also desired to use her accumulated sick leave for which no provision was made in the negotiated agreement. The board in this case, as in Castellano and Farley, refused to permit her to use her sick days in conjunction with her maternity leave.

However, it is at this point that the similarity between this case and the other two ends. While the mandatory maternity leave provision in this case requires that appellant apply for a leave of absence, the provision does not prohibit her return to work when she is physically able to do so. Although the provision requires that the leave of absence "shall stand for one (1) year following the birth of the child," it also provides that the superintendent of schools could recommend a lesser term or a greater term. However, the most significant difference in this case from the others is the absence of any evidence that the board's policy is applied any differently to nonpregnant female or male employees. Indeed that was the very basis for the State Board's decision in the present case. Here there was no proof that a male employee who became disabled while on an approved unpaid leave of absence would be permitted to utilize his sick days for the period of disability. In both Castellano and Farley there was proof that board policy denied sick leave benefits only

for disabilities arising from pregnancy and childbirth and not for any other disability. The basic holdings of both Farley and Castellano are that a board's policy with respect to pregnancy and the use of accumulated sick leave in relation to an unpaid maternity leave of absence can be no different than its policy with respect to use of accumulated sick leave in relation to an unpaid leave of absence for any other purpose. As long as there is no discrepancy or differentiation in the treatment of pregnant and nonpregnant employees, the board's policy will be permitted to stand. Pregnancy and its attendant disabilities are to be treated no differently than any other disability in terms of the availability of sick leave benefits.

Under the circumstances of this case, we are unable to conclude that the State Board erred in its determination with respect to appellant's ability to use her accumulated sick leave after the commencement of an unpaid leave of absence. Since the proofs do not indicate a discriminatory application of this policy by the board, we perceive no reason why the board cannot implement such a policy. The decision of the State Board is therefore affirmed.

IN THE MATTER OF THE TENURE	:	
HEARING OF DAVID HERBST, SCHOOL	:	STATE BOARD OF EDUCATION
DISTRICT OF THE TOWNSHIP OF	:	DECISION
EAST BRUNSWICK, MIDDLESEX COUNTY.	:	

Decided by the Commissioner of Education, August 8, 1980

For the Petitioner-Appellee, Rubin, Lerner & Rubin
(Frank J. Rubin, Esq., of Counsel)

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

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

March 4, 1981

IN THE MATTER OF THE TENURE	:	
HEARING OF CHARLES KANE, SCHOOL	:	SUPERIOR COURT
DISTRICT OF THE TOWNSHIP OF	:	APPELLATE DIVISION
PARSIPPANY-TROY HILLS, MORRIS	:	
COUNTY.	:	
_____	:	

Decided by the Commissioner of Education, October 5, 1979

Decided by the State Board of Education, June 11, 1980

Argued May 4, 1981 - Decided May 19, 1981

Before Judges Allcorn, Pressler and Furman

On appeal from the State Board of Education

William S. Greenberg argued the cause for the appellant (Greenberg & Mellk, attorneys; Arnold M. Mellk and John B. Prior, Jr., on the brief).

John W. Adams argued the cause for Parsippany-Troy Hills Township Board of Education (Dillon, Bitar & Luther, attorneys; Henry N. Luther, III, of counsel; Mr. Adams and Myles C. Morrison, on the brief).

PER CURIAM

The State Board of Education affirmed the Commissioner of Education in dismissing appellant Kane, a tenured teacher, for conduct unbecoming a teacher and for insubordination, after a hearing pursuant to N.J.S.A. 18A:6-16.

On appeal Kane contends that the determination to dismiss him was not based upon substantial competent evidence and that he was not guilty of conduct unbecoming a teacher but, at the worst for him, of errors of judgment in his capacity as assistant track coach.

But, in addition to six charges arising out of Kane's relationship to the high school's track program, he was found guilty on 13 classroom and related academic charges, including his permitting use of vulgar and obscene language in compositions without correction, his violation of mandatory sign-out and sign-in procedures in taking students away from school premises

for lunch, his use of vulgarities in front of parents in back-to-school night presentations, his discussion in class of administrative evaluations contrary to specific direction to him by school authorities, his discussion in class of personal problems of a class member, his disruption while proctoring an examination by writing irrelevant words on the chalkboard, his discussion in class of his own marital and other personal problems, his portraying himself in class as the victim of persecution by the school administration and his failing repeatedly to attend required meetings and conferences.

Upon comprehensive review of the record we are convinced that, cumulatively, the charges against Kane warrant the sanction of his dismissal. Redcay v. State Board of Education, 130 N.J.L. 369, 371 (Sup. Ct. 1943), aff'd o.b. 131 N.J.L. 326 (E. & A. 1944). We are also convinced that the findings below were reasonably reached on sufficient credible evidence present in the record and should not be disturbed on appeal. In re Tenure Hearing of Grossman, 127 N.J. Super. 13, 22-23 (App. Div. 1974), certif. den. 65 N.J. 292 (1974).

At oral argument Kane raised an issue not raised below: that he should have not been subject to dismissal except upon clear and convincing proof, in accordance with our holding in Matter of Polk, 178 N.J. Super. 191, 193 (App. Div. 1981) that disciplinary proceedings against physicians are subject to the clear and convincing, not the preponderance of evidence, standard of proof.

Matter of Polk involved revocation of a license to practice a profession, medicine and surgery, and is thus not specifically applicable to the appeal before us. Kane did not forfeit his teacher's certificate as the result of his dismissal, nor is he barred from employment as a teacher. Moreover, in our view the essentially undisputed facts supporting the charges against Kane would have satisfied the clear and convincing standard of proof.

We affirm.

WESLEY A. KOCH, ET AL.,	:	
PETITIONERS-APPELLANTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BERGEN COUNTY VOCATIONAL SCHOOLS, BERGEN COUNTY,	:	DECISION
RESPONDENT-APPELLEE.	:	
	:	

Decided by the Commissioner of Education, April 14, 1980

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

For the Respondent-Appellee, Greenberg & Covitz (Morton R. Covitz, Esq., of Counsel)

Five teaching staff members of the respondent Board of Education claimed entitlement to military service credits with respect to basic salary and to longevity credits. All of these Petitioners had reached their maximum salary by the end of the school year 1965-66. The Commissioner accordingly held and, we think, properly so that the claims with respect to salary were barred by the six-year statute of limitations (N.J.S.A. 2A:14-1), since the petition was not filed until 11 years after the last alleged underpayment of salary.

The longevity credits seem to us to stand on a different footing. They are paid each year to a staff member who has been employed in the District for more than a certain number of years. Thus the denial of a longevity credit or a portion thereof (based on not giving proper credit for military service) creates a new cause of action each time it occurs. The claims for longevity credits or portions thereof denied for the six years immediately preceding the filing of the petition were therefore not barred by the statute of limitations.

There remains the equitable doctrines of laches and estoppel with respect to claims not outlawed by the statute. In accordance with the State Board decisions in Union Township Teachers Association v. Board of Education of Union Township and Lavin v. Board of Education of Hackensack Borough, both decided March 5, 1980, we believe that the controversy with respect to longevity credits should be remanded to the Commissioner for further proceedings in accordance with the principles laid down

by us in those two cases. See also the decisions of the Appellate Division in Giorno v. Township of South Brunswick, 170 N.J. Super. 162 (App. Div. 1979) and Kloss v. Township of Parsippany-Troy Hills, 170 N.J. Super. 153 (App. Div. 1979).

The State Board accordingly affirms the Commissioner's decision as to military service credits with respect to salary and remands the remainder to the Commissioner for reconsideration as to the longevity credits.

Attorney Exceptions are noted.

March 4, 1981

THOMAS KUC AND JOHN NILIO, :

PETITIONERS-APPELLANTS, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE TOWNSHIP OF HAZLET, MONMOUTH COUNTY, : DECISION

RESPONDENT-APPELLEE. :

:

Decided by the Commissioner of Education, September 29, 1980

For the Petitioners-Appellants, Chamlin, Schottland, Rosen & Cavanagh (Thomas W. Cavanagh, Esq., of Counsel)

For the Respondent-Appellee, Crowell & Otten (Robert H. Otten, Esq., of Counsel)

The State Board of Education affirms the Commissioner's decision and denies petitioner's motion to have this matter remanded to the Administrative Law Judge for the purpose of taking testimony from Frank Farrell.

March 4, 1981

Pending New Jersey Superior Court

BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD,

PETITIONER-APPELLEE,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF BRICK AND LONG BEACH ISLAND BOARD OF EDUCATION, OCEAN COUNTY,

RESPONDENTS-APPELLEES.

LONG BEACH ISLAND BOARD OF EDUCATION,

PETITIONER-APPELLEE,

V.

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

RESPONDENT-APPELLANT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, September 26, 1980

For the Lakewood Board, Rothstein, Mandell & Strohm (Mark Williams, Esq., of Counsel)

For the Brick Township Board, Anton & Sendzik (Martin B. Anton, Esq., of Counsel)

For the Long Beach Island Board, Kalac, Newman & Griffin (Peter P. Kalac, Esq., of Counsel)

For the Wall Township Board, Magee, Kirschner & Graham (William C. Nowels, Esq., of Counsel)

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

March 4, 1981

MARJORIE A. LAVIN, :

PETITIONER-APPELLANT, :

V. : SUPERIOR COURT

BOARD OF EDUCATION OF THE BOROUGH OF HACKENSACK, : APPELLATE DIVISION

RESPONDENT-RESPONDENT. :

:

Decided by the Commissioner of Education, June 6, 1979

Decided by the State Board of Education, March 5, 1980

Argued: December 8, 1980 - Decided March 9, 1981

Before Judges Bischoff, Milmed and Francis

On appeal from a final determination of the State Board of Education

Louis P. Bucceri argued the cause for appellant (Goldberg & Simon, attorneys; Gerald M. Goldberg of counsel; Louis P. Bucceri, on the brief).

E. Gerard McGovern argued the cause for respondent.

John J. Degnan, Attorney General of New Jersey, filed a statement in lieu of brief on behalf of the State Board of Education (Jaynee LaVecchia, Deputy Attorney General, of counsel and on the statement).

The opinion of the court was delivered by

FRANCIS, J.A.D.

The questions presented by this appeal are: (1) whether the statute of limitations applicable to contract claims, N.J.S.A. 2A:14-1, applies to teachers' claims for retroactive pay based upon the statutory military service credit, N.J.S.A. 18A:29-11; (2) whether the claim may be barred by the equitable doctrines of laches or estoppel; and (3) whether the State Board of Education's exclusion of any salary credit for military service time of less than a full year's duration was proper.

The essential facts are undisputed. Petitioner (Lavin) was a member of the United States Army from January 2, 1943 through October 20, 1945, a period of 2 years, 9 months and 19 days. She was employed by the Board of Education of the Borough of Hackensack (local Board) commencing on September 1, 1968 and thereafter to the present time. At no time was Lavin given salary credit for any time spent in the military service.

In or about May or June 1977 Lavin was informed by an acquaintance of a newspaper article regarding a decision of the Superior Court Appellate Division which she conceived as indicating some basis for a claim based on her military service. As a result of this information Lavin's husband contacted the New Jersey Education Association (N.J.E.A.) for information, and was told that a claim might exist. By letter of October 14, 1977 Lavin applied for salary credit to the Borough of Hackensack Superintendent of Schools. She was told by the superintendent to contact the N.J.E.A. Lavin's N.J.E.A. representative negotiated with the local board in her behalf throughout the winter of 1978 in an attempt to resolve the matter without litigation. This proving fruitless a petition was filed with the Commissioner of Education seeking compliance with the military service credit statute, N.J.S.A. 18A:29-11.

The Commissioner of Education held the statute of limitations inapplicable to such a claim. He reasoned that the military credit is the result of a legislative fiat, N.J.S.A. 18A:29-11, and not a contractual status. He further declined to apply laches or estoppel against petitioner, and in allowing her claim, equated her military service of 2 years, 9 months and 19 days as equivalent to three academic years in determining the allowable additional incremental military credits. He thus awarded petitioner the additional amount she would have received since 1968 had she been properly credited with her military service, after which she would be entitled to her regular salary as enhanced by the three yearly increments based on her military service. The State Board, however, rejected the Commissioner's decision and held that the claim, insofar as it included the period prior to six years immediately preceding the filing of the claim, was barred by the statute of limitations N.J.S.A. 2A:14-1. The State Board also rejected petitioner's claim for back pay in its entirety for that period of time prior to September 1978 on the basis of laches and estoppel. The State Board did allow petitioner military service credit of two years to be applied subsequent to September 1978, i.e., the beginning of the 1978-79 academic year.

In rejecting the claim on the basis of the statute of limitations the State Board ruled in essence that notwithstanding the statutory source of the military service credit, the substance of the claim is still a suit by a public employee to recover compensation -- a matter cognizable in a court of law and

hence within the strictures of N.J.S.A. 2A:14-1. Since Lavin had not asserted her claim until October 1977, nine years after the first alleged underpayment in 1968 and nine years after the cause of action first accrued, the State Board held that at least a portion of the claim was filed beyond the six year period mandated by the statute. The applicable statute of limitations, N.J.S.A. 2A:14-1, reads in pertinent part as follows:

> Every action at law for trespass to real property, for any tortious injury to real or personal property, for taking, detaining, or converting personal property, for replevin of goods or chattels, for any tortious injury to the rights of another not stated in sections 2A:14-2 and 2A:14-3 of this Title, or for recovery upon a contractual claim or liability, express or implied, not under seal, or upon an account other than one which concerns the trade or merchandise between merchant and merchant, their factors, agents and servants, shall be commenced within 6 years next after the cause of any such action shall have accrued. [Emphasis added.]

The question is whether the State Board correctly viewed the unpaid credit as a contractual claim or whether it should be deemed a statutory benefit independent of contract and therefore not subject to traditional defenses such as the statute of limitations.

The military service credit is conferred by N.J.S.A. 18A:29-11:

> 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 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.
>
> 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 absence. [Emphasis supplied.]

It is undisputed that Lavin had the requisite military service.

The mechanics of the military service credit were surveyed in Wall Tp. Ed. Assn. v. Wall Tp. Bd. of Ed., 149 N.J. Super. 126 (App. Div. 1977):

> ...[T]he credit for military service entitles a teacher to a status equal to that of a teacher who has had employment credit for the same period of time up to a maximum of four years. This credit is not limited to the benefits of his status on the salary guide but extends also to any other benefits granted to other teachers because of longevity experience in the teaching field. We find nothing in the statute suggesting a contrary construction. As a consequence, when a teacher with military service is advanced on the salary guide because of the statutory credit, he remains in that position for equal treatment with those on the same step because of teaching experience. The statute is clear and unambiguous in its intent. [at 130-131.]

In holding that petitioner's claim was no different from any cause of action grounded in contract, the State Board principally relied upon Miller v. Hudson County Freeholders Bd., 10 N.J. 398 (1952), a case which Lavin claims is distinguishable. In that case the widows of two former county prison guards filed suit for salary allegedly due their spouses under a statute fixing salary increments for county jail employees. The county asserted the defense, among others, of the statute of limitations, noting that the complaint was filed more than six years after the last date of employment of each employee. The Appellate Division disagreed, holding that "the plaintiffs' claims were based upon a statutory direction and therefore not barred by the asserted statute of limitation." 10 N.J. at 403. The statute as it then existed (R.S. 2:24-1) was phrased differently, reading in pertinent part as follows:

> All actions in the nature of...debt, founded upon a lending or contract without a specialty..., actions in the nature of actions upon the case... shall be commenced within six years next after the cause of any such action has accrued...[10 N.J. at 405; italics deleted.]

The Supreme Court reversed, reasoning that an implied contractual relationship exists between a public employer and its employees, which contract must be deemed to incorporate any pertinent statutory terms. Id. at 408-409, 413. It summarized its holding as follows:

> ...Where the services have been performed, and the public servant is an employee, a civil action lies for recovery of the reasonable value of the services rendered, and the action is in the nature of an action upon the case at common law, namely assumpsit, principally indebitatus assumpsit, the action in form and substance resorted to for such relief in this State for more than a century. And where the circumstances permit, i.e., when debt as well as assumpsit would lie at common law, the action is in the nature of debt founded upon a contract without a specialty. (The significance of the term "without a specialty" as used in R.S. 2:24-1, supra, is that it imported absence of a writing obligatory in its technical sense, rather than in its loose sense as, for example, a duty imposed by statute. See discussion of R.S. 2:24-5, post). 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. [at 409; citation omitted.]

Thus, the law appears to be that a statutory source of a cause of action does not necessarily take the suit outside the

statute of limitations. State v. Atlantic City Electric Co., 23 N.J. 259 (1957). If the statute merely dictates certain terms of an independent, existing contractual relationship, express or implied, the bar applies. If the statute, however, creates a liability where none existed, either at common law or by virtue of a contract between the parties, that liability may be enforced without regard to the statute of limitations.

Lavin seeks to avoid the conclusion suggested by Miller by reasoning that N.J.S.A. 18A:29-11 is a statutory directive enacted to achieve a special aim, viz., rewarding veterans, and thus is immune from the limitations bar. She further argues that the statute does not set one's basic salary nor does it provide compensation according to services rendered. We disagree. N.J.S.A. 18A:29-11 is a legislatively-decreed measure of compensation for qualifying veterans, which comes into operation only after an employment contract has been entered into. A teacher has no claim to the credit until she begins rendering services, and whether she receives the credit in any subsequent year depends upon whether she has continued to perform as an employee. As in Miller, supra, the substantive right stems from the rendition of service pursuant to a teaching contract, and in the absence thereof the benefits conferred by N.J.S.A. 18A:29-11 are meaningless, since the provisions have nothing to relate to. The statutory credit is, in effect, an implied term of the teaching contract, in that it determines one's step on the salary scale throughout one's career. Cf. Kloss v. Parsippany-Troy Hills Tp., 170 N.J. Super. 153, 159 (App. Div. 1979), holding that N.J.S.A. 40A:9-5, allowing public employees service credits for prior public employment, was an implied term of the negotiated employment contract. Hence the credit is directly related to compensation and thus, under Miller, enforcement of it is a contractual claim subject to N.J.S.A. 2A:14-1.

Lavin seeks to avoid Miller by noting the difference between the statutory language of R.S. 2:24-1, "actions in the nature of... debt, founded upon a lending or contract without a specialty," and it is now under N.J.S.A. 2A:14-1, "...actions at law...for recovery upon a contractual claim or liability, express or implied, not under seal...." The legislative revision was largely an attempt to modernize the language of the former statute, and within the context of this appeal, we hold that both versions relate to the type of contractual claim under appeal.

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 Ins. Co., 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. South Brunswick Tp., 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 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.

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.

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.

Petitioner Lavin contends finally that the State Board's ruling, that credit can be given only for full years of military service, deprives her of any credit at all for the 9 months, 19 days served during her third year in the military. She urges adoption of the Commissioner's view that service should be rounded off to the nearest year, such that any period of a half year or more is counted as a full year. The pertinent portion of the military service credit statute, N.J.S.A. 18A:29-11, is as follows:

> 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 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.
>
> 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 absence. [Emphasis supplied.]

In the absence of any clear guidance in the statute for dealing with fractions of years, the Commissioner attempted an equitable solution based upon public policy favoring veterans, conceiving that to adopt a stricter view would be to penalize a teacher because her military service fell even a day short of a year. The State Board, however, took a more rigid view:

> ...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.

Petitioner argues, very persuasively, that when read in light of (1) the legislative intent of N.J.S.A. 18A:29-11, (2) the subtitle of which it is a part, and (3) established educational practice, the statute must be read to permit a full year's credit whenever the period of military service was long enough to warrant an annual salary increment had the person been teaching instead.

Looking to the key statutory language, it mandates that a teacher "receive equivalent years of employment credit for" her military service "as if" she had been employed in teaching during the same period (emphasis ours). The apparent intention to equalize the status of a teacher and a military person was confirmed in Wall Tp. Ed. Ass'n. v. Wall Tp. Bd. of Ed., supra, the only reported case construing N.J.S.A. 18A:29-11. There the issue was whether N.J.S.A. 18A:29-11 applied to "longevity increments contained in the collective negotiating agreement." 149 N.J. Super. at 129. This court discussed the mechanics of the military service credit:

> ...[T]he credit for military service entitles a teacher to a status equal to that of a teacher who has had employment credit for the same period of time up to a maximum of four years. This credit is not limited to the benefits of his status on the salary guide but extends also to any other benefits granted to other teachers because of longevity experience in the teaching field. We find nothing in the statute suggesting a contrary construction. As a consequence, when a teacher with military service is advanced on the salary guide because of the statutory credit, he remains in that position for equal treatment with those on the same step because of teaching experience. The statute is clear and unambiguous in its intent.
>
> ...A veteran, therefore, is entitled to the same increments if his total service as a fully certified teacher plus his military service credit equals the number of years required for eligibility. Since the statute

> mandates equivalency, the local board cannot apply the agreement in a manner which is violative of the statutory requirement. [at 130-131; emphasis supplied.]

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. But the statute places no time adjective in front of military service; rather, it refers to "years of employment credit" (emphasis ours) 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.

In arguing that "years of employment credit" under N.J.S.A. 18A:29-11 refers to academic years, petitioner notes that N.J.S.A. 18A:29-6, the pertinent definitional section, defines "year of employment" as "employment by a [full-time teaching staff] member for one academic year in any publicly owned and operated college, school or other institution of learning for one academic year in this or any other state or territory of the United States [emphasis ours]. 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."

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.

Many computational alternatives are suggested by petitioner as more appropriate than the rigid standard suggested by the board. In declining to adopt the unrealistic standard set by the board, we find it unnecessary to explore all of these alternatives for the purposes of this case. On the facts in this case it is appropriate to allow the claim for the military service credit to commence as of September 1978, i.e., in a time coinciding with the school year.

We therefore hold that the petitioner is barred by laches and the statute of limitations for any retroactive salary adjustments prior to the academic year commencing September 1978; and that petitioner is entitled to the prospective application of three years of military service credit as of the aforementioned date.

We affirm the decision of the State Board, except as modified, so as to award petitioner three years of military service credit instead of two. We remand the matter to the Commissioner of Education for disposition in conformity with this opinion.

[178 N.J. Super. 221 (App. Div. 1981)]

Pending New Jersey Supreme Court

IN THE MATTER OF THE BOARD :
OF EDUCATION OF THE CITY OF : STATE BOARD OF EDUCATION
LINDEN, UNION COUNTY. : DECISION

Decided by the Commissioner of Education, October 6, 1980

For the Petitioner-Appellee, Alfred E. Ramey, Jr., Esq., Deputy Attorney General

For the Respondent-Appellant, Greenwood & Sayovitz (Robert H. Greenwood, Esq., of Counsel)

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

May 6, 1981

MANALAPAN-ENGLISHTOWN EDUCATION ASSOCIATION, :

APPELLANT, :

V. : SUPERIOR COURT

BOARD OF EDUCATION OF THE MANALAPAN-ENGLISHTOWN REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY, : APPELLATE DIVISION

RESPONDENT. :

_____:

Decided by the Commissioner of Education, August 30, 1979

Decided by the State Board of Education, February 6, 1980

Argued January 6, 1981 -- Decided January 30, 1981

Before Judges Fritz and Polow.

On appeal from New Jersey State Board of Education.

Michael D. Schottland argued the cause for appellant (Chamlin, Schottland, Rosen & Cavanagh, attorneys; Mr. Schottland, on the brief).

Sanford D. Brown argued the cause for respondent (Dawes & Youssouf, attorneys; Mr. Brown, on the brief; John I. Dawes, of counsel).

John J. Degnan, Attorney General of New Jersey, filed a statement in lieu of brief on behalf of State Board of Education (Jaynee LaVecchia, Deputy Attorney General, of counsel and on the statement).

The opinion of the court was delivered by FRITZ, P.J.A.D.

This is an appeal by a local education association (association) from a determination by the commissioner of education, affirmed by the state board of education on the opinion of the commissioner, that a local board of education did not err in failing to certify certain disciplinary charges against a principal under N.J.S.A. 18A:6-11.

At the outset we observe that on this appeal the association asks us to declare that the local board of education

should not engage in fact finding under N.J.S.A. 18A:6-11 proceedings. We will not address this question because we are satisfied that it was not isolated below by the appellant sufficiently to be considered as an issue having been there raised. In its appeal to the commissioner, the association merely complained that the local board "misapplied the standard required under the Statute." The parties conferred in the office of the assistant commissioner of education in charge of controversies and disputes prior to consideration of the appeal. Certain agreements and stipulations were reached. An order was entered which spoke of the anticipated determination simply as one of "whether or not the [local] Board will be compelled to certify the tenure charges." It is true that the local board argued before the commissioner in support of its "quasi-judicial evaluative function" and in his opinion the commissioner discussed the charging function of the local board at some length. But this discussion failed to zero in on the precise issue respecting fact finding by the local board and more importantly, failed to recognize or comment upon the role such fact finding, if any, should play in the commissioner's statutorily imposed hearing obligation.

The closest the opinion of the commissioner came in regard to the question of a fact finding privilege in the local board was his view that in the light of the statutory history and In re Fulcomer, 93 N.J. Super. 404 (App. Div. 1967), L. 1975, c. 304 had added a "new dimension" to the N.J.S.A. 18A:6-11 responsibility of local boards which now have "been granted certain discretionary parameters with respect to certifying tenure charges to the Commissioner which did not exist at the time of [McCabe v. Bd. of Ed., Tp. of Brick, 1974 S.L.D. 299, aff'd Docket No. A-3192-73, New Jersey Superior Court, App. Div., April 2, 1975 (1975 S.L.D. 1073)]." We do not believe we should take on such a fundamental and important question without its having been addressed at the outset in the local board and thereafter precisely considered. See Nieder v. Royal Ind. Ins. Co., 62 N.J. 229, 234 (1973); Jackson v. Muhlenberg Hospital, 53 N.J. 138, 141-142 (1969).

We turn to the substantive issues raised on this appeal. While a review of the teachers' complaints produces an intuitive repulsion, considering such events as an alleged course of four-letter word profanities and an admitted physical ejection of a teacher by the principal from his office, that is not the concern here. Simply enough, the problem implicates only questions expressly projected by the statute, N.J.S.A. 18A:6-11: (1) Is there probable cause to credit the evidence in support of the charge and (2) is such a charge, if credited, sufficient to warrant the dismissal of a tenured principal or a reduction of his salary? These are the questions which the local board should have answered. Whether it did, and if so, whether it did so properly is the question which the commissioner was called on to

decide by the appeal of the association to him. Irrespective of whether the local board had a fact finding function, it was certainly not theirs to decide any issues at that point except (1) and (2) above. Nor was it for the commissioner then to determine the merits of the complaints. He does not do that until after a certification. N.J.S.A. 18A:6-16.

Our review is of the action of the commissioner to see if he performed that duty correctly, for the appeal to us is from the action of the State board which summarily affirmed the commissioner.

We are satisfied that the commissioner recognized the task set for him. He stated his obligation in terms of a purported determination by the local board "that there was not probable cause to credit the evidence in support of [the] charges," a statement repeated at least twice in his opinion. The difficulty is that the conclusion of the commissioner thereby implied revolves around a discussion of the limits, if any, of the local board's fact finding prerogative and nowhere addresses that which the local board in fact did. The commissioner has supplied us with no findings at all to aid us in a review of whether he reasonably reached his conclusion that the local board determined there was not probable cause to credit the evidence. His further bare conclusion that the local board "did not abuse its discretionary authority as alleged" is also otherwise unsupported. Without such findings an intelligent assessment of the conclusionary statements of the commissioner is impossible. Van Realty, Inc. v. City of Passaic, 117 N.J. Super. 425, 429 (App. Div. 1971).

Nor does a "finding" that "two such charges have been cured by courts of competent jurisdiction" or that "remaining charges lacked the specificity and did not rise to the level of tenure charges" respond to the inquiry. Such "findings" do not relate to the local board's responsibility which is, as noted above, to determine if there is probable cause to credit the evidence and if so to warrant sanctions. At the very best, these constitute findings more appropriate to a N.J.S.A. 18A:6-16 proceeding.

A "harmless error" type argument might be advanced that the commissioner was thus performing a permissible subsection 16 function as though the charges had been certified. Arguably he is expressing an opinion that "the charges are not sufficient to warrant dismissal or reduction in salary" and so has determined to dismiss the charges. In this respect we note at the outset that he is not privileged to make subsection 16 findings except after a hearing upon notice "to all parties in interest." Passing this for the moment, we observe that if our task were to review the commissioner's findings as though they were subsection 16 findings, we would reverse on the basis that the record does not support either (1) a "cure" of misconduct charges by the

finding in a municipal court that charges there have not been proved beyond a reasonable doubt or (2) any lack of specificity in the individual matters. The Aitken charge clearly accused the principal of lying in the course of official conduct. The Hitzel complaint expressly repeated gutter language of an unseemly and unprofessional nature alleged to have been uttered by the principal in a school corridor presumably during school hours. The Takach denouncement detailed, among many other things, the secreting by the principal of congratulatory letters and the diversion of other material properly destined for the teacher's personnel file in a "concerted effort ... to force Ms. Takach's resignation." The Murphy accusation described a physical assault on school property in conduct admitted by the principal. Whatever else these charges were or were not, they certainly cannot be reasonably said to lack specificity.

We conclude then that we must reverse the decision below principally because it lacks findings necessary to a meaningful assay of the commissioner's conclusions, to the extent that those conclusions deal with the question of whether the local board did or did not find probable cause for crediting the evidence in support of the charges.

The temptation is great at this point to invoke our original jurisdiction under R.2:10-5 and finally dispose of these matters which have nettled the school system and its components, including the citizenry, for so long. In fact, we have the way pointed to such a review in the resolution of the local board. Close examination of this also suggests that whatever the determination there of the probable cause, the sins of the principal, if any, were not in any event sufficient to warrant a sanction, at least in the minds of the local board persons. But we resist that temptation first because here the local board did not make adequate findings in this respect. Secondly, in this connection at least we have less than adequate knowledge of the field to come to an unadvised decision. Here is where the commissioner's expertise is invoked by the statute (among other things, for a reviewing court's benefit) and why the hearing of the charges, if there is to be a hearing, is entrusted to him.

Accordingly we remand to the local board of education. Not to determine that the Aitken charge fails because of a confusion between various parties in the use of the word "observation." Not to determine that the Hitzel and Takach accusations leave more questions than answers or that the proof is insufficient respecting the charges if the charges were to be believed. Not to determine that the Murphy complaint of an admitted physical confrontation lost its thrust as a challenge to "unbecoming conduct, or other just cause" (N.J.S.A. 18A:6-10) because the principal was not deemed beyond a reasonable doubt to have committed a criminal act. We remand so that the local board now may do what it should have done then: expressly determine

whether "there is probable cause to credit the evidence in support of the charge[s] and whether such charge[s], if credited, [are] sufficient to warrant a dismissal or reduction of salary" and then to articulate plainly the reasons for the determination respecting those questions. Following that response the matter shall take whatever administrative course is then available to the parties.

We pause to make it entirely clear that we choose up no sides: none of the foregoing is to be deemed an expression of views of the substantive controversy.

Remanded to the Board of Education of the Manalapan-Englishtown Regional School District. We do not retain jurisdiction.

[187 N.J. Super. 426 (App. Div. 1981)]

PATRICIA MARKOT,	:	
PETITIONER-APPELLANT,	:	
V.	:	SUPERIOR COURT
BOARD OF EDUCATION OF THE BOROUGH OF HAWTHORNE, PASSAIC COUNTY,	:	APPELLATE DIVISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, December 28, 1979

Decided by the State Board of Education, April 8, 1980

Argued April 7, 1981--Decided July 8, 1981

Before Judges Botter, King and McElroy

On appeal from State Board of Education

Arnold M. Mellk argued the cause for appellant (Greenberg & Mellk, attorneys; Mr. Mellk and Allan G. Kelley, on the brief).

Reginald F. Hopkinson argued the cause for respondent Board of Education of Hawthorne (Jeffer, Hopkinson & Vogel, attorneys; Mr. Hopkinson, on the Brief).

Jaynee LaVecchia, Deputy Attorney General, argued the cause for respondent, State Board of Education (James R. Zazzali, Attorney General of New Jersey, attorney; John J. Degnan, former Attorney General, and Ms. LaVecchia, Deputy Attorney General, on the brief; Erminie L. Conley, Assistant Attorney General, of counsel).

PER CURIAM

Appellant, Patricia Markot, appeals from a decision of the State Board of Education dated April 8, 1980 which affirmed a decision of the Commissioner of Education which upheld the resolution of the Hawthorne Board of Education terminating appellant's services effective February 26, 1979.

Appellant was an English teacher at the Hawthorne High School. She was first employed by the Hawthorne Board in March 1976 and was reemployed thereafter until her termination in February 1979. Had her employment not been terminated she would have attained tenure on March 8, 1979.

Appellant's termination of employment resulted primarily from observations made of her classroom activity by Dr. Robert Hausner who became the high school principal on February 1, 1979. On February 5, 1979 Dr. Hausner observed Markot's class for a period of 20 minutes during which Markot and her class engaged in silent reading of a novel, To Kill a Mockingbird. Although Markot testified that the students also were working on worksheets, Hausner testified that he saw no notebooks or worksheets at the students' desks and he observed no communication between teacher and students. The following day Hausner observed the same silent reading in Markot's class for a period of 20 minutes. He testified that he spoke to Markot before leaving the class on February 5 and she indicated that "the remaining portion of this period will be confined totally to silent reading...." Concluding that there was no point "as an evaluator" in staying in the classroom to observe nothing more than a "supervised study hall" instead of the "teaching of English Arts," he left. On February 6 Hausner arrived in the middle of the class period and left about one minute before the class ended. Both Markot and the students were reading the novel silently. He testified that, at a meeting with Markot on February 14 at which the vice-principal Joseph Livatino was present, appellant "clearly stated" that her English 102 class was engaged in silent reading for the entire period on three days, February 5, 6 and 7. Livatino confirmed this in his testimony. He said that Markot defended the practice and maintained that it was "her right" and "her method" and it "should be accepted." He testified further that the first time that appellant mentioned work sheets or work papers was when she testified at the meeting of the Board of Education. This "teaching methodology," involving "extensive implementation of silent reading," was the main reason given by the Hawthorne Board for terminating appellant's employment before she acquired tenure.

There is ample evidence to support the conclusions of the Commissioner of Education, which were adopted by the State Board, that such silent reading of the novel was not a classroom activity which was approved by the Hawthorne Board and that the Hawthorne Board had a sufficient basis for terminating appellant's employment. Although the evaluation by Dr. Hausner was not conducted for a full class period on February 5 or 6 we concur in the State Board's conclusion that such "defect" in compliance with N.J.A.C. 6:3-1.19 did not invalidate the evaluations in the circumstances of this case and did not render the local Board's action arbitrary and capricious. We see no merit in appellant's complaint about the reference in the Commissioner's decision to "philosophical differences" between appellant and Dr. Hausner with regard to silent reading of a novel in class as a teaching methodology. We can discern no federal constitutional right of appellant to use this form of silent reading as a so-called teaching device. Moreover, if these rights were reserved by appellant for her litigation in Federal courts it is unlikely that such courts would be bound by the Commissioner's comment on this subject.

We note also that our careful examination of the record persuades us that the Statement of Facts in appellant's brief incorrectly asserts that the published "English Course of Study" for the Hawthorne High School authorized silent reading as a teaching method for studying a novel as distinguished from a method of improved reading skills. See par. 2 of the section on "Directed Reading Activity," in which the teacher may use silent reading to observe reading rates and habits such as "tension, lip movements, finger or head movements." Consistent with appellant's testimony, at a later point in appellant's brief it is conceded that this manual does not mention silent reading as a technique for "teaching of a novel." Nor did Markot's lesson plans indicate that silent reading for whole periods at a time would be used for teaching a novel. The entry, "Some class time will be allowed from time to time for in-class silent reading," does not suggest the actual practice.

Affirmed.

LINDA MASSA,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY,	:	DECISION
RESPONDENT-APPELLEE.	:	

Decided by the Commissioner of Education, August 25, 1980

For the Petitioner-Appellant, Goldberg & Simon (Louis P. Bucceri, Esq., of Counsel)

For the Respondent-Appellee, Frederick R. Dunne, Esq.

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

January 22, 1981

EMMET F. MC WILLIAMS, :

PETITIONER-APPELLANT, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE BRIDGEWATER-RARITAN SCHOOL DISTRICT SOMERSET COUNTY, : DECISION

RESPONDENT-APPELLEE. :

:

Decided by the Commissioner of Education, December 24, 1980

For the Petitioner-Appellant, Carl John Kerbowski, Esq.

For the Respondent-Appellee, Daniel C. Soriano, Esq.

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

May 6, 1981

IN THE MATTER OF THE TENURE	:	
HEARING OF ELIZABETH MERKOOLOFF,	:	STATE BOARD OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF WASHINGTON, WARREN COUNTY.	:	
	:	

Decided by the Commissioner of Education, December 4, 1980

Decided by the State Board of Education, April 1, 1981

For the Petitioner-Appellee, Henry W. Eckel, Jr., Esq.

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

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

Anne Dillman opposed in this matter.

June 3, 1981

ARTHUR L. PAGE, :

PETITIONER-APPELLEE, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY, : DECISION

RESPONDENT-APPELLANT. :

_____:

Decided by the Commissioner of Education, October 20, 1980

For the Petitioner-Appellee, Ruvoldt & Ruvoldt (Harold J. Ruvoldt, Jr., Esq., of Counsel)

For the Respondent-Appellant, Robert B. Rottkamp, Jr., Esq.

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

P. Paul Ricci abstained in the matter.

June 3, 1981

BOARD OF EDUCATION OF THE TOWNSHIP OF PARSIPPANY-TROY HILLS, MORRIS COUNTY,	:	
RESPONDENT-APPELLANT,	:	
V.	:	SUPERIOR COURT
GEORGE MORELL,	:	APPELLATE DIVISION
PETITIONER-RESPONDENT.	:	

Decided by the Commissioner of Education, June 5, 1980.

Decided by the State Board of Education, December 3, 1980.

Argued December 8, 1981. Decided December 16, 1981.

Before Judges Michels, McElroy and J. H. Coleman.

On appeal from New Jersey State Board of Education.

Kenneth C. Schneier argued the cause for appellant (Dillon, Bitar & Luther, attorneys; Henry N. Luther, III, of counsel; John W. Adams and Mr. Schneier on the brief).

Robert M. Schwartz argued the cause for respondent (Robert M. Schwartz, General Counsel, New Jersey Association of Principals and Supervisors, attorney; Mr. Schwartz on the brief).

James R. Zazzali, Attorney General of New Jersey, attorney for New Jersey State Board of Education, filed statement in lieu of brief (Alfred E. Ramey, Jr., Deputy Attorney General, of counsel).

William Wallen argued the cause as amicus curiae on behalf of New Jersey School Boards Association (David W. Carroll, General Counsel for the New Jersey School Boards Association, attorney; Mr. Wallen on the brief).

Richard A. Friedman argued the cause as amicus curiae on behalf of New Jersey Education Association (Ruhlman and Butrym, attorneys; Mr. Friedman and Cassel R. Ruhlman on the brief).

PER CURIAM

This appeal raises the question of whether the transfer of an elementary school principal to the position of acting assistant principal of a junior high school[1] constitutes a dismissal within the meaning of N.J.S.A. 18A:28-5. We hold that it does not.

In August 1979 petitioner, a tenured elementary school principal, filed a petition with the Commissioner of Education protesting his involuntary transfer to that of acting assistant principal of Brooklawn Junior High School. The administrative law judge concluded that the transfer was not violative of the statute. The Commissioner of Education affirmed and adopted the findings and determinations set forth in the initial decision of Administrative Law Judge Young dated April 17, 1980. Upon petitioner's appeal to the State Board of Education, the Legal Committee Report recommended to the board that the Commissioner's decision be affirmed. The State Board of Education, however, reversed the Commissioner and held that the transfer was a demotion in violation of the statute. The respondent board of education filed this appeal.

The clear language of N.J.S.A. 18A:28-5 proscribes the dismissal of or reduction in the compensation of administrators, such as a principal, who have acquired tenure except for just cause. The word "demotion" is no where mentioned in the statute.

The transfer of petitioner from a principal to an acting assistant principal was not a dismissal. It is agreed that there was no reduction in compensation. Accordingly, the decision of the State Board of Education dated December 3, 1980 is reversed.

Reversed.

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[1] At oral argument we were informed that petitioner has been a principal in residence in the Central Office of respondent board since the beginning of the 1980-81 school year.

BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSVILLE, SALEM COUNTY,

PETITIONER-APPELLANT,

V.

STATE BOARD OF EDUCATION

MR. & MRS. JOSEPH OLIVE, JR., ON BEHALF OF THEIR SON "J.O.",

DECISION

RESPONDENTS-APPELLEES.

Decided by the Commissioner of Education, June 30, 1980

For the Petitioner-Appellant, Jordan & Jordan (John D. Jordan, Esq., of Counsel)

For the Respondents-Appellees, Nancy L. Heath, Esq.

This is an appeal from the June 30, 1980 decision of the Commissioner of Education upholding a Classification Officer's decision requiring the Board of Education of the Township of Pennsville (hereinafter Board) to pay tuition and transportation costs to the parents of "J.O." for the 1979-80 school year and to complete an acceptable plan for returning J.O. to the Pennsville School District by September 1, 1980. We think the Commissioner erred in ordering the board to pay tuition and transportation costs incurred by the parents of J.O. in sending J.O. to an approved, out-of-state private school during the 1979-80 school year.

The enrollment of J.O. in the Pilot School, an approved out-of-state private school, was accomplished solely through the action of his parents.

Prior to the commencement of the 1979-80 school year, the Child Study Team of Pennsville School District had completed its classification of J.O. and had prepared an I.E.P. which despite some modification has remained intact throughout the various appeals which have occurred in this matter.

Since an appropriate free public education was available to J.O. in the Pennsville School District for the 1979-80 school year, there is no basis to require the Board to now pay the tuition and transportation costs incurred by the parents of J.O. in sending J.O. to an approved out-of-state private school for the 1979-80 school year. N.J.A.C. 6:28-4.8.

Although some procedural erros were admittedly made by the Pennsville Child Study Team with respect to the classification of J.O., the classification was substantially correct and was supported by the State Review Team and by the Classification Officer. Indeed, many if not all of the errors occurred due to the efforts of the Child Study Team, short-staffed due to the summer months, to prepare a classification and I.E.P. for J.O. in time for the upcoming 1979-80 school year. The parents of J.O. had no reasonable basis to suspect the validity of J.O.'s classification due to procedural defects in the classification process and, therefore, their placement of J.O. in the Pilot School must be regarded as their own voluntary withdrawal of J.O. from the Pennsville school system. This unilateral action does not require reimbursement. See "T.E.E." v. Board of Education of the Township of Livingston, 1978 S.L.D. 754; "B.K." v. Board of Education of Margate City School District, et al., 1978 S.L.D. 897.

Accordingly, to the extent that the Commissioner's decision requires the Board to reimburse the parents of J.O. for tuition and transportation expenses incurred during the 1979-80 school year, the decision is hereby reversed.

Susan N. Wilson, Katherine Neuberger and Sonia B. Ruby opposed in the matter.

S. David Brandt abstained in the matter.

Attorney Exceptions are noted.

February 4, 1981

RONALD J. PERRY, :

PETITIONER-APPELLANT, :

V. : SUPERIOR COURT

BOARD OF EDUCATION OF THE RIVER DELL REGIONAL HIGH SCHOOL DISTRICT, : APPELLATE DIVISION

RESPONDENT-RESPONDENT. :

:

Decided by the Commissioner of Education, December 17, 1979

Decided by the State Board of Education, April 8, 1980

Argued March 31, 1981 -- Decided April 8, 1981

Before Judges Matthews and Morton I. Greenberg.

On appeal from the State Board of Education.

Carl John Kerbowski argued the cause for appellant.

Eric J. Weiss argued the cause for respondent (Stein, Joseph & Rosen, attorneys; Marc Joseph, of counsel).

John J. Degnan, Attorney General, filed a statement in lieu of brief on behalf of the State Board of Education (Alfred E. Ramey, Jr., Deputy Attorney General, of counsel).

PER CURIAM

This is an appeal from a final decision of the State Board of Education affirming the decision of the Commissioner of Education which upheld the resolution of the River Dell Regional High School Board of Education not to reemploy petitioner as superintendent of its schools for another school year. Petitioner had been hired under a three year contract which expired in June 1977. Because the board had "reasonable doubt [about his] ability to provide and promote effective and harmonious leadership in the administration and the community," and because the board questioned petitioner's physical and emotional capacity to reasonably discharge [his] responsibilities," petitioner's contract was permitted to expire on its own terms.

Petitioner filed an appeal from that decision to the Commissioner. After a 13-day plenary hearing, the administrative law judge rendered an initial decision finding no merit in any of

petitioner's contentions of improper and illegal conduct by the board except for his complaint that the board failed to evaluate him as required by N.J.S.A. 18A:27-3.1. Although the administrative law judge found that the board violated that law by its failure to evaluate petitioner, he concluded that that finding alone was insufficient to warrant reinstatement of petitioner or imposition of a financial penalty since the record demonstrated that a number of the board members and the board president had advised petitioner of their personal dissatisfaction with his leadership. This dissatisfaction was clearly the underlying reason for the board's non-renewal of petitioner's employment.

By operation of N.J.S.A. 52:14B-10, the initial decision of the administrative law judge became effective as the Commissioner's own within 45 days. Upon appeal to the State Board, the Commissioner's decision was affirmed for the reasons expressed therein.

Petitioner contends here that the board erred in failing to award him some type of remedy, either financial penalty or reinstatement, as a consequence of the board's failure to comply with the dictates of N.J.S.A. 18A:27-3.1 which requires periodic evaluation of teaching staff members, including superintendents. Petitioner insists on entitlement to some type of redress for the board's failure to comply with the statute. We are satisfied that no such entitlement exists.

The school law decisions cited in support of petitioner's position are clearly distinguishable. Even if they were not, the fact that the Commissioner had seen fit in those cases to take corrective action upon a local board's failure to comply with the evaluation law does not mandate that corrective action be taken in petitioner's case. While the Legislature has required local boards to evaluate their teaching staff members, it has not provided for the imposition of any sanction for a board's failure to do so in a given case. Certainly the Commissioner and State Board are at liberty to take corrective action when it is deemed warranted. That is not to say, however, that such corrective action is required in every case.

We are satisfied that there is no basis either in the statutes or case law to support petitioner's assertion of entitlement to either financial compensation or reinstatement. The decision of the State Board is affirmed.

"S.W." AND "D.W.",	:	
PETITIONERS-APPELLANTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF WESTFIELD, UNION COUNTY,	:	DECISION
RESPONDENT-APPELLEE.	:	

Decided by the Commissioner of Education, August 22, 1980

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

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

The State Board of Education affirms the Commissioner's decision with the clarification, that the language of our September 6, 1979 remand should not be interpreted in the restrictive manner as suggested by counsel. Although the Hearing Examiner could have decided the matter solely on the record without additional testimony, the Hearing Examiner certainly was free to, at his discretion, review any additional evidence he felt necessary in making the de novo determination.

March 4, 1981

Pending New Jersey Superior Court

WILLIAM E. SCHELL,	:	
PETITIONER-APPELLANT,	:	
V.	:	SUPERIOR COURT
HAZLET TOWNSHIP BOARD OF EDUCATION,	:	APPELLATE DIVISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, October 9, 1979

Decided by the State Board of Education, May 7, 1980

Argued: February 17, 1981 - Decided March 5, 1981

Before Judges Bischoff, Milmed and Francis

On appeal from Decision of the State Board of Education

Peter P. Frunzi, Jr. argued the cause for appellant.

Robert H. Otten argued the cause for respondent (Crowell and Otten, attorneys).

John J. Degnan, Attorney General of New Jersey, submitted a statement in lieu of brief on behalf of the State Board of Education (Mary Ann Burgess, Deputy Attorney General, of counsel and on the statement).

PER CURIAM

Appellant Schell appeals from a final decision of the State Board of Education denying him substantive relief relating to an alleged failure on the part of the Hazlet Board of Education to apply a certain incremental increase to his salary, pursuant to the Salary Guide, upon the occasion of his promotion to the position of Assistant Elementary School Principal. Schell was a tenured teacher in the Township prior to that promotion.

The respondent School Board cross appeals from a denial of its motion for summary judgment, which motion challenged the jurisdiction of the Commissioner of Education over the substantive dispute. The Commissioner denied the motion and asserted jurisdiction after concluding that the matter involved the implementation of a Salary Guide adopted by the Board pursuant to N.J.S.A. 18A:29-4.1 and was thus a controversy arising under the school laws. The State Board affirmed the assumption of jurisdiction by the Commissioner and the Appellate Division denied a

motion for leave to appeal. We agree with the reasoning and the result stated by the Commissioner on the question of jurisdiction.

The Administrative Law Judge, after concluding a plenary hearing in the matter as directed by the Commissioner, made appropriate findings and conclusions as set forth in his initial decision and denied relief. The Commissioner reversed the Administrative Law Judge and ruled in favor of Schell. The local Board appealed to the State Board of Education which in turn reversed the Commissioner and reinstated the decision of Judge McKeown, the Administrative Law Judge.

There was sufficient credible evidence in the record before Judge McKeown to support his conclusion and we therefore agree with the decision of the State Board of Education dated May 7, 1980, which relied upon the reasons expressed in Judge McKeown's written decision of July 24, 1979, and reversed the decision of the Commissioner of Education.

Affirmed.

RAYMOND L. SCHWARTZ, President, DOVER EDUCATION ASSOCIATION et al.

PETITIONERS-APPELLANTS,

V. : SUPERIOR COURT

DOVER PUBLIC SCHOOLS IN THE COUNTY OF MORRIS, : APPELLATE DIVISION

RESPONDENT-RESPONDENT.

Decided by the Commissioner of Education, December 24, 1979

Decided by the State Board of Education, August 6, 1980

Submitted March 31, 1981--Decided August 6, 1981

Before Judges Botter, King and McElroy.

On appeal from New Jersey State Board of Education.

Saul R. Alexander, attorney for appellants.

Green & Dzwilewski, attorneys for respondent (Allan P. Dzwilewski, on the brief).

A statement in lieu of brief was filed for respondent State Board of Education; James R. Zazzali, Attorney General of New Jersey, attorney (John J. Degnan, former Attorney General, and Alfred E. Ramey, Jr., of counsel).

PER CURIAM

This appeal concerns the meaning of N.J.S.A. 18A:30-2 which provides for paid sick leave for "a minimum of 10 school days in any school year" for various employees of boards of education. The collective bargaining agreement between the parties provided that employees were entitled to 10 days sick leave per year without loss of pay, but any employee "whose contract is effective after the beginning of the school year shall be allowed one day of sick leave for each remaining month of the contract period." The State Board of Education (State Board) upheld the contract provision against the claim that N.J.S.A. 18A:30-2 requires an allowance of 10 days of sick leave in any school year for each employee regardless of when the employment began in that year.

Appellants contend that the State Board's decision should be reversed because N.J.S.A. 18A:30-2 by its plain terms requires a minimum of 10 sick leave days a year per employee regardless of the length of time in the year that the employee has worked. Appellants contend that the provision in the collective bargaining agreement violates the legislative intent. Thus, appellants contend that an employee who comes on board near the end of the school year must be given the same 10 days of sick leave as an employee who has worked the entire school year.

The Dover Education Association (Association) is the majority representative of employees of the Dover Board of Education. It filed a petition on April 9, 1979 to the State Commissioner of Education contending, in the first count, that Louise Moore has been a full time compensatory education teacher commencing March 1, 1978 and that she worked through June 30, 1978 during which time she used one sick day. In September 1978 she was informed that her sick leave accumulation as of that day was three days. Apparently Louise Moore had been allowed one day per month of sick leave for four months of which one day was used, leaving a balance of three days. This calculation conformed to Article IV, paragraph A, of the collective bargaining agreement between the parties in effect for the school year of 1978-1979. A grievance was filed challenging the amount of sick leave granted Louise Moore, and the claim was rejected by the Dover Board of Education. The petition to the Commissioner asserted that the contract provision violated the applicable statute. The second count of the petition claimed that a number of other teachers had been denied proper sick leave credit for various years. Annexed to the petition was a list of 22 teachers who were allegedly denied proper sick leave credits during their initial years of employment. Claims were made for a number of days ranging from one to seven for each of these teachers. One of these teachers began employment as far back as March 1965, another in February 1966, and others in various years from 1970 to 1979. Additional credits of three, three, and five days of sick leave were claimed for three teachers respectively while on unpaid maternity leave in 1973, 1977, and 1978.

The provisions for sick leave in the collective bargaining agreement were as follows:

ARTICLE IV

EMPLOYEE ABSENCE

SICK LEAVE

1. Sick leave is hereby defined to mean the absence from his or her post of duty, of any person because of personal disability due to illness or injury, or because he or she has been excluded

from school by the school district's medical authorities on account of a contagious disease or of being quarantined for such disease in his or her immediate household.

2. Employees shall be entitled to ten (10) days sick leave per year without loss of pay.

3. An employee whose contract is effective after the beginning of the school year shall be allowed one day of sick leave for each remaining month of the contract period.

4. All unused sick leave time shall accumulate, without limit.

5. Accumulation of sick leave allowance shall be based on consecutive years of service. An employee shall be considered as rendering consecutive service as long as the Board does not terminate his service.

6. A leave of absence does not constitute an interruption of service, but during a leave of absence there shall be no accumulation of sick leave.

N.J.S.A. 18A:30-2 provides as follows:

All persons holding any office, position, or employment in all local school districts, regional school districts or county vocational schools of the state who are steadily employed by the board of education or who are protected by tenure in their office, position, or employment under the provisions of this or any other law, except persons in the classified service of the civil service under Title 11, Civil Service, of the Revised Statutes, shall be allowed sick leave with full pay for a minimum of 10 school days in any school year.

An Administrative Law Judge concluded that the contract provisions were in conflict with N.J.S.A. 18A:30-2 because the statute provides that a minimum of 10 paid days of sick leave "shall" be allowed and "shall" was used in a mandatory rather than a permissive sense. He reasoned that the statute literally required an allowance of 10 days of sick leave and said nothing about prorating those days. He also rejected respondent's defense that petitioners' claims were barred by laches. This decision was adopted by the Commissioner of Education by inaction and the passage of time. N.J.S.A. 52:14B-10(c).

The State Board reversed the Commissioner's decision and dismissed the petition. In a written opinion it said:

> The Commissioner's view would mean that if an employee started work on June 1st, became sick the next day and was out ill for the remainder of the school year, he would be entitled to 10 days of sick leave with pay--the same amount of leave that would be available to a teacher who had worked the entire year. We believe that such an interpretation is not required by the language of the statute, and that it finds no support in reason or logic.

The State Board held that the question before it was whether a local board of education could validly agree in a collective bargaining agreement that an employee whose contract becomes effective after the beginning of the school year would be allowed one day of sick leave for each remaining month of the contract. The State Board held that such a provision did not conflict with N.J.S.A. 18A:30-2 and was therefore a validly negotiated term or condition of employment. The State Board also held that many of the claims arose six years before the filing of the petition and were barred by the statute of limitations. Accordingly, it found that the principles of laches and equitable estoppel would apply to most, if not all, of the claims.

We affirm essentially for the reasons given by the State Board of Education. Reason is said to be the "soul of law," and the sense of a statute should control over its literal terms. State v. Carter, 64 N.J. 382, 390-391 (1974). Interpretations which lead to absurd or unreasonable results should be avoided. State v. Gill, 47 N.J. 441, 444 (1966); Marranca v. Harbo, 41 N.J. 569, 574 (1964). In the latter case the court, considering an interpretation of a statute urged by a party, observed, "No one can think of a reason why the Legislature would want that extraordinary result. . . ." We take the same view of the statute before us. There is no reason why the legislature would want to grant the same number of sick leave days to an employee who has only worked one or two months of the school year as are guaranteed to employees who worked the full year. Appellants contend that the failure of the legislature to provide a method of allocation where an employee works less than a full year precludes such an interpretation. We disagree. N.J.S.A. 18A:30-2 is directed toward employees who are "steadily employed" or who are protected by tenure. It is more likely that the legislature was contemplating regular, full time employees and did not contemplate employees who were hired for less than a full school year. Employees who work a full school year are guaranteed 10 days of paid sick leave. A reasonable interpretation is to allow a proportionate amount of sick leave for those employed less than a full school year.

This disposition of the case makes it unnecessary for us to pass upon the issue of laches as a bar to petitioners' claims. The staleness of those claims suggests that the practice of allocating sick leave had been in effect as far back as 1965 without anyone challenging the reasonableness of the interpretation.

Affirmed.

MARY SIEBOLD, et al.,	:	
PETITIONER-RESPONDENTS/ CROSS-APPELLANTS,	:	
V.	:	SUPERIOR COURT
OAKLAND BOARD OF EDUCATION,	:	APPELLATE DIVISION
RESPONDENT-APPELLANT/ CROSS-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, June 2, 1980

Decided by the State Board of Education, October 1, 1980

Argued May 5, 1981. Decided June 3, 1981

Before Judges Matthews, Morton I. Greenberg and Loftus

On appeal from the State Board of Education

Theodore M. Simon argued the cause for petitioners-respondents, cross-appellants (Goldberg & Simon, attorneys).

Irving C. Evers argued the cause for respondent-appellant, cross-respondent.

James R. Zazzali, Attorney General of New Jersey, attorney for respondent, New Jersey State Board of Education (Mary Ann Burgess, Deputy Attorney General, of counsel on statement in lieu of brief).

PER CURIAM

This is an appeal by the Oakland Board of Education and several teachers from a determination of the State Board of Education. The case, which concerns the application of a salary adjustment policy providing increments for teachers, was initially heard before an Administrative Law Judge who made findings of fact and conclusions of law. The Commissioner of Education adopted such, and the State Board of Education affirmed the decision of the Commissioner.

The issues presented are: (1) whether certain teachers in the Oakland School District who earned graduate level credits prior to attaining a Master's Degree are entitled to such credits in support of their requests for salary increments based upon the M.A. + 15 or M.A. + 30 scale under the salary adjustment policy;

and (2) whether certain teachers of the Oakland School District who have similar claims, but who asserted such claims after October, 1978, are barred by a 1978 formal amendment to the salary policy which specified that such credits must be earned after the Master's Degree.

In 1972 the Oakland Board of Education adopted a salary adjustment policy whereby salary increments were given to teachers who had earned a Master's Degree plus an additional number of graduate level credits. The salary increments correspond to certain classifications of academic achievement, such as a Master's Degree plus 15 (M.A. + 15) and a Master's Degree plus 30 (M.A. + 30). Between 1972 and October, 1978, the Oakland salary adjustment policy was silent as to the order in which the Master's Degree and graduate credits had to be earned. In October, 1978, the Board formally adopted a policy which provided:

> In order for graduate courses to be applied to the Bachelor's plus 15 or the Master's plus 15, 30 or 45, training levels - the teachers' salary guide, said courses must be taken after the Bachelor's or Master's Degree, respectively, has been completed. (Emphasis added).

In this case teachers within the school system, Siebold, Davis, Kenny and Dykstra, applied to the Oakland Board of Education at different times to grant them salary adjustments based upon graduate credits each had earned prior to the acquisition of their Master's Degree, but which had not been used to fulfill the requirements of the M.A.'s.

In the spring of 1978 Siebold, who had received her Master's Degree in 1975, applied for placement at the M.A. + 15 level of the salary guide for credits earned prior to those taken for the Master's Degree. Siebold later amended her claim in November, 1978, to have her placed at the M.A. + 30 level. In September, 1978, Davis, who received a Master's Degree in 1978, applied for placement at the M.A. + 15 level as well as for credits earned prior to her enrollment in the Master's Program. Before October, 1978, Kenny, who had received a Master's Degree in 1970 but who began employment with the school district in 1975 applied for placement at the M.A. + 30 claiming that the increment should date back to 1970 when she received her Master's Degree in February, 1979. Dykstra, who had received her Master's Degree in 1978, applied for placement at the M.A. + 15 for credits earned prior to her Master's Degree.

The Oakland Board of Education denied the applications of such teachers for placement on the salary scale based on credits earned prior to attaining the Master's Degree and con-

cluded that only post M.A. credits were to be considered in the salary adjustment scale. The teachers instituted administrative review proceedings.

After considering the evidence submitted at the administrative hearing, the administrative law judge determined that in each of the cases the critical factor was whether the claim for adjustment had been made before or after the October, 1978, change in policy which specified that credits had to be earned after the M.A. was attained. After reviewing the evidence submitted to him, he concluded that the claims made before October, 1978, should be allowed to include pre-M.A. credits because the Board policy was silent as to the order in which the credits were to be earned. However, he held that claims made after October, 1978, would be subject to the new policy requirement that the credits be post-M.A. before they could be counted for salary adjustments. He relied on McAllen v. Bd. of Ed. of the Borough of North Arlington, Bergen County, 1975 S.L.D. 90, aff'd State Board of Education 1975 S.L.D. 92. The Commissioner of Education and the State Board of Education adopted such findings of fact and conclusions.

The practical effect of these determinations was that school teachers Siebold, Kenny and Davis were credited with credits earned prior to their M.A. Degrees and granted before October, 1978. However, school teachers Dykstra and Siebold who claimed additional credits after October, 1978, were barred from using the pre-M.A. credits for salary adjustments because such claims were filed after the policy change.

On appeal the Oakland Board contends that the decision of the State Board should be reversed because the pre-1978 policy was to adjust salaries only for credits achieved after the M.A. Degree. Siebold, by way of cross-appeal, alleges that the Board erred in affirming the rejection of her amended petition.

The Appellate Division has a limited role in reviewing the decision of an administrative agency. Ordinarily "an Appellate Court will reverse the decision of an administrative agency only if it is arbitrary, capricious or unreasonable or it is not supported by substantial credible evidence in the record as a whole". Henry v. Rahway State Prison, 81 N.J. 571, 579-580 (1980); Close v. Kordulak Bros., 44 N.J. 589, 598, 599 (1965); Campbell v. Department of Civil Service, 39 N.J. 556, 562 (1963).

The standard of appellate review from the decision of an Administrative Agency is limited to examining the proofs to determine whether there is sufficient or substantial credible evidence on the record to support the Agency's determination. In re Suspension of Heller, 73 N.J. 292, 309 (1977); DeAngelo v. Alsan Masons, Inc., 122 N.J. Super. 88, 89 (App. Div. 1973). Where such credible evidence appears, and giving due weight to

the expertise of the agency in the particular field, DeAngelo, supra; Close, supra, the determination of the agency should not be disturbed.

Our review of the record convinces us that there was sufficient credible evidence to support the determination that respondent Board prior to October, 1978, did not have a policy as to the order in which graduate credits and the Master's Degree had to be earned. Since the respondent had no duly adopted policy regarding the sequence in which qualifying credits had to be earned, it could not require that they be earned before the Master's Degree. See John McAllen, Jr. v. Board of Education of the Borough of North Arlington, Bergen County, supra; Chaump v. Bd. of Ed. of the Town of Belleville, 1979 S.L.D. 241 (Board was precluded from granting only a half-year salary advancement credits instead of full-year salary advancement for full-year's work in a part-time position because of absence of dispositive Board policy and its inconsistent treatment of petitioner. Board was ordered to advance petitioner at full-year rate and to compensate her accordingly); Watchung Hills Regional Education Association v. Board of Education of the Watchung Hills Regional High School District, 1980 S.L.D. 347 (Commissioner invalidated a 22 year old Board practice wherein half-time teachers were advanced one-half step on the salary guide for each academic year of part-time employment because the practice was not covered by any salary provision. Board was ordered to place teachers on guide as if they were full-time teachers and to reimburse them accordingly); Ford and Parker v. Board of Education of the Township of South Hackensack, 1980 S.L.D. 616 (Commissioner held that a Board cannot refuse longevity increments because employment was part-time or not under full certification unless the limitation was specifically made part of the salary policy). In each of these decisions is the need for a specific policy statement with respect to any changes that would affect the salary guide schedules.

Our review of the entire record leads us to conclude that the decision of the State Board in this case was not arbitrary, capricious or unreasonable and that it was supported by sufficient and credible evidence. Therefore, we find no merit to appellants' contention with one modification. All parties agree that Kenny was not hired until October, 1975. Therefore, she should not be compensated retroactive to September 1, 1970. We, therefore, direct that the order be modified to reflect October, 1975, as the correct date of hiring for Kenny.

With the aforesaid modification, the decision of the State Board is affirmed under R.2:11-3(e) (1) (D).

Affirmed.

HORACE SMITH, :

PETITIONER-APPELLANT, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF JERSEY CITY, HUDSON COUNTY, : DECISION

RESPONDENT-APPELLEE. :

Decided by the Commissioner of Education, September 20, 1980

For the Petitioner-Appellant, Ashley & Charles (Joseph Charles, Esq., of Counsel)

For the Respondent-Appellee, William A. Massa, Esq.

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

March 4, 1981

RITA SPIEWAK, PEGGY DABINETT, PATRICIA O'REILLY and the RUTHERFORD EDUCATION ASSOCIATION,

PETITIONERS-APPELLANTS,

V.

BOARD OF EDUCATION OF RUTHERFORD,

RESPONDENT.

SUPERIOR COURT

APPELLATE DIVISION

Decided by the Commissioner of Education, December 18, 1979

Decided by the State Board of Education, July 2, 1980

Argued June 8, 1981 - Decided June 22, 1981

Before Judges Allcorn, Pressler and Furman.

On appeal from the New Jersey State Board of Education.

Louis P. Bucceri argued the cause for the appellants (Goldberg & Simon, attorneys; Theodore M. Simon, of counsel; Mr. Bucceri on the brief).

Irving C. Evers argued the cause for the respondent.

Statement in Lieu of Brief on behalf of State Board of Education was filed by James R. Zazzali, Attorney General of New Jersey (John J. Degnan, former Attorney General of New Jersey; M. Kathleen Duncan, Deputy Attorney General, of counsel and on the statement).

The opinion of the court was delivered by PRESSLER, J.A.D.

This is a teacher-tenure controversy.

Petitioners Rita Spiewak and Peggy Dabinett have each been employed by the Rutherford Board of Education since the early 1970's as "Beadleston" supplementary teachers of the handicapped,[1] and petitioner Patricia O'Reilly has been employed by

1. See N.J.S.A. 18A:46-1, et seq., legislation originally sponsored by Senator Beadleston, requiring special educational services for the handicapped.

the Rutherford Board of Education (district) since February 1973 as a "Title I" remedial reading teacher. All three appeal from a determination of the State Board of Education denying them status as members of the teaching staff of the district and accordingly declaring them ineligible for the acquisition of tenure. In so concluding, the State Board reversed the contrary conclusion of the Commissioner of Education, who had generally accepted the recommendations of the hearing examiner.

The State Board's sole expressed basis for its action was its reliance on this court's opinion in Point Pleasant Beach Teacher's Ass'n v. Callam et al., 1973 N.J. Super. 11 (App. Div. 1980), certif. den. 84 N.J. 469 (1980). We reverse. For the reasons herein set forth, it is our view that the holding of Point Pleasant Beach is inapplicable to the undisputed facts of this case and that its holding has been over-broadly interpreted by the State Board. Indeed, we are not without reservations as to the viability of the apparent breadth of the Point Pleasant Beach holding.

The reference point in this, as in all teacher-tenure controversies, must be N.J.S.A. 18A:28-5, which provides in relevant part that all teaching staff members holding the "proper certificates" shall be under tenure after employment by the district 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;

"Teaching staff member" is defined by N.J.S.A. 18A:1-1 as

> ...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 facts here compel the conclusion that all three petitioners are encompassed by the definition of teaching staff member and that each, at the time of the administrative hearing, had met the employment requirements of N.J.S.A. 18A:28-5.

More specifically, the record shows that Spiewak was first employed in October 1971 as a "Beadleston" supplemental instructor in the combined junior and senior high school and had, up to the time of the hearing below, been so employed during each successive academic year. Contrary to so-called regular contract teachers in the district, and except for academic year 1973-1974, she began work several days after the start of the academic year and completed her work several days before the conclusion of the academic year. For the academic year 1973-1974, for reasons which are not explained, she had a contract, and thus was employed for the same period of time as all other contract teachers. During the entire period of her employment, she was paid on a hourly basis for her actual instructional time. At some point in her employment she was also paid for two hours of preparation time per week. That constituted her entire remuneration. She was not paid for her lunch break. She received no sick leave. She received no other emoluments of employment such as paid vacations, personal days or insurance coverage. When school was not in session, as for example on a holiday or snow day, she was not paid. Nor was she admitted into the Teacher's Pension and Annuity Fund.

When she first began to work for the district, Spiewak's employment was clearly part-time and her responsibilities limited to three hours of instruction per day. Her duties continued to expand so that by the 1974-1975 academic year, she was teaching for five hours a day five days a week, and by the 1977-1978 academic year she was teaching seven forty-minute instructional periods daily and using a half-period daily for preparation time. She was not assigned a homeroom or such other duties as cafeteria, playground or hall supervision, she had no extracurricular responsibilities, and she was not required to be at school as early in the morning as regular teachers were.

Her teaching responsibilities and ancillary functions of conferring, reporting, planning and the like were part of the district's special services program for handicapped students as mandated by N.J.S.A. 18A:46-1, et seq. Students at the secondary level who were classified as neurologically, emotionally, mentally or physically impaired or handicapped were referred to Spiewak for special educational assistance on a tutorial basis. Working with one or two students at a time and following generally the child study team's "prescription," her job was to provide such appropriate academic supplementation as each student individually required. Her functions, therefore, together with the entire special services staff, were intended and designed to meet the mandate of N.J.S.A. 18A:46-13, which provides in part that

> It shall be the duty of each board of education to provide suitable facilities and programs of education for all the children who are classified as handicapped under this chapter except those so mentally retarded as to be eligible for day training pursuant to N.J.S.A. 18A:46-9. The absence or availability of a special class facility in any district shall not be construed as relieving a board of education of the responsibility for providing education for any child who qualifies under this chapter.

The district employs four teachers, Spiewak, Dabinett and two others, to perform the instructional function of the special services program, which is in part funded by the State. The two other teachers are assigned to the elementary school; both are under contract and are concededly tenurable. Spiewak and Dabinett are assigned to the secondary level. Dabinett's situation does not differ in any material respect from Spiewak's. It was, moreover, the testimonial opinion of the district's coordinator of the program that its function, concept and operation, particularly in terms of instructional responsibilities and techniques, are not materially different on the secondary level than on the elementary level.

Petitioner O'Reilly has been employed by the district in various positions since 1971, and since February 1973 has been continuously employed as a Title I tutor under a federal program designed to provide remedial training in reading for elementary school pupils. See 20 U.S.C.A. §236, et seq. She holds a teaching certificate for kindergarten through eighth grade. Her employment situation vis-a-vis non-instructional duties, salary and other emoluments of employment are essentially the same as those of Spiewak and Dabinett although she is accorded Blue Cross and Blue Shield benefits. Her actual instructional week of five hours per day five days a week is as long if not longer than that of regular elementary teachers, and as in the cases of Spiewak and Dabinett, her instructional responsibilities have substantially increased since her initial employment. She works with student groups of not more than four at a time.

In view of these facts, it is at least prima facie clear that each of the petitioners is and has been a regular and continuously employed professional staff member entitled to tenure upon the passage of the requisite time specified by the statute. As the hearing examiner pointed out, the fact that petitioners are paid hourly or per diem salary has no legal effect on this conclusion, and the contrary is not argued. See, e.g., Board of Education of Jersey City v. Wall, 119 N.J.L. 308 (Sup. Ct. 1938). Nor do the facts that these petitioners use a tutorial instructional technique and that they have no homeroom or other noninstructional assignments militate against their professional staff status. All that N.J.S.A. 18A:1-1 requires as

a qualification of professional staff membership is employment by the board in a position requiring appropriate certification. And all three petitioners meet that criterion. Thus, the only basis for denying these petitioners tenurable status is the holding in Point Pleasant Beach, supra.

As we read Point Pleasant Beach, which addressed only the status of Title I teachers, its result was based primarily on the premise that where employment is offered and accepted on a temporary basis and where its temporary nature is understood by both employer and employee to be one of its essential predicates, such employment cannot then be relied on by the employee as the basis of tenure. We further note that the source of funds for the program and the uncertainty both of continued funding and its quantum were not apparently relied on by the court in Point Pleasant Beach as facts of independent significance but rather as indicia of intention regarding the nature of the employment. We do not disagree with these basic premises of Point Pleasant Beach and we do not suggest that they were not applicable to the facts then before the Court.

We do not, however, regard the Point Pleasant Beach rationale as applicable here. First, in our view the nature of the employment is not as immutably fixed by its original parameters. Indeed, the initial periods of employment of all these petitioners do seem to have been premised on the temporary character of the employment. The indubitable fact, however, is that by the 1973-1974 academic year, if not before, the original temporary character of the employment changed, the programs pursuant to which petitioners were employed became well-established and integrated with the regular instructional program, their employment became regular and continuous, and their services by whomever they might be performed were clearly required indefinitely into the future.

Furthermore, we are satisfied, considering the nature of these programs, that the immediate source of their funding cannot be regarded as dispositive. We have already pointed out that the special services program for the handicapped pursuant to which Spiewak and Dabinett are employed is mandated by state statute. The district, irrespective of funding, thus has no present choice but to continue this program. The same is apparently true of the remedial reading program, which is presently funded by the federal government. As the hearing examiner cogently pointed out, the Public School Education Act of 1975, 18A:7A-1 et seq., was enacted in response to the Supreme Court dictate that the constitutional mandate of a thorough and efficient system of free public schools be complied with. See, e.g., Robinson v. Cahill, 69 N.J. 133 (1975). A major element of a thorough and efficient system of free public education has been legislatively defined as "Programs and supportive services for all pupils especially those who are educationally disadvantaged or who have special educational needs." N.J.S.A. 18A:7A-5(c). We deem it beyond cavil that elementary school children unable to

read at grade level are included within this mandate and that remedial programs for such children are encompassed by this legislative directive. Certainly the programs prescribed by N.J.S.A. 18A:46-1 et seq. are also generally encompassed within the definitional scope of this directive. Thus, it appears to us that where a teacher is regularly and continuously employed to perform a legislatively mandated educational function, as all three petitioners here were, the source of funds by which they are paid must be deemed essentially irrelevant to the question of their status as teaching staff members.[2]

In short, Point Pleasant Beach was not, we are convinced, intended to constitute a license for the circumvention of the tenure laws. For the reasons herein set forth, we are satisfied that its application in these circumstances would constitute just such a circumvention. Cf. Schulz v. State Board of Education, 132 N.J.L. 345, 353 (E. & A. 1945); Biancardi v. Waldwick Bd. of Ed., 139 N.J. Super. 175, 178 (App. Div. 1976), aff'd o.b. 73 N.J. 37 (1977).

Petitioners by these proceedings sought not only a declaration of their tenure status but also the retroactive granting of sick leave and other emoluments of that status. The hearing examiner concluded that all were entitled to sick leave pursuant to N.J.S.A. 18A:30-2, which accords that benefit to all district employees "who are steadily employed * * * or who are protected by tenure" except those covered by Civil Service. The Commissioner of Education agreed and so do we. Petitioners were obviously steadily employed within the statutory intendment irrespective of the tenure question. With respect to other emoluments, the Commissioner concluded that petitioners' "services entitled each of them to the emoluments and benefits afforded all other teaching staff members employed by the district although on a pro rata basis." We see no reason to disturb that conclusion.

The determination of the State Board of Education is reversed and the determination of the Commissioner of Education is reinstated. The matter is remanded to the Commissioner for the fixing of the date upon which tenure accrued and the retroactive emoluments to which petitioners are entitled in the event the parties cannot agree on these issues.

[180 N.J. Super. 312 (App. Div. 1981)]

Pending New Jersey Supreme Court

[2] Clearly, the unavailability of necessary funds would not, despite a teacher's acquisition of tenure, ultimately preclude a board of education from abolishing any position for good faith economic reasons. See, e.g., Weider v. High Bridge Bd. of Ed., 112 N.J.L. 289 (Sup. Ct. 1933).

SUSAN R. STACHELSKI, :

PETITIONER-APPELLEE, :

V. : SUPERIOR COURT

BOARD OF EDUCATION OF THE BOROUGH OF OAKLYN, COUNTY OF CAMDEN, : APPELLATE DIVISION

RESPONDENT-APPELLANT. :

:

Decided by the Commissioner of Education, June 21, 1979 and September 11, 1979

Decided by the State Board of Education, November 8, 1979

Argued December 2, 1980 - Decided April 10, 1981

Before Judges King and McElroy

On appeal from New Jersey State Board of Education

William D. Hogan argued the cause for Appellant (Davis & Reberkenny, attorneys).

Joel S. Selikoff argued the cause for appellee.

Steven Cohen, Deputy Attorney General, argued the cause for State Board of Education (John J. Degnan, Attorney General of New Jersey, attorney; Alfred E. Ramey Jr., Deputy Attorney General, of counsel and on the brief).

Paula A. Mullaly argued the cause for New Jersey School Boards Association (David W. Carroll, General Counsel, attorney).

The opinion of the court was delivered by McElroy, J.A.D.

Defendant-appellant, Board of Education, (hereinafter "Board"), appeals a decision of the State Board of Education which affirmed a determination by the Commissioner of Education holding that petitioner-respondent is a tenured teacher entitled to reinstatement and retroactively entitled to salary and other benefits from September 1, 1978. The case involves interpretation of N.J.S.A. 18A:28-5, the legislative prescription for

acquisition of teachers' tenure. Our review of the facts and the statute impels a reversal of the decision entered below.

The facts are not in dispute. Mrs. Stachelski was first employed by defendant Board as an elementary school teacher on February 25, 1974. She worked the remainder of that school year and was reemployed for the academic years 1974-75 and 1975-76. On April 28, 1976 petitioner was offered a contract for the academic year 1976-77. Petitioner accepted this contract on April 30, 1976 and on May 10, 1976 petitioner applied to defendant Board for unpaid maternity leave for the entire 1976-77 school year. Defendant granted petitioner's request and she remained on a leave of absence during that academic year.[1] Petitioner returned to work in September 1977 and worked until the end of that term in June 1978. On April 17, 1978 defendant Board voted not to renew petitioner's contract and so advised her. Petitioner contends on this state of facts that she acquired tenure on February 26, 1978 and that the defendant Board was obliged to renew her contract. The Board asserts that petitioner lacks tenure because she failed to meet the requirements of N.J.S.A. 18A:28-5(c) which in pertinent part provides:

> The services of all teaching staff members including all teachers, principals, assistant principals, vice principals, superintendents, assistant principals, vice principals, superintendents, assistant superintendents, and all school nurses including school nurse supervisors, head school nurses, chief school nurses, school nurse coordinators, and any other nurse performing school nursing services 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:

1

Petitioner does not contend that the matter is one involving sex discrimination. In similar context, however, this court has already dealt with the issue. Jaeger v. State of New Jersey, et al., 176 N.J. Super. 222 (App. Div. 1980), certif. den. 88 N.J. 493 (1981).

> (a) three consecutive calendar years, or 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; ....

This statute is unambiguous. For purposes of teacher tenure it requires employment for: (a) three consecutive calendar years; or (b) three consecutive academic years plus 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 term "academic year" is defined in N.J.S.A. 18A:1-1 as the period between the time school opens after summer vacation until the next succeeding summer vacation. Petitioner does not contend that she falls within the requirements of subsections (a) or (b), rather she asserts, and the Board agrees, that subsection (c) is applicable to her case. The Commissioner of Education and the State Board of Education applied the latter subsection and held petitioner met its requirements. In order to do so they, in our view, reached an interpretation of this lucid statute which subverts its clear intent and ignores the persistent legislative use of the word "consecutive" in all three subsections.

Petitioner urges that in our approach to interpretation we must be wary of a literal approach which may not accord with the act's essential purpose, design or spirit and cites a string of cases supportive of that salutary principle. Petitioner, however, fails to recognize that plain language, such as that here employed, must, in the absence of explicit indication of special meaning, be construed to express its ordinary and well-understood meaning. Service Armament Co. v. Hyland, 70 N.J. 550, 556 (1976). Petitioner also ignores what is settled law. Tenure is a statutory grant and teachers can only acquire tenure by strict compliance with the conditions legislatively imposed. This controlling principle is set forth in Zimmerman v. Bd. of Educ. of Newark, 38 N.J. 65, 72 (1962) where the court held:

> As we have already emphasized, teacher tenure is a statutory right imposed upon a teacher's contractual employment status. In order to acquire the status of a permanent teacher under a tenure law and with it the consequent security of a permanent employment, a teacher must comply with the precise conditions articulated in the statute ....

The language of N.J.S.A. 18A:28-5(c) is clear. There must be "employment" for more than three academic years within any four "consecutive" academic years. Petitioner does not contend that her leave of absence may be considered as "employment" during the academic year 1976-77. This view is consistent with Zimmerman, supra, which regards the employment status as existing where the teacher is actually working during the three year probationary period and subject to the employer's scrutiny during this "proving out" period (38 N.J. at 72 to 73). Cf. Cammarata v. Essex County Park Comm'n, 26 N.J. 404, 412 (1958). This was also the interpretation of the term "employment" taken by the Commissioner of Education in the present case and in Mountain v. Bd. of Educ. of the Township of Fairview, 1972 S.L.D. 526, aff'd, State Board of Educ., 1973 S.L.D. 777. We are of the same view.

The undisputed facts here demonstrate that petitioner worked the following pattern:

Academic Year	Employment During Academic Year
1973-74	less than 1/2 year
1974-75	1
1975-76	1
1976-77	0
1977-78	1

Petitioner's employment ranged over a period of five academic years but actual employment time in five years amounts, at best, to three and one half years. Since the statute requires more than three academic years out of any four consecutive years, we have to consider either the first four years or the last four years of employment. From the academic year 1973-74 to the year 1976-77 petitioner only worked two and one-half years. When one works backwards from the academic year 1977-78 for a period of four years to the year 1974-75, petition demonstrates employment for three years but not "more than" that number.

Clearly petitioner did not "comply with the precise conditions articulated in the statute." Zimmerman, supra, and we so hold. The Commissioner of Education, whose opinion was adopted by the State Board of Education, overcomes this obstacle by relying upon Mountain v. Bd. of Educ. of the Township of Fairview, supra. Mountain involved a teacher who, after two academic years of employment (1967-1969), sought and received a one year leave of absence for the academic year 1969-70. When that time expired he sought, and was granted, a one year extension of such leave for the 1970-71 academic year. However, when Mountain sought to resume his employment for the 1971-72 academic year, the Fairview Board of Education declined to reemploy him. The parties stipulated that the sole issue presented was, "whether the leaves of absence ... are to be included as time

spent ... in the employment of the [Board] for the purposes of determining whether the petitioner has tenure...." The Commissioner treated the issue as being of different nature. He held that because Mountain was on a permissive leave of absence the Board was obligated to reemploy him.

Relying primarily upon Zimmerman, supra, the Commissioner then held that Mountain's two years of leave could not be counted as employment for tenure purposes. Thereafter, without any discussion or reference to the legislative intent evinced by its use of the word "consecutive" in N.J.S.A. 18A:28-5, the Commissioner ordered the respondent Board to reemploy petitioner and directed Mountain's "service under the new contract shall be added to [his] previous accrual of two years of service toward a tenure status." The case was not appealed.

In the present case the Commissioner found the matter presented is, "similar to and, in fact, turns upon the Commissioner's holdings in Mountain ... " and held as follows:

> In the instant matter, the Commissioner reaches a similar conclusion. Time spent by a probationary teaching staff member on approved leave shall not be counted toward the acquisition of tenure. Neither shall it be considered in the calculation of service necessary to fulfillment of the requirements of N.J.S.A. 18A:28-5 when, as herein, the parties have entered voluntarily into a leave agreement, the terms of the agreement have been honored by both parties and the employee has resumed active service. Accordingly, the Commissioner determines that petitioner's service in the 1973-74, 1974-75, 1975-76 and 1977-78 school years shall be treated as seamless and find therefrom that petitioner achieved tenure status on February 27 [sic], 1978.

The determination in Mountain and the decision below clearly ignore the legislative use of the word "consecutive" in N.J.S.A. 18A:28-5(c). Mountain completely avoids discussing the legislative use of the word and the decision below, using Mountain as its bootstrap, likewise avoids the necessity that petitioner prove employment for more than three academic years in any four consecutive academic years. There is no logical way to interpret N.J.S.A. 18A:28-5(c) as permitting a tacking together of two years of employment which precede a leave of absence to a year of employment which follows such leave. Where the legislature uses a quite ordinary word such as "consecutive" to denote, in common parlance, an uninterrupted succession of years, there is no reasonable way one can look to years interrupted by a

leave of absence and hold them to be "seamless." The Commissioner of Education, the State Board of Education and this court are bound by the clear language of the act. "It is not our function to substitute our judgment for that of the legislature. (Dixon v. Gassert, 26 N.J. 1, 9 (1958). Nor may we apply a meaning we believe to be more equitable or fair. Matawan v. Monmouth Cty. Bd. of Taxation, 51 N.J. 291, 298 (1968)." Jaeger v. State of New Jersey, supra, at 227.

The decision entered below is clearly a misinterpretation of the statute and as such has no persuasive weight. Mayflower Securities v. Bureau of Securities, 64 N.J. 85, 92-93 (1973). We reverse that decision. To the extent Mountain v. Bd. of Educ. of the Township of Fairview presents a view in conflict with this decision, it is overruled.

[Cert. den. 88 N.J. 493]

RICHARD STEGEMANN, :

PETITIONER-RESPONDENT, :

V. : SUPERIOR COURT

BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, : APPELLATE DIVISION

RESPONDENT-APPELLANT. :

:

Decided by the Commissioner of Education, March 27, 1980

Decided by the State Board of Education, July 2, 1980

Submitted September 14, 1981 -- Decided October 7, 1981

Before Judges Allcorn and Morton I. Greenberg

On appeal from New Jersey State Board of Education

Howard Schwartz, attorney for the appellant

Bucceri & Pincus, attorneys for the respondent (Gerald M. Goldberg, of counsel; Sheldon H. Pincus, on the brief)

James R. Zazzali, Attorney General, filed a statement in lieu of brief on behalf of the State Board of Education.

PER CURIAM

The protection afforded teaching and administrative staff members who have acquired tenure in accordance with the terms of N.J.S.A. 18A:28-5, provides simply that "they shall not be dismissed or reduced in compensation" except for certain specified causes "or other just cause." Id.

The transfer of the petitioner from the position of coordinator of industrial education to the position of teacher of industrial arts, which transfer resulted in no change in compensation, quite obviously was not a dismissal nor did it involve a reduction of petitioner's compensation. In these circumstances, the petitioner having been neither "dismissed" nor "reduced in compensation," the transfer was in no way violative of the prohibition of the cited tenure statute. See, Greenway v. Camden

Board of Education, 129 N.J.L. 46 (S. Ct. 1942), aff'd 129 N.J.L. 461 (E & A. 1943); Cheeseman v. Gloucester City, 1 N.J. Misc. 318 (S. Ct. 1923); Lascari v. Lodi Board of Education, 36 N.J. Super. 426 (App. Div. 1955).

Accordingly, the decision of the State Board of Education of July 8, 1980 affirming the determination of the Commissioner of Education that petitioner had been improperly transferred and was entitled to reinstatement, is hereby reversed.

[Cert. den. 89 N.J. 437]

ROBERT STEPHENSON,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF GREEN BROOK AND JOHN KOLCHIN, SOMERSET COUNTY,	:	DECISION
RESPONDENT-APPELLEE.	:	

Decided by the Commissioner of Education, July 2, 1980

For the Petitioner-Appellant, Paul T. Koenig, Jr., Esq.

For the Respondent-Appellee, Nichols, Thomson, Peek & Meyers (Kenneth S. Meyers, Esq., of Counsel)

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

January 22, 1981

BOARD OF EDUCATION OF THE SUSSEX COUNTY VOCATIONAL SCHOOL DISTRICT,

RESPONDENT,

V. : SUPERIOR COURT

BOARD OF CHOSEN FREEHOLDERS, SUSSEX COUNTY, : APPELLATE DIVISION

APPELLANT,

V.

SUSSEX COUNTY VOCATIONAL-TECHNICAL TEACHERS ASSOCIATION,

INTERVENOR.

Decided by the Commissioner of Education, May 30, 1979

Decided by the State Board of Education, November 8, 1979

Argued March 9, 1981 - Decided March 23, 1981

Before Judges Allcorn, Pressler and Furman

On appeal from the New Jersey State Board of Education

Erwin G. Goovaerts argued the cause for appellant (Donald L. Kovach, Sussex County Counsel, attorney).

Emanuel A. Honig argued the cause for respondent (Honig & Honig, attorneys).

John J. Degnan, Attorney General, attorney for the State Board of Education (M. Kathleen Duncan, Deputy Attorney General, of counsel and on the statement in lieu of brief)

No brief was filed on behalf of Intervenor.

PER CURIAM

The State Board of Education (State Board) affirmed the Commissioner of Education (Commissioner) in certifying to the Sussex County Board of Taxation the additional sum of $125,000 to be raised by public taxation for the expenses of the Board of Education of the Sussex County Vocational School District (Board) for the 1978-79 school year. The Sussex County Board of Chosen Freeholders (Freeholders) appeals.

The administrative order under review was issued pursuant to N.J.S.A. 18A:7A-15, which authorizes the Commissioner and State Board to direct a budgetary increase above that fixed by the local authorities upon a determination that the school district is not providing a thorough and efficient education opportunity. Robinson v. Cahill (Robinson V), 69 N.J. 449, 460-462 (1976); Matter of Bd. of Ed. of City of Trenton, 176 N.J. Super. 553 (App. Div. 1980). A referendum for a supplemental appropriation of $125,000 was defeated in the school election of April 3, 1979.

After an evidentiary hearing, the hearing examiner reached findings of fact which were adopted by the Commissioner and State Board that because of budget miscalculations not attributable to the Board members who took office in March 1978 and despite economies effected by them totaling over $100,000, the Board would be compelled to shut down the Vocational School on June 1, 1979, reducing by 16 the calendar of instructional days and thus falling short of the 180 instructional days for the school year mandated under N.J.S.A. 18A:58-16 as a qualification for State aid in the ensuing school year, unless the additional sum of $125,000 was authorized.

This appeal is moot. Following the Commissioner's decision of May 30, 1979 and prior to any appeal, the Board continued operation of the Vocational School to complete the school year of 180 days and borrowed $125,000 in anticipation of taxes, pursuant to N.J.S.A. 18A:22-42, for that purpose and, specifically, to meet its mid-June 1979 payroll.

The obligation to repay the loan was fixed. In view of N.J.S.A. 18A:22-8, limiting education budgets to current operating and capital needs only, the Freeholders would lack statutory authority to withhold appropriations to meet necessary education expenses for subsequent school years in order to recoup money unjustifiably expended, if we determine that the Commissioner and State Board erred in certifying the additional sum of $125,000 to the County Board of Taxation.

Notwithstanding the mootness of this appeal, the issue before us is of sufficient public importance to warrant a determination. On the merits we reject the Freeholders' appeal. The Freeholders argue that the Commissioner and State Board failed to set forth factual findings establishing that the shutdown of the Vocational School for the final 16 days of the school year calendar would interfere with the constitutional and legislative goal of a thorough and efficient education.

We disagree. The factual findings below were sufficient. According to the Commissioner:

> A thorough and efficient education could not be afforded to pupils by the cancellation of classes that were regularly scheduled and

> operating in the fall of 1978. Had the Board cancelled those operating classes when it learned of its fiscal crisis in the fall of 1978 it would have been in violation of N.J.S.A. 18A:7A-1 et seq. for failure to maintain viable programs of vocational education for its pupils. Nor can it now reduce those programs by shortening the school year by sixteen school days. To do so could further aggravate the fiscal problem by jeopardizing the Board's eligibility for full allocation of 1978-79 State aid. Nor may those pupils who wish to transfer to other schools, who must move from the area, or who have entered advanced educational programs be handicapped by incomplete grades and withholding of approved credits. Such action as is proposed by the Freeholders in the exceptions does not comport with the constitutional mandate of a thorough and efficient education.

We share the Commissioner's view. The curtailment of the school year by 16 days short of the statutory minimum of 180 days would have denied the opportunity to complete courses to the 1100 pupils of the Vocational School, presumptively frustrating the fulfillment of a thorough and efficient education.

The Board's final argument also fails on this record, that is, that the regulations defining State educational goals and standards in N.J.A.C. 6:8-1.1 et seq. are unconstitutionally vague and indefinite. The administrative order on appeal before us rested on the manifest deprivation of the opportunity for a thorough and efficient education which would have resulted from the loss of 16 instructional days. The conclusion was compelling that the implementation of the Board's educational plan, as required by N.J.A.C. 6:8-3.1, would have been thwarted.

We need not render an advisory opinion as to whether, otherwise, the regulations in N.J.A.C. 6:8-2.1 et seq. set forth adequate standards governing the Commissioner and State Board in proceedings under N.J.S.A. 18A:7A-15 for corrective actions and remedial plans to further a thorough and efficient education. Constitutional issues not imperative to the disposition of litigation should not be reached and determined. Donadio v. Cunningham, 58 N.J. 309, 325-326 (1971).

We affirm.

IN THE MATTER OF THE BOARD :

OF EDUCATION OF THE CITY OF : SUPREME COURT

TRENTON, MERCER COUNTY. :

_____:

Decided by the Commissioner of Education, November 7, 1979

Decided by the State Board of Education, November 8, 1979

Argued May 4, 1981 -- Decided June 17, 1981

On certification to the Superior Court, Appellate Division, whose opinion is reported at 176 N.J. Super. 553 (1980)

Bruce M. Schragger argued the cause for appellant Board of Education of the City of Trenton (Schragger, Schragger & Lavine, attorneys; Kristina P. Hadinger, on the brief).

Mary Ann Burgess, Deputy Attorney General, argued the cause for respondent New Jersey State Board of Education (James R. Zazzali, Attorney General of New Jersey, attorney).

Fredrica Hochman argued the cause for intervenors Puerto Rican Congress and Association of Puerto Rican Organizations.

PER CURIAM

The Appellate Division sustained on appeal an order of the Commissioner of Education and the State Board of Education appointing and assigning "a monitor general" to act as "a general supervisor of all activities" undertaken by the Board of Education of the City of Trenton. As explained by the Appellate Division in a comprehensive opinion by Judge Matthews, published at 176 N.J. Super. 553, the order providing for this action encompassed a "corrective action plan" that required the emplacement of a "monitor general," who is to report directly to the Commissioner with respect to the total operation of the school district for the 1979-1980 and 1980-1981 school years. It also enabled the Commissioner to engage the services of an independent auditor, to order the transfer of moneys in the budget and to increase fiscal resources through the county board of taxation. Further elements of the corrective action plan called for in-service training programs, implementation of the school board's affirmative action plan, initiation of "a thorough and

efficient program" of special, compensatory and bilingual education, and the formulation of comprehensive plans for needed school facilities and personal staffing. Id. at 559-560. The corrective action plan, as pointed out by the court below, contained many other provisions relating to the operations of the board, the submission of periodic progress reports and procedures to be followed with respect to actions upon personnel recommendations. Id. at 560. The Commissioner also directed the assumption of costs, in the amount of $85,000 per year, for the monitor general and support staff. Id. The Commissioner's order was approved by the State Department of Education.

We affirm the judgment of the Appellate Division upholding the administrative action of the Commissioner of Education and Department of Education substantially for the reasons presented in the opinion of Judge Matthews. As clearly recognized by the appellate court, the administrative measures at the heart of this litigation were extraordinary but the problems that they sought to address and redress were equally extraordinary. We are satisfied that the powers exercised by the Commissioner and State Board were invoked in highly unusual, virtually unprecedented circumstances. The comprehensiveness of the Commissioner's remedial plan is not indifferent or insensitive to the fundamental understanding that public education be a primary responsibility for local government. Rather, the action of the Commissioner was required by irrefutable exigency. It was established in the record of this case, without substantial contradiction, that "the educational system of the City of Trenton is in an abysmal state, due almost entirely to the mismanagement and incompetence of the members of the local board of education." Id. at 559.

The Appellate Division found requisite authority in the Commissioner of Education for the imposition of the corrective plan under N.J.S.A. 18A:7A-14 and 15 and ruled that these statutes, part of the Public School Education Act of 1975, N.J.S.A. 18A:7A-1 et seq., contain adequate substantive and procedural safeguards for the proper exercise of power by the administrative agencies committed to its implementation -- the State Commissioner of Education and the State Board of Education. Id. at 561-562. As we observed in Robinson v. Cahill (Robinson V), 69 N.J. 449, 461, "[t]he imposition of this duty [to provide for the maintenance and support of a thorough and efficient system of free public schools] carries with it such power as may be needed to fulfill the obligation." It was appropriately emphasized by the lower court, 176 N.J. Super. at 562, that the delegation of power under N.J.S.A. 18A:7A-15 is broad. In instances where the local board of education has failed to provide a thorough and efficient public education, the statute conveys the authority "to issue an administrative order specifying a remedial plan to the local board of education, which plan may include budgetary changes or other measures the State board determines to be appropriate" (emphasis added).

With respect to the particular challenge that the State Board had no statutory authority to direct the Commissioner "to assign a monitor general to full time service within the district as a general supervisor of all activities conducted by the district," we are satisfied that this power may be reasonably implied in the Public School Education Act of 1975. The source of this power does not repose in any single statutory provision. Rather, it emanates from the entire statutory fabric of the 1975 Act in which many statutory components form an interlocking whole, serving to create powers unique in their breadth and strength. In dealing with the power to designate a monitor general, the appellate court referred not only to N.J.S.A. 18A:4-10, it also gathered support from other statutory provisions, e.g., N.J.S.A. 18A:7A-22(d), and -23. It emphasized, again, the provisions of N.J.S.A. 18A:7A-15, pointing out that the State Board has the power to issue a remedial plan that "may include whatever measures the State board deems appropriate to remedy educational deficiencies within the school district." Id. at 564. Those measures would, in our view, encompass the right to designate agents to effectuate the constitutional mandate for a thorough and efficient education. The sweep of the remedial powers of the State Commissioner of Education and State Board of Education has recently been confirmed by this Court. In the Matter of the Application of the Board of Education of Upper Freehold Regional School District, 86 N.J. 265 (1981).

At oral argument it was contended that school board elections, which have served to change the composition of the board subsequent to the decision of the Appellate Division, obviate the need for corrective administrative action by the State Board and the Commissioner. It was urged that the new board should be given the opportunity to put the local school district in educationally good order and that it is no longer necessary to have a "monitor general" in order to assure compliance with the remedial plan of the Commissioner to achieve a thorough and efficient education.

As we earlier indicated, the powers exercised by the Commissioner and State Board are available and appropriate only in rare cases and, even in those instances, must be invoked with a full appreciation that public education under our governmental system is primarily a local responsibility. Nevertheless, the relief now sought by appellants, essentially a countermand of the administrative order for the designation of the monitor general, has no foundation or support in the record. No proofs were tendered as to conditions within the school district and, in particular, whether any of the egregious deficiencies which gave rise to the Commissioner's order have been removed, corrected or mitigated. We do not find on the basis of the record before us, in which grave educational deficits have been graphically portrayed without refutation, any present justification for disturbing the action of the Commissioner and the State Board. That action, as we view it, sprang from necessity. We assume that it

will recede with the evaporation of the necessitous conditions. In this respect, the local school board retains a full measure of ability to control its own destiny. The sooner it creates an atmosphere and takes concrete steps toward educational remediation and progress, the quicker it will be able to achieve a normal measure of local autonomy. Its plaint for relief from the administrative order should therefore be placed before the Commissioner and the State Board of Education.

Affirmed.

For affirmance - Chief Justice WILENTZ and Justices SULLIVAN, PASHMAN, CLIFFORD, SCHREIBER and HANDLER - 6.

For reversal - None.

[86 N.J. 327 (1981)]

ROBERT P. TUCKER,	:	
PETITIONER-APPELLEE,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF LAWNSIDE, CAMDEN COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, June 18, 1980

For the Petitioner-Appellee, Carl John Kerbowski, Esq.

For the Respondent-Appellant, Theodore Z. Davis, Esq.

In this case we face again the question of what remedy, if any, is available to a teaching staff member when the board has failed to give him the formal evaluation mandated by N.J.S.A. 18A:27-3.1 and regulations promulgated pursuant thereto and has given him a statement of reasons for his non-renewal which reasons have been proven to be not true.

The petitioner here was employed from September 1975 through June 30, 1977 as Administrative Principal by the Lawnside Board of Education. He asserts that the Board failed to legally determine that he would not be reemployed thereafter, in that the Board failed to evaluate his performance in accordance with the above cited statute and further failed to provide valid reasons based upon proper evaluations. The Hearing Examiner found that at no time did the Board, as petitioner's immediate superior, evaluate petitioner as required by N.J.S.A. 18A:27-3.1, although on at least 12 occasions during the two years in question the Board did discuss with petitioner his performance, his goals and priorities, or lack thereof. The Hearing Examiner also took extensive testimony with respect to the validity of the Board's stated reasons for nonrenewal and concluded that the Board had not produced sufficient evidence to substantiate those reasons. The Commissioner adopted the conclusions of the Hearing Examiner, and stating that "the Board must be prepared to defend those reasons when their validity is persuasively questioned," he directed that petitioner be reinstated to his former position of Administrative Principal at the salary he would have commanded had he not been dismissed as of June 30, 1977 and, further, that the Board pay petitioner his lost salary for the period September 1977 to the date of reinstatement, mitigated by any earnings received from alternate employment during that period.

We believe that the reinstatement of petitioner would not be in the best interests of the children of the school district. However, we recognize the difficult situation which the Commissioner faces when a local district gives as its explanation for its nonrenewal of a nontenured employee a statement of reasons which has no basis in fact.

In contrast to the Board's failure to evaluate petitioner in accordance with N.J.S.A. 18A:27-3.1, the Board's failure to give petitioner a true statement of reasons for his nonrenewal constitutes much more than a mere technical violation of an education statute. The Board's action in this regard undermines the salutary purpose behind N.J.S.A. 18A:27-3.2, which is to provide the teaching staff member with the benefit of learning of any correctible deficiencies or knowing that nonretention was due to factors unrelated to his professional or classroom performance.

The Commissioner "has broad powers and responsibilities to supervise public education in the State and effectuate constitutional and legislative policies concerning it." Piscataway Township Board of Education v. Burke, 158 N.J. Super. 436, 440-441 (App. Div. 1978), dismissed 79 N.J. 473 (1978). 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. (See N.J.S.A. 18A:7A-5(g).) Accordingly, in an exercise of the broader educational discretionary power entrusted to us and to the Commissioner we order that the Board pay petitioner sixty (60) days pay. See Heather J. Reid v. Board of Education of the Township of Hamilton, Docket No. A-222-79 (unpublished decision issued November 7, 1980). See also N.J.S.A. 18A:4-15.

We wish to add that the extraordinary remedy awarded in this matter is not to be interpreted as meaning that a financial remedy is available for every technical violation of education statute or regulation. It is the egregious factual circumstances involved herein which have persuaded us to invoke the foregoing penalty so as to discourage this and other local boards of education from disregarding education law and thereby to improve the educational process.

Attorney Exceptions are noted.

March 4, 1981

Pending New Jersey Superior Court

UNION TOWNSHIP TEACHERS' ASSOCIATION, on behalf of JOSEPH CALIGUIRE, et al.,	:	
PETITIONER-APPELLANT and CROSS-RESPONDENT,	:	
V.	:	SUPERIOR COURT
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	APPELLATE DIVISION
RESPONDENT-RESPONDENT and CROSS-APPELLANT.	:	

Decided by the Commissioner of Education, August 27, 1979

Decided by the State Board of Education, March 5, 1980

Argued: December 8, 1980 - Decided: March 9, 1981

Before Judges Bischoff, Milmed and Francis

On appeal from Decision of the State Board of Education

Sanford R. Oxfeld argued the cause for petitioner-appellant and cross-respondent (Rothbard, Harris & Oxfeld, attorneys).

Howard Schwartz argued the cause for respondent-respondent and cross-appellant.

David W. Carroll filed a brief on behalf of amicus curiae New Jersey School Boards Association (Paula A. Mullaly on the brief).

John J. Degnan, Attorney General of New Jersey, filed a statement in lieu of brief on behalf of State Board of Education (Jaynee LaVecchia, Deputy Attorney General, of counsel and on the statement).

PER CURIAM

On October 20, 1977, petitioner, a teachers' association (Association) acting on behalf of a group of individual teachers, filed a petition with the Commissioner of Education (Commissioner) requesting that the Board of Education of the Township of Union (local Board) be ordered to retroactively

credit the teachers for the time they served in the military, alleging that such credit was required by N.J.S.A. 18A:29-11. The local Board filed an answer asserting the defenses, among others, of laches and the statute of limitations. On July 3, 1978, Association filed an amended petition specifically naming 52 teachers and demanding credit for each according to his or her length of military service.

The matter was submitted to the Commissioner as on summary judgment based upon the pleadings, other documents and briefs. The Commissioner held the defenses of the statute of limitations (N.J.S.A. 2A:14-1), laches and estoppel inapplicable to a claim under N.J.S.A. 18A:29-11. On the question as to whether less than one year of military service would count as a full year of employment credit, the Commissioner adopted a formula whereby "...military service of six months or more shall be construed to be one year of salary credit." Applying that formula to each of the 54 teachers,[1] the Commissioner dismissed 29 of the claims and awarded an appropriate amount of back pay to the remaining 25 qualifying teachers.

The State Board of Education (State Board) summarily affirmed the 29 dismissals, but disagreed that the statute of limitations was inapplicable, ruling that N.J.S.A. 2A:14-1 barred all claims for years earlier than the six years before the petition was filed. It also rejected the Commissioner's formula for rounding off less than a full year's service, ruling that any military service of less than a full year could not qualify.

Finally, the State Board applied the defense of equitable estoppel as a bar to claims for those years not already barred by the statute of limitations, ruling that the service credit could be awarded prospectively only for those years after the filing of the petition. The State Board in its opinion did not specifically rule on the defense of laches as asserted by the local Board as an additional defense.

Association filed a timely notice of appeal, and the local Board filed a notice of cross appeal from the ruling that the statute of limitations began to run six years before the filing of the complaint, as opposed to on the date of each teacher's initial employment. By leave granted by this Court, the New Jersey School Boards Association (N.J.S.B.A.) filed a brief amicus curiae.

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[1] While the amended petition listed 52 teachers it did include two more who were not listed in the petition but who were later added by amendment.

The first question presented by this appeal is whether the statute of limitations applicable to contract claims applies to a teacher's claim for back pay based upon the statutory military service credit (N.J.S.A. 18A:29-11).

The applicable statute of limitations, N.J.S.A. 2A:14-1, reads in pertinent part as follows:

> Every action at law for trespass to real property, for any tortious injury to real or personal property, for taking, detaining, or converting personal property, for replevin of goods or chattels, for any tortious injury to the rights of another not stated in section 2A:14-2 and 2A:14-3 of this Title, or for recovery upon a contractual claim or liability, express or implied, not under seal, or upon an account other than one which concerns the trade or merchandise between merchant and merchant, their factors, agents and servants, shall be commenced within 6 years next after the cause of any such action shall have accrued. [Emphasis added.]

The question is whether the State Board correctly viewed the unpaid credit as a "contractual claim" or whether it should be deemed a statutory benefit independent of contract and therefore not subject to traditional defenses such as the statute of limitations.

The military service credit is conferred by N.J.S.A. 18A:29-11:

> 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 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.
>
> 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 absence. [Emphasis added.]

It is undisputed that the 25 members of Association had the requisite military service.

The mechanics of the military service credit were surveyed in Wall Tp. Ed. Assn. v. Bd. of Ed. of Tp. of Wall, 149 N.J. Super. 126 (App. Div. 1977):

> ...[T]he credit for military service entitles a teacher to a status equal to that of a teacher who has had employment credit for the same period of time up to a maximum of four years. This credit is not limited to the benefits of his status on the salary guide but extends also to any other benefits granted to other teachers because of longevity experience in the teaching field. We find nothing in the statute suggesting a contrary construction. As a consequence, when a teacher with military service is advanced on the salary guide because of the statutory credit, he remains in that position for equal treatment with those on the same step because of teaching experience. The statute is clear and unambiguous in its intent. [Id. at 130-131.]

In holding that Association's claim was no different from any cause of action grounded in contract, the State Board principally relied upon Miller v. Board of Chosen Freeholders, Hudson County, 10 N.J. 398 (1952), a case which Association claims is distinguishable. In that case the widows of two former county prison guards filed suit for salary allegedly due their spouses under a statute fixing salary increments for county jail employee. The county asserted the defense, among others, of the statute of limitations, noting that the complaint was filed more than six years after the last date of employment of each employees. The Appellate Division disagreed, holding that "the plaintiffs' claims were based upon a statutory direction and therefore not barred by the asserted statute of limitations." 10 N.J. at 403. The statute as it then existed, R.S. 2:24-1, was phrased differently, reading in pertinent part as follows:

> All actions in the nature of...debt, founded upon a lending or contract without a specialty..., actions in the nature of actions upon the case... shall be commenced within six years next after the cause of any such action has accrued....[10 N.J. at 405; italics deleted.]

The Supreme Court reversed, reasoning that an implied contractual relationship exists between a pubic employer and its employees, which contract must be deemed to incorporate any pertinent statutory terms. Id. at 408-409, 413. It summarized its holding as follows:

> ...Where the services have been performed, and the public servant is an employee, a civil action lies for recovery of the reasonable value of the services rendered, and the action is in the nature of an action upon the case at common law, namely assumpsit, principally indebitatus assumpsit, the action in form and substance resorted to for such relief in this State for more than a century. And where the circumstances permit, i.e., when debt as well as assumpsit would lie at common law, the action is in the nature of debt founded upon a contract without a specialty. (The significance of the term "without a specialty" as used in R.S. 2:24-1, supra, is that it imported absence of a writing 'obligatory in its technical sense, rather than in its loose sense as, for example, a duty imposed by statute. See discussion of R.S. 2:24-5, post). 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. [Id. at 409; citation omitted.]

Thus the law appears to be that a statutory source of a cause of action does not necessarily take the suit outside the statute of limitations. State v. Atlantic City Electric Co., 23

N.J. 259 (1957). If the statute merely dictates certain terms of an independent, existing contractual relationship, express or implied, the bar applies. If the statute, however, creates a liability where none existed, either at common law or by virtue of a contract between the parties, that liability may be enforced without regard to the statute of limitations.

Association seeks to avoid the conclusion suggested by Miller by reasoning that N.J.S.A. 18A:29-11 is a statutory directive enacted to achieve a special aim, viz. rewarding veterans, and thus is immune from the limitations bar. Association also argues that the remedial nature of the legislation requires a liberal construction mandating retroactive application of its beneficial provisions. It further argues that the statute does not set one's basic salary nor does it provide compensation according to services rendered. We disagree. N.J.S.A. 18A:29-11 is a legislatively decreed measure of compensation for qualifying veterans, which comes into operation only after an employment contract has been entered into. A teacher has no claim to the credit until he begins rendering services, and whether he receives the credit in any subsequent year depends upon whether he has continued to perform as an employee. As in Miller, supra, the substantive right stems from the rendition of service pursuant to a teaching contract, and in the absence thereof the benefits conferred by N.J.S.A. 18A:29-11 are meaningless, since the provisions have nothing to relate to. The statutory credit is, in effect, an implied term of the teaching contract, in that it determines one's step on the salary scale throughout one's career. Cf. Kloss v. Township of Parsippany-Troy Hills, 1970 N.J. Super. 153, 159 (App. Div. 1979), holding that N.J.S.A. 40A:9-5, allowing public employees service credits for prior public employment, was an implied term of the negotiated employment contract. Hence, the credit is directly related to compensation and thus, under Miller, enforcement of it is a contractual claim subject to N.J.S.A. 2A:14-1. Association seeks to avoid Miller by noting the difference between the statutory language of R.S. 2:24-1, "actions in the nature of ... debt, founded upon a lending or contract without a specialty," and as it is now under N.J.S.A. 2A:14-1, "action at law ... for recovery upon a contractual claim or liability, express or implied, not under seal ...." The legislative revision was largely an attempt to modernize the language of the former statute; and within the context of this appeal, we hold that both versions relate to the type of contractual claim under appeal.

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 Association'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).

We consider Association's additional arguments that (1) the local Board is estopped to assert the statute of limitations by reason of its failure to notify a teacher of the existence of the military service credit statute and (2) the statutory bar is inapplicable to the "continuing nature" of the wrong committed. Based on our review of the record we find these matters to be without merit. R. 2:11-3(e) (1) (E).

We therefore approve the State Board's application of the bar of N.J.S.A. 2A:14-1; as to the school years prior to the six years immediately preceding the filing of the petition on October 20, 1977.

The State Board relying on Kloss and Giorno invoked the equitable doctrine of estoppel in denying any retroactive adjustment based on military credit. We are of the view that members of the Association are 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 of 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 in Kloss and Giorno 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 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 Association's teachers are attempting to repudiate a prior agreement.

The local Board contends that the teachers are, however, barred by the doctrine of laches as to that portion of the military credit adjustment applicable to the period prior to the filing of the petition. The lengthy period between Association's members' employment and the commencement of the action before the Commissioner satisfies us that retroactive relief should be barred on that ground.

Where the fact of the military service was known to each of Association's members, ignorance of the statute applicable thereto and the consequent ignorance of their rights under

the statute will not excuse the members' 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 unforeseen, 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.

On the facts in this case it would be appropriate to allow prospective application of the military service credit as of October 20, 1977.

The State Board in allowing for prospective application of the military service credit deprived many of the named teachers of additional years of credit for service under a year but more than one-half a year. Association urges this court to adopt the Commissioner's formula that military service of six months or more be counted as a year of employment. The State Board's entire treatment of this issue was as follows:

> We would also hold that no military service credit may be allowed for a part of a year of such services; only a full year will suffice, because the statute (N.J.S.A. 18A:29-11) speaks only of equivalent years of employment credit and makes no provision for credit for any lesser period than one year.

In our view, when the statute is read in light of (1) the legislative intent of N.J.S.A. 18A:29-11, (2) the subtitle of which it is a part, and (3) established educational practice, it must be construed to permit a full year of credit whenever the period of military service was long enough to warrant an annual salary increment had the person been teaching instead.

Looking to the key statutory language, it mandates that a teacher "receive equivalent years of employment credit for" his or her military service "as if" he or she had been employed in teaching during the same period (emphasis added). The apparent intention to equalize the status of a teacher and of a military person was confirmed in Wall Tp. Ed. Assn. v. Bd. of Ed. of Tp. of Wall, 149 N.J. Super. 126 (App. Div. 1977). That case construed N.J.S.A. 18A:29-11 as it applied to "longevity increments contained in the collective negotiating agreement." Id. at 129. This court discussed the mechanics of military service credit:

> ...[T]he credit for military service entitles a teacher to a status equal to that of a

> teacher who has had employment credit for the same period of time up to a maximum of four years. This credit is not limited to the benefits of his status on the salary guide but extends also to any other benefits granted to other teachers because of longevity experience in the teaching field. We find nothing in the statute suggesting a contrary construction. As a consequence, when a teacher with military service is advanced on the salary guide because of the statutory credit, he remains in that position for equal treatment with those on the same step because of teaching experience. The statute is clear and unambiguous in its intent.
>
> ...A veteran, therefore, is entitled to the same increments if his total service as a fully certified teacher plus his military service credit equals the number of years required for eligibility. Since the statute mandates equivalency, the local board cannot apply the agreement in a manner which is violative of the statutory requirement. [Id. at 130-131; emphasis added.]

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 the 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 the 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.

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[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.

By way of cross appeal the local Board challenges the State Board's ruling that the statute of limitations bars only those claims for the years prior to the six years immediately preceding the filing of the petition. It argues that the statute should begin to run on the initial date of employment. In view of our application of the defense of laches as a bar to all claims for the six years preceding the petition, the argument is not significant, and therefore we need not reach it. We are satisfied to state that in our opinion the argument has no merit since the claims are contractual in nature and amount to a new cause of action in each year a teaching staff member continues employment.

Association's final point is that the State Board erred in summarily affirming the Commissioner's dismissal of the claims of 29 of the teachers. It insists that there are issues of fact deserving of a hearing relating to the amount of actual military service credit granted those teachers.

The Commissioner dismissed 29 of the claims for one of three reasons. Two (Allen and Shaffer) were dismissed because the record showed that they did not receive their full statutory entitlement. One other (Hatalosky) was dismissed because she was not a teaching staff member. These dismissals are not disputed. Association does protest the other 26 dismissals, which dismissals were grounded on the Commissioner's observation that in each case petitioner failed to prove that the military service credit was in fact not received. An examination of some of the records indicates that very probably mistakes were made and that the summary dismissals could well have been premature.

While it was Association's burden to provide the necessary records to this court if it expected this court to remand, in the interest of justice and given the Commissioner's misreading of some of the records, we remand as to all 26 cases on the ground that the reasons offered by the Commissioner are inadequate for this court to determine whether summary judgment was proper. Very likely a stipulation will be forthcoming from the parties as to how much entry credit was for military service and how much for past teaching experience.

We therefore affirm the results reached by the State Board with the exception of that portion of its decision which denied credit for less than a whole year's service and of that portion of the State Board's order which affirmed the Commissioner's dismissal of the claims of 26 members of the teaching staff and we remand the matter to the State Board for determination of these two issues in accordance with this opinion.

Affirmed as modified.

Pending New Jersey Supreme Court

IN THE MATTER OF THE :

APPLICATION OF THE BOARD OF :

EDUCATION OF UPPER FREEHOLD : SUPREME COURT

REGIONAL SCHOOL DISTRICT, :

MONMOUTH COUNTY. :

_____:

Decided by the Commissioner of Education, August 24, 1979

Decided by the State Board of Education, December 5, 1979

Argued February 23, 1981 -- Decided June 10, 1981

On certification to the Superior Court, Appellate Division

Peter P. Kalac argued the cause for appellant Board of Education of Upper Freehold Regional School District (Kalac, Newman & Griffin, attorneys).

Alfred E. Ramey, Jr., Deputy Attorney General, argued the cause for respondent State Board of Education (John J. Degnan, Attorney General of New Jersey, attorney; Stephen Skillman, Assistant Attorney General, of counsel).

John I. Dawes argued the cause for respondent Governing Body of Upper Freehold Township (Dawes & Youssouf, attorneys; Sanford D. Brown, on the brief).

Henry G.P. Coates argued the cause for respondent Borough of Allentown (Turp, Coates, Essl & Driggers, attorneys).

Lewis Goldshore and Marsha Wolf submitted a brief on behalf of amicus curiae New Jersey Institute of Municipal Attorneys (Goldshore & Wolf, attorneys).

David W. Carroll, General Counsel, submitted a brief on behalf of amicus curiae New Jersey School Boards Association.

The opinion of the Court was delivered by POLLOCK, J.

The sole issue in this case is whether the Commissioner and State Board of Education, pursuant to the constitutional and

statutory obligation to provide a thorough and efficient education, can direct a local school district to issue bonds for a capital project for a public school, after the voters of the district have rejected referenda to finance the project. We conclude that the Commissioner and the State Board have the power to direct the issuance of bonds and that their order is legal authority to constitute the bonds as valid and binding obligations of the school district.

I

The Upper Freehold Regional School District (district) is a Type II school district comprised of the Township of Freehold and the Borough of Allentown. The district owns Allentown High School to which Freehold and Allentown, as well as three other municipalities, send students. A Type II district differs from a Type I district with respect to the issuance of bonds. In a Type I district, bonds may be issued pursuant to an ordinance adopted by the governing body of the municipality comprised within the district. In a Type II district where, as here, there is no board of school estimate, bonds may be issued with the approval of the voters of the district. Compare N.J.S.A. 18A:24-11 with N.J.S.A. 18A:24-12.

Appellant, Upper Freehold Regional Board of Education (Board), administers the district. Respondents include the State Board of Education (State Board), the Township of Freehold and the Borough of Allentown. The New Jersey School Boards Association and the New Jersey Institute of Municipal Attorneys have filed briefs as amici curiae. Analysis of the issues requires a description of the conditions at Allentown High and the administrative proceedings in this matter, as well as an understanding of the system for administering public education and the procedures by which a local board obtains funds for capital projects.

The facts are essentially undisputed. Allentown High is a one-story structure constructed in 1963 and attended by approximately 1,000 students. In 1975, the Board became aware that the building was deteriorating. Among the problems were cracked corridor floors, a deflected roof and warped and distorted windows. Following an engineering study that revealed numerous deficiencies, the Board instituted a civil action, which is still pending, against the architect and others who participated in the construction and design of the school.

From 1975 to 1978, conditions worsened steadily. The roofing blistered and cracked, permitting water leakage onto the ceiling tiles. In 1978, the Monmouth County superintendent of schools and the chief safety consultant in the New Jersey Department of Education, Division of Facility Planning Services, inspected the school. Their report concluded that due to the

stress on the window frames, there was danger of injury to the students and faculty from shattering glass. The report recommended immediate repairs, and an architect retained by the Board submitted plans for repairs at an estimated cost of $1,643,000.

Following the architect's report, the Board arranged for a special referendum on December 13, 1978. The referendum sought approval for a bond issue in the amount of $2,342,000 ($1,643,000 to repair the facility, plus $699,000 to build an addition) or, alternatively, in the amount of $1,643,000 for the repair only. The voters rejected both proposals.

On the day following the rejection of the bond issue, roof stress tests were conducted. The tests concluded that, although the roof was structurally adequate to bear the required load of 30 pounds per square foot, there were other serious problems. Sagging roof planks created the danger that tiles and pieces of concrete would fall from the ceiling. Other potential safety hazards included short-circuited electrical systems, slippery flooring and shattering glass.

During the 1978-1979 school year, rain caused puddles one-quarter to one-half inch deep stretching for hundreds of feet in the halls of the school. Students going to and from class navigated around buckets. Plastic covers were installed to catch the water in 20-gallon drums; later, 55-gallon drums were required. Conditions were so intolerable in 1978-1979 that approximately 30 classes were moved to the auditorium stage or the cafeteria. Later, classes were moved to locations outside the building. Rain poured into one room as if there were no roof. A sump pump has since been installed on the roof. The chemistry room could not be used for two months in 1978 because rain had loosened floor tiles. Water damage has since caused rotting of wooden columns and framing in the library. In other rooms, acoustical tiles have fallen from the ceiling, and water dripping onto a fire sensor has activated a fire alarm. In still other rooms, shades were drawn throughout the school year to shield against the possibility of shattering glass. To minimize danger from flying glass, some glass panes have since been replaced with plexiglas. Students have been forced to move their desks to make room for buckets, and teachers try to teach above the sound of dripping water.

Nonetheless, on April 3, 1979, the voters again rejected a bond issue. That referendum sought an amount to repair the roof ($1,643,000), plus an amount necessary to conduct school in an alternate facility during the proposed construction.

Between September 1978 and May 1980, the Board spent an additional $62,530 on temporary repairs. In spite of this, the continuing dangerous condition of the school caused the liability insurance carrier to reduce its coverage from $1,000,000 to $500,000 and to threaten cancellation of the coverage in the absence of immediate repairs.

On April 10, 1979, the Board unsuccessfully applied to the Commissioner for emergency funding to effectuate the necessary repairs. Finally, the Board petitioned the Commissioner pursuant to N.J.S.A. 18A:7A-15 for an order to issue the bonds and other relief. The Commissioner referred the matter to an administrative law judge, who found, after a hearing, that the conditions were a "clearly present danger to the health and safety of pupils within the Allentown High School." He ruled that the Commissioner had not only the authority but also "the responsibility to take corrective action to enable the Board to restore Allentown High School to a condition which comports with the thorough and efficient requirements." The Commissioner adopted the findings of fact and conclusions of law of the administrative law judge. Consequently, he directed "the issuance of school district bonds in the amount of $1,643,000 for a capital project to replace the roof of Allentown High School and necessary attendant repairs."

Allentown and Freehold appealed to the State Board, which affirmed the decision of the Commissioner. The factual findings adopted by the Commissioner are not challenged on this appeal. Rather, the dispute centers on whether the Commissioner and State Board have the power to order, over voter rejection, issuance of bonds for a capital project.

Although the municipalities took no further appeal, bond counsel informed the school district that, because of the voter rejection, they could not issue a favorable opinion on the validity of bonds issued pursuant to the order of the State Board. Notwithstanding the receipt of an unstayed order from the State Board mandating the issuance of bonds, the opinion of bond counsel precluded the sale of bonds by the local Board. Consequently, bond counsel advised the Board, among other things, to file a notice of appeal to obtain an order of this Court.

Seeking relief from its dilemma, the Board appealed the decision of the State Board to the Appellate Division and filed a motion for certification of an appeal pending unheard. That motion was denied. The Appellate Division dismissed the appeal because the Board was not a party disadvantaged by the ruling of the State Board. Before dismissing the appeal, however, the Appellate Division granted a motion of the State Board for relief under N.J.S.A. 18A:7A-16 and directed the issuance of bonds or such other means necessary to effectuate repairs to the roof. Still seeking to comply with the requirements of bond counsel, the Board filed a petition for certification, which we granted. 85 N.J. 130 (1980). To assure an adversary proceeding, we directed Allentown and Freehold to participate in the appeal. We uphold the decision of the Commissioner and State Board.

II

Public education is one of the most cherished rights in our society. The fulfillment of that right assures our intel-

lectual strength and renews the hope of students to achieve their potential. In public schools, children learn the fundamentals of formal education and the truth of equality of opportunity.

The obligation for the provision of public education is left to the individual states. U.S. Const. amend. X. The people of New Jersey have enshrined the right to public education in the State Constitution, which provides:

> The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years. [N.J. Const., Art. VIII, § IV, par. 1]

That mandate of the New Jersey Constitution places the basic responsibility for education on the Legislature. The declaration of legislative responsibility for public education, added to the Constitution by amendment in 1875, was included, virtually unchanged, in the 1947 Constitution. In turn, the Legislature has delegated the power to a combination of state and local authorities. The general supervision and control of public education is vested in the State Department of Education. N.J.S.A. 18A:4-1, -10. The head of the State Department of Education is the State Board of Education, which consists of the chairman of the board, the Chancellor of Higher Education and twelve citizens appointed by the Governor with the advice and consent of the Senate. N.J.S.A. 18A:4-1, -3, -4. The Commissioner of Education, who is the chief executive and administrative officer of the Department, has the statutory duty to inquire into the thoroughness and efficiency of the operation of public schools. N.J.S.A. 18A:4-22, -24. As we have stated previously, the Commissioner has the "affirmative obligation to see to it that the statutory objectives are met" and that local school boards and governing bodies fulfill their delegated duties. Robinson v. Cahill, 62 N.J. 473, 509 n.9 (1973).

In each county, a county superintendent of schools, appointed by the Commissioner with the approval of the State Board, must monitor the condition of schools, particularly with respect to construction, heating, and ventilation. N.J.S.A. 18A:7-1, -8. In addition, the Legislature has delegated the primary duty for enforcement of school laws to the local boards of education. That duty includes responsibility for the conduct, equipment and maintenance of the public schools. N.J.S.A. 18A:11-1(b), (d). Thus, the authority and power to educate are shared by state and local agencies. Because of the vast power given to the Commissioner and State Board, it has been observed that:

> To the extent that 'local control' has been taken to mean that the educational function

> of government is controlled exclusively at the local level, the notion of home rule becomes an unwarranted myth. In fact, New Jersey's educational system is based on a concept of lay control, not local control, and the exercise of that power is shared among officials at all levels of government. [R. Martinez, W. Zaino, C. Weger & J. Collins, Basic School Law 2 (1978)]

That interrelationship of state and local authority is illustrated by the procedures for approval of capital projects and of the annual budget of a local board of education. The Public School Education Act of 1975, N.J.S.A. 18A:7A-1 et seq. (Supp. 1981-1982) (the 1975 Act), requires each local board to submit annually, before January 15, a copy of the proposed budget to the Commissioner of Education for his determination of compliance with the 1975 Act. N.J.S.A. 18A:7A-28 (Supp. 1981-1982). In a Type II regional school district, such as Upper Freehold, the school board prepares the budget and submits it to voters of the member municipalities. N.J.S.A. 18A:22-7, 32 (Supp. 1981-1982). If the voters reject the budget, then the governing bodies of the constituent municipalities, after consultation with the school board, must certify a budget to the County Board of Taxation. N.J.S.A. 18A:22-37 (Supp. 1981-1982). If the governing bodies fail to make such a certification or certify less than he deems required, the Commissioner makes the necessary adjustments in a final determination. N.J.S.A. 18A:22-38 (Supp. 1981-1982). The Commissioner can determine the amount he deems to be necessary to fulfill the educational requirements of the district. Ibid.

In a similar manner, a local school district may undertake a capital project, such as reconstruction or repair of a building, and pay for it by taxes or the issuance of bonds. N.J.S.A. 18A:21-1(3) (Supp. 1981-1982). To spread over time the cost of a major capital expenditure, local boards generally have sought voter approval for the issuance of bonds. For example, with voter approval a Type II district may issue bonds to repair or furnish buildings. N.J.S.A. 18A:20-4.2.

This Court has taken an expansive view of the powers of the Commissioner and State Board of Education. See Jenkins v. Township of Morris School Dist., 58 N.J. 483 (1971) (to achieve integration, Commissioner could refuse to allow termination of a sending-receiving relationship between districts and could direct the districts to proceed with regionalization notwithstanding absence of a specific grant of authority); Booker v. Plainfield Bd. of Educ., 45 N.J. 161 (1965) (Commissioner can order a local school district to submit a remedial integration plan or prescribe plan of its own to correct de facto segregation notwithstanding the absence of specific statutory language authorizing such actions). In Jenkins and Booker, we held that, although the Legislature had not granted the express power to the Commissioner

to correct racial segregation, it had granted the implied power to reject or modify a plan of integration of a local school board.

In circumstances analogous to this case, we have found that the Commissioner has the implied power to appropriate additional funds for a school budget after the budget has been rejected by the voters and reduced by the governing body. We stated that, although the Commissioner had no express authority to order the budget increases, the power was derived from his duty to assure that every school district provides a thorough and efficient education. Board of Educ. v. City Council of Elizabeth, 55 N.J. 501, 506 (1970) (in Type I school districts, Commissioner has power to reject the annual school budget and to direct an increase over the amount fixed by the governing body); Board of Educ., East Brunswick Twp. v. Township Council, 48 N.J. 94, 107 (1966) (the Commissioner has power to reject and fix a budget within limits originally proposed by the Board of Education where the budget proposed by the Board was rejected by voters and modified by the governing body).

The Court stated in Elizabeth that the duty to assure a thorough and efficient education necessarily includes provision for adequate physical facilities. 55 N.J. at 506. Thus, even before the enactment of the 1975 Act, we had declared that the Commissioner had the implied power to direct capital improvements. We next consider the impact of the 1975 Act in light of the decisions of this Court in the Robinson v. Cahill litigation.

III

Our commitment to fulfill the constitutional mandate to provide a thorough and efficient public education to all students led to six decisions in the Robinson v. Cahill litigation. We recognized in Robinson I that the obligation of the State to fulfill its constitutional duty not only extended to current operating expenses, but also to capital expenditures. Writing for the Court, Chief Justice Weintraub stated:

> We have discussed the existing scene in terms of the current operating expenses. The State's obligation includes as well the capital expenditures without which the required educational opportunity could not be provided. [Robinson v. Cahill, supra, 62 N.J. at 520]

In response to the first four Robinson v. Cahill decisions, the Legislature adopted the 1975 Act. Stating that "the sufficiency of education [was] a growing and evolving concept," N.J.S.A. 18A:7A-2(a)(4) (Supp. 1981-1982), the Legislature defined the elements of a thorough and efficient educational system, N.J.S.A. 18A:7A-5 (Supp. 1981-1982). The legis-

lative guidelines in the Act include, as an essential element of a thorough and efficient education, school buildings that are "[a]dequately equipped, sanitary and secure physical facilities ...." N.J.S.A. 18A:7A-5(f) (Supp. 1981-1982).

Section 5 also provides for "[e]valuation and monitoring programs at both the State and local levels." N.J.S.A. 18A:7A-5(j) (Supp. 1981-1982). The 1975 Act provides further that the Commissioner is to review the progress of local school districts in complying with the guidelines of the Act. N.J.S.A. 18A:7A-10 (Supp. 1981-1982). If he finds that the local board is not complying with the standards, he is directed to advise the local board of his determination and to direct the board to submit a remedial plan. N.J.S.A. 18A:7A-14 (Supp. 1981-1982). If the Commissioner determines the remedial plan to be insufficient, he is directed to order the board to show cause why corrective action under N.J.S.A. 18A:7A-15 should not be utilized. N.J.S.A. 18A:7A-15 (Supp. 1981-1982). The Commissioner is empowered also to recommend to the State Board that it take appropriate action. N.J.S.A. 18A:7A-15 (Supp. 1981-1982).

Section 15 continues:

> The State board, on determining that the school district is not providing a thorough and efficient education, notwithstanding any other provision of law to the contrary, shall have the power to issue an administrative order specifying a remedial plan to the local board of education, which plan may include budgetary changes or other measures the State board determines to be appropriate. [N.J.S.A. 18A:7A-15 (Supp. 1981-1982)]

If the local board fails to comply with the administrative order, the State Board may, by a proceeding in lieu of prerogative writs, seek a court order directing compliance with the administrative order. N.J.S.A. 18A:7A-16 (Supp. 1981-1982). In addition, the evaluations and reports to be monitored by the Commissioner pursuant to Section 14 may include "[r]ecommendations for school improvements during the school year" and a "facilities survey, including current use practices and projected capital project needs." N.J.S.A. 18A:7A-11(g) (Supp. 1981-1982).

In Robinson V, we found N.J.S.A. 18A:7A-14, -16 "[c]rucial to the success of the legislative plan, as well as to the argument that the statute is facially constitutional." Robinson V, 69 N.J. 449, 459 (1976). We stated that the Legislature had delegated to the Commissioner and the State Board the duty "to maintain a constant awareness of what elements at any particular time find place in a thorough and efficient system of education" and to insure the presence of "sufficiently competent and dedicated personnel, adequately equipped." Ibid.

The delegation of that duty carries with it the necessary power to meet the mandate of the Constitution. For this purpose, the Commissioner and the State Board have been constituted "legislative agents. They have received a vast grant of power and upon them has been placed a great and ongoing responsibility." Id. at 461.

Under the 1975 Act, the power given to the Commissioner and the State Board extends beyond approving the budgets as determined by the local authorities. Where these authorities are not providing a thorough and efficient education because of a failure of fiscal resources,

> then the power given the Commissioner and the State Board to effect changes in local budgets does include the power to increase such budgets beyond the amounts locally determined. Such power must of course be wisely exercised and any such exercise will always be subject to judicial review, but there is no doubt that under the terms of the Act of 1975 such power exists. [Id. at 462]

In the present case, the picture of Allentown High reveals a school system in which, due to deteriorating conditions, education is inadequate and inefficient, if not impossible. Those conditions contravene the constitutional right of the students to a thorough and efficient education and justify invocation of the power of the Commissioner to vindicate that right. The Constitution, the 1975 Act and our prior decisions all point toward the conclusion that the Commissioner has the power to order the issuance of bonds for a capital project to repair a school that has deteriorated to the point where a thorough and efficient education is not possible. See Formal Opinion of the Attorney General No. 27-1977.

In summary, the Legislature delegated its constitutional responsibility to the Commissioner and the State Board. Robinson V, supra, 69 N.J. at 461. The 1975 Act contemplates that adequate facilities are part of a thorough and efficient education. N.J.S.A. 18A:7A-5(f) (Supp. 1981-1982). In discharging his duties, the Commissioner may direct a remedial plan, and if the plan is insufficient, he may, after notice and hearing, recommend that the State Board order corrective action. N.J.S.A. 18A:7A-14, -15 (Supp. 1981-1982).

IV

In this case, the hearings conducted by an administrative law judge led the Commissioner to conclude that the repairs to Allentown High were necessary and that the district should issue bonds to finance those repairs. On appeal, the State Board affirmed the decision of the Commissioner. The procedure was substantially similiar to that provided by section

15 of the 1975 Act authorizing the Commissioner to recommend corrective action to the State Board, which has the power to order a remedial plan that includes budgetary changes or other measures it determines to be appropriate. N.J.S.A. 18A:7A-15 (Supp. 1981-1982). Instead of merely recommending corrective action, the Commissioner directed the issuance of bonds, a decision affirmed by the State Board. Although the procedure did not comport strictly with section 15, the procedural differences are insignificant. The matter was considered by the Commissioner and State Board in proceedings in which the school district and municipalities of Allentown and Freehold participated. Similarly, the authority of the State Board in N.J.S.A. 18A:7A-16 to obtain a court order in a proceeding in lieu of prerogative writs should not preclude application, as here, by the State Board to the Appellate Division for an order enforcing the administrative order of the State Board.

We recognize that the traditional and preferred method for obtaining necessary approval of bonds for a capital project in a Type II district is to obtain voter approval. In this case, however, in spite of the critical situation faced by the local board, the voters twice rejected referenda seeking approval of the issuance of the bonds. Although the Legislature has provided that voters of a school district may authorize the issuance of bonds, the Legislature has not specified that voter approval is the only acceptable method. The lack of any such restriction should be assessed in light of the constitutional mandate and statutory provisions for a thorough and efficient education. We conclude that, after voter rejection, the Commissioner may authorize the issuance of bonds for a capital project for a public school.

In addition to providing the financial support for a thorough and efficient education for school children, municipalities have other fiscal obligations to the public. Those obligations may require the issuance of bonds for capital projects unrelated to education. In this case, the amount of the proposed bond issue would not force the municipalities to exceed their debt limit. Nothing indicates that the issuance of the bonds by the district would impair the ability of the municipalities to meet other possible capital needs. We express no opinion on whether those capital needs would affect the powers of the Commissioner to authorize the issuance of bonds for a capital project for a public school.

We are confronted here with a critical problem in the Allentown High School and a record steeped in due process and public participation. There is no demonstration or suggestion that additional hearings with further public participation will provide any fresh evidence or disclose any new circumstance that would alter the determination of the Commissioner. Moreover, there has been no showing that the purpose and amount of the proposed bond issue do not correlate directly with those repairs and improvements that are essential for Allentown High to meet

minimal educational standards. Given the dire conditions of the school and the lengthy administrative and judicial proceedings that have already transpired, there is no need for further hearings to determine the propriety of the order of the Commissioner directing the issuance of bonds in the amount of $1,643,000. The students and teachers of Allentown High School have been held hostage long enough. It is now time to proceed with the repairs of the school.

At oral argument, we were informed, however, that because of inflation, the estimated cost of repairs has escalated to an estimated $2,800,000, nearly two-thirds greater than the amount submitted in the 1978 referendum. If the school board determines that it is necessary to issue bonds in excess of $1,643,000, the Commissioner should hold further hearings on the increased costs. Public notice should be given in a practical manner, and the public should have an opportunity to participate in the proceedings. As further hearings on the need for the repairs are not necessary, the only issue should be reasonableness of any increase in the bond issue over the amount previously approved.

Should similar cases arise in the future, the public should have the right to participate in hearings before the Commissioner. When proceeding in the face of voter rejection, the Commissioner should exercise restraint in authorizing the issuance of bonds. Any order of the Commissioner or State Board authorizing the issuance of bonds would be subject, of course, to judicial review.

Because we affirm the order of the Commissioner directing the issuance of bonds by the Board, we need not consider the alternative of obtaining funds by the issuance of refunding bonds by Freehold and Allentown. In brief, to implement the issuance of refunding bonds, it would be ncessary for Freehold and Allentown to levy taxes on the taxpayers of those municipalities in the total amount of the bond issue. As explained by bond counsel at oral argument, if those taxes were not paid, Freehold and Allentown could then issue refunding bonds. Because the bonds would be the obligation of the municipalities, not the school district, the procedure poses practical problems that we need not resolve in this case.

V

We reverse the order of the Appellate Division dismissing the appeal and reinstate the order of the Commissioner and State Board of Education.

For reversal and reinstatement - Chief Justice WILENTZ and Justices SULLIVAN, PASHMAN, CLIFFORD, SCHREIBER, HANDLER and POLLACK - 7.

For affirmance - None

[86 N.J. 265 (1981)]

"V.R.", ON BEHALF OF "A.R.",	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HAMBURG, SUSSEX COUNTY,	:	DECISION
RESPONDENT-APPELLEE.	:	

Decided by the Commissioner of Education, December 5, 1980

For the Petitioner-Appellant, Nancy L. Heath, Esq.

For the Respondent-Appellee, Joseph M. Hoffman, Esq.

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

S. David Brandt abstained in the matter.

April 1, 1981

WATCHUNG HILLS REGIONAL EDUCATION ASSOCIATION, ON BEHALF OF GABRIELLE TESTA, ET AL.,	:	
PETITIONERS-APPELLEES,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE WATCHUNG HILLS REGIONAL HIGH SCHOOL DISTRICT, SOMERSET COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, April 10, 1980

For the Petitioners-Appellees, Rothbard, Harris & Oxfeld
(Sanford R. Oxfeld, Esq., of Counsel)

For the Respondent-Appellant, Buttermore, Mullen & Jeremiah
(William S. Jeremiah, Esq., of Counsel)

For the past 22 years the Respondent Board of Education has advanced its half-time teachers one-half step on the salary guide for each year of part-time employment. For example, one of the Petitioners initially employed for the school year 1973-74 was placed for the following year at a one-half step increase on the salary guide, and in the following year another one-half, so that over a period of two years his place on the salary guide went up one full step. As a result, two years after his initial employment this Petitioner had gained one step on the salary guide; and since he was employed half-time, his salary increased by one half of a full increment at the end of two years. Petitioners attacked this practice as being ultra vires, contending that each one-half time teacher must advance a full step on the salary scale each year, and then be paid at one-half of the full salary for that higher step. The claim is based upon N.J.S.A. 18A:29-8, which provides:

> "Any member holding office, position or employment in any school district of this state, shall be entitled annually to an employment increment until he shall have reached the maximum salary provided in the appropriate training level column in the preceding section."

The Commissioner has ruled in favor of Petitioners, declaring that "a part-time teacher who is contracted to work a

full-year is entitled to a regular increment prorated to the time spent teaching." He further held that N.J.A.C. 6:24-1.2 barred any claims of Petitioners for the years previous to 1979-80. That section of the regulations pertains to the filing and service of a petition to determine a controversy arising under the school laws. In its second sentence the section provides:

> "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."

We respectfully disagree with the Commissioner as to the applicability to this case of either N.J.S.A. 18A:29-8 or N.J.A.C. 6:24-1.2.

The above cited statute is part of subarticle B of Article 2, Chapter 29 of Title 18A. Article 2 deals with salaries, and subarticle B thereof concerns salary schedules. N.J.S.A. 18A:29-6 declares that "as used in this subarticle", i.e., subarticle B, the word "member" shall mean "a full time teaching staff member as defined in this title"; and the expression "full time" means "the number of days of employment in each week and the period of time in each day required by the State Board of Education *** to qualify any person as a full-time member."

The ensuing sections of subarticle B pertain only to a staff person falling within the aforesaid definition of "member", i.e., a full-time person. By definition, a part-time staff member is not full time. Accordingly, section 18A:29-8 does not apply to part-time professional employees of the board.

In the absence of a statutory provision or applicable State Board regulation pertaining to the salaries and increments of part-time employees, these terms of employment are governed by duly adopted board policies or by negotiated agreements between the employer and the employee.

In the present case we note that the parties had already submitted to arbitration the question of whether the Board's practice above described violated any provision of the negotiated agreement. On this matter the arbitrator had ruled in favor of the Board. In our judgment that ruling disposed of the controversy, since it did not conflict with any statute or State regulation.

The State Board reverses the Commissioner's decision herein and dismisses the petition.

Attorney Exceptions are noted.

February 4, 1981

Pending New Jersey Superior Court

JOHN T. WHITING,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BEDMINSTER, SOMERSET COUNTY,	:	DECISION
RESPONDENT-APPELLEE.	:	

Decided by the Commissioner of Education, August 26, 1980

For the Petitioner-Appellant, Carl John Kerbowski, Esq.

For the Respondent-Appellee, Blumberg, Rosenberg, Mullen & Blumberg (William B. Rosenberg, Esq., of Counsel)

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

January 22, 1981

Pending New Jersey Superior Court

IN THE MATTER OF THE TENURE :
HEARING OF JEFFREY WOLFE, : SUPERIOR COURT
SCHOOL DISTRICT OF THE TOWN- : APPELLATE DIVISION
SHIP OF RANDOLPH, MORRIS :
COUNTY. :
_____ :

Decided by the Commissioner of Education, July 8, 1980

Decided by the State Board of Education, November 5, 1980

Argued September 21, 1981 - Decided October 5, 1981

Before Judges Bischoff, King and Polow

On appeal from the Final Determination of the State Board of Education

Arnold M. Mellk argued the cause for the appellant (Greenberg & Mellk, attorneys; Mr. Mellk and William A. Fead on the brief).

Jaynee LaVecchia, Deputy Attorney General, argued the cause for the New Jersey State Board of Education (James R. Zazzali, Attorney General of New Jersey, attorney; Erminie L. Conley, Assistant Attorney General, of counsel; Ms. LaVecchia on the brief).

Douglas S. Brierley argued the cause for the Board of Education of the Township of Randolph (Schenck, Price, Smith and King, attorneys; David B. Rand and Robert M. Tosti, of counsel; Mr. Brierley on the brief).

PER CURIAM

This is an appeal from the final determination of the New Jersey State Board of Education (State Board) which affirmed the decision of the New Jersey State Commissioner of Education (Commissioner) dismissing appellant, Jeffrey Wolfe, from his tenured position as a school teacher.

On October 14, 1977, Wolfe was arrested and charged with growing marijuana on his premises in violation of N.J.S.A. 2A:170-25.1 and with possession of more than 25 grams of marijuana in violation of N.J.S.A. 24:21-20(a)(4). Five days

later Wolfe was suspended from his teaching duties by the superintendent of schools pending action by the Board of Education. A written statement charging that the above-mentioned violations demonstrated that Wolfe had engaged in conduct unbecoming a teacher was filed by the superintendent with the Board and on November 29, 1977, the Board of Education found probable cause that the charges were true. The charges were certified and forwarded to the Commissioner for disposition pursuant to N.J.S.A. 18A:6-16. The tenure proceedings were suspended until disposition of the criminal complaints.

Wolfe's motion in the criminal division for a conditional discharge as a first offender under N.J.S.A. 24:21-27 was granted. On September 15, 1978, an order was entered terminating the probationary supervision of Wolfe and dismissing the criminal charges against him.

The Board then requested that the hearing on the tenure charges proceed and Wolfe filed his answer to them. Thereafter, without notice to the Board, Wolfe sought and obtained, pursuant to N.J.S.A. 2A:85-15, an order of expungement of the records of his arrest, investigation and disposition arising out of the October 14, 1977 incident. When the tenure charges were about to proceed to hearing, the prosecution learned for the first time of the expungement and sought an order permitting release and inspection of records pursuant to N.J.S.A. 2C:52-19. The order was granted on the condition the records be considered by the Commissioner or his representative in camera only and solely in the presence of Wolfe and counsel for all parties.

A hearing on the tenure charges was held before an Administrative Law Judge who found the charges to be true and, in his initial decision, he recommended dismissal of Wolfe from his tenured position. The Commissioner affirmed and on appeal the State Board affirmed the Commissioner.

Wolfe argues on this appeal "that the tenure charges should have been dismissed because of the expungement of [his] arrest." It is his contention that "the completion of the supervisory program and expungement of his arrest should preclude reliance upon the circumstances underlying his arrest as a basis for termination of his tenured rights." He argues that the records of his arrest and the testimony of a detective were produced in violation of Wolfe's rights under the expungement statute. N.J.S.A. 2A:85-17. He also argues that in the absence of that evidence the record is devoid of any unbecoming conduct on his part within the meaning of N.J.S.A. 18A:6-10 and the charges should have been dismissed.

Appellant fails to understand the limited effect of an order of expungement. While the records expunged are, in effect, nonexistent "the events which they concern and evidence do, nonetheless, have existence." Ulinsky v. Avignone, 148 N.J. Super. 250, 255 (App. Div. 1977). Under the expungement order

the fact of Wolfe's arrest may not have been available, but the testimony of witnesses to the underlying facts which provided the basis for the arrest and conditional discharge under N.J.S.A. 24:21-27 continue to be available under subpoena or otherwise.

Neither a conditional discharge nor an order of expungement can seal the lips of witnesses and prevent them from describing an event they observed. Wolfe also argues that the order releasing the records pursuant to N.J.S.A. 2C:52-19 was improperly entered since the new criminal code does not apply to offenses committed before its effective date which was September 1, 1979, citing N.J.S.A. 2C:1-1(b). However, chapter 52 of the penal code has its own section governing its retroactive application. N.J.S.A. 2C:52-25 provides "This chapter shall apply to arrests and convictions which occurred prior to and which occur subsequent to the effective date of this act."

In our view the entry of the order releasing information is without significance here. The testimony of Detective Gary Goble of the New Jersey State Police, given before the Administrative Law Judge, to the relevant facts and circumstances provided a sufficient basis for the determination of the State Board and would be available with or without an order releasing the records.

Wolfe also contends that forfeiture of tenure rights was a mistaken exercise of the Commissioner's discretion. He argues that there is no proof that his possession of marijuana was in any way related to his teaching, or had any impact upon the performance of his teaching duties in the schools or upon his students or fellow professionals.

We disagree. The charges involve the cultivation, growth and possession of narcotics. There is a strong legislative policy of concern about the problem of drugs in the public schools. N.J.S.A. 18A:35-4, N.J.S.A. 18A:26-8, N.J.S.A. 18A:4-28.4 et seq.

While unfitness for a position within the school system may be evidenced by a series of incidents, Redcay v. State Board of Education, 130 N.J.L. 369 (Sup. Ct. 1943), aff'd o.b. 131 N.J.L. 326 (E. & A. 1944), unfitness may also be shown by a single incident if it is sufficiently flagrant. And, fitness to teach is not based exclusively upon classroom proficiency. Rather, it is based upon a broad range of factors. Gish v. Board of Education of Paramus, 145 N.J. Super. 96, 105 (App. Div. 1976), certif. den. 74 N.J. 251 (1977), cert. den. 434 U.S. 879 (1977); In re Tenure Hearing of Grossman, 127 N.J. Super. 13, 30-32 (App. Div. 1974), certif. den. 65 N.J. 292 (1974). The evidence of Wolfe's guilt of the charges stands unrefuted and they involve a peculiarly sensitive area. No evidence of mitigating circumstances or personal hardship was presented.

We cannot say that the sanction of dismissal imposed by the Commissioner of Education and affirmed by the State Board constitutes a mistaken exercise of discretion. The decision has support in the record and is neither arbitrary nor capricious. Henry v. Rahway State Prison, 81 N.J. 571, 579-580 (1980); Mayflower Securities v. Bureau of Securities, 64 N.J. 85, 93 (1973).

Affirmed.

AUDREY ZUBKOFF,	:	
PETITIONER-APPELLANT,	:	
V.	:	SUPERIOR COURT
MADISON BOROUGH BOARD OF EDUCATION, MORRIS COUNTY,	:	APPELLATE DIVISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, September 28, 1979

Decided by the State Board of Education, July 2, 1980

Argued March 17, 1981 -- Decided March 27, 1981

Before Judges Matthews, Morton I. Greenberg and J.H. Coleman.

On appeal from the New Jersey State Board of Education.

Irving C. Evers argued the cause for appellant (Saul R. Alexander, attorney).

Douglas S. Brierley argued the cause for respondent Madison Borough Board of Education (Schenck, Price, Smith and King, attorneys; David B. Rand, of counsel, and Mr. Brierley, on the brief).

John J. Degnan, Attorney General, filed a statement in lieu of brief on behalf of the State Board of Education (Mary Ann Burgess, Deputy Attorney General, of counsel and on the statement).

PER CURIAM

Petitioner appeals from the final decision of the State Board of Education (State Board) reversing the Commissioner's decision and holding that petitioner was not entitled to reinstatement as either a full-time teacher or a part-time (3/5) teacher even though she had been employed for a longer period of time than other full-time teachers.

Petitioner was initially employed as a full-time high school foreign language teacher for three consecutive academic years. Because of declining enrollments in foreign languages,

the school district decided to establish a part-time teaching position. Since petitioner had lesser abilities as a teacher than other faculty members, her fourth year of employment with the school district was in that part-time position. She was reemployed the following year as a part-time teacher. However, due to further reduction in foreign language enrollment the district decided to eliminate the part-time foreign language teaching position and consequently the board had no position to offer petitioner for the next school year.

Petitioner complained that her seniority in the district entitled her to consideration for a full-time teaching position. Upon the board's rejection of her contention, petitioner appealed to the Commissioner. An initial decision was rendered by an administrative law judge who found in petitioner's favor. He held that although petitioner had tenure only as a part-time teacher, her seniority rank entitled her to a position in the foreign language department and thus her termination was violative of her seniority rights.

By operation of N.J.S.A. 52:14B-10 the administrative law judge's decision became effective as the Commissioner's own and the board appealed to the State Board. The State Board reversed the Commissioner, holding that seniority rights cannot give rise to greater tenure than that which the teaching staff member has achieved under the statute (N.J.S.A. 18A:28-5). The State Board held that petitioner could achieve seniority only over any other part-time teacher but not over a full-time staff member. Consequently, when the part-time position was abolished by the board there was no position left to which petitioner's tenure and seniority rights could attach.

Petitioner appeals, contending that the State Board erred in finding no violation of her seniority rights. We have reviewed the record as well as the briefs submitted by the parties and the applicable statutory and case law and are persuaded that the State Board's decision should be affirmed. Tenure can only be acquired by strict compliance with the statute's requisites. N.J.S.A. 18A:28-5 requires four consecutive years of employment in the same position before tenure attaches. Here, petitioner was not employed for four years in the position of a full-time Spanish and French teacher. Her fourth year of employment was in a part-time teaching position in those subjects. Since a full-time position necessarily encompasses a part-time one, when petitioner was appointed in the fourth year as a part-time teacher she unquestionably attained tenure in that position. But this State's tenure statute was intended to save a teacher from the loss of a position, not to promote a teacher to a position that he or she has never occupied. Schulz v. State Board of Education, 132 N.J.L. 345, 354 (E. & A. 1944).

Seniority rights necessarily follow tenure status. But we are satisfied that the Legislature did not intend its seniority rights provisions to be utilized to circumvent the well-established purpose of the tenure statute. What petitioner seeks to do here is to utilize her seniority status (speaking only in terms of her years of service) to require a greater tenure (that of a full-time teacher) than she can under the tenure statute. We find no authority to support that position and consequently we are satisfied that the decision of the State Board should be affirmed.

Affirmed.

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